

Commission on a Bill of Rights Discussion Paper: 'Do We Need a UK Bill of Rights?'

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We are responding to this Discussion Paper in our capacity as Director¹ and Research Officer (respectively) of the Human Rights Futures Project (HRFP) at the LSE and on the basis of many years of academic research and scholarship on the Human Rights Act (HRA) and how it operates (see *Appendix 1 for a description of HRFP and our biographies*). We will respond to each of the four consultation questions below. **Under Question 4 we attempt to address the main issues of contention that are driving the current debate on whether the HRA should be replaced by what is usually described as a 'British Bill of Rights.'** (*A list of appendices is attached.*)

Question 1: Do you think we need a UK Bill of Rights?

1.1 This question raises the interesting legal and constitutional issue of what comprises a Bill of Rights? Responding to calls over many decades for a UK Bill of Rights from constitutional reform groups like Charter 88, and a number of politicians and lawyers, **the HRA was intended to be more than the incorporation of a human rights treaty into domestic law.** When the HRA came into force in October 2000, the then Home Secretary, Jack Straw, described it as "the first Bill of Rights this country has seen for three centuries".² Most informed legal and political commentators at the time the Act was passed, and since, have recognised that the HRA is a Bill of Rights by any other name.³ **Bills of Rights can have different titles (e.g. the Charter of Rights and Freedoms in Canada and the Human Rights Act in the Australian Capital Territory) but this is not material as to their legal and constitutional function.** The 1689 Bill of Rights, the first document to boast that name, also remains on the statute book although it protects few of the individual rights that are in the HRA.⁴ An alternative title for the Discussion Paper might therefore have been 'Do we need an additional, stronger or different Bill of Rights for the UK than the 1689 Bill of Rights and the HRA?'

1.2 **The HRA 1998 was preceded by a number of written proposals for a bill of rights,** most of which were based on incorporating the European Convention on Human Rights (ECHR) into UK law. These included:

- the Liberal Peer, Lord Wade's, proposals for a Bill of Rights in 1969, 1976, 1977, 1979 and 1981, based on incorporating the ECHR.⁵
- Conservative Peer, Lord Aaran's Bill of Rights Bill in 1970.⁶
- Lord Scarman's call for "the law of the land [to] meet the exacting standards of human rights declared by international instruments, to which the UK is a party, [through] entrenched or fundamental laws protected by a Bill of Rights" in his 1974 Hamlyn lectures.⁷
- the Society of Conservative Lawyers' recommendation in 1976 that "the ECHR should be given statutory force as overriding domestic law" in their report *Another Bill of Rights?*

¹ Professor Klug was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the HRA. She was a Member of the Government Human Rights Task Force, to oversee implementation of the HRA, from 1998-2000 and acted as a Consultant on the HRA at the Home Office from 2000-01. Professor Klug was also appointed by former Minister Michael Wills to sit as a member of the small Bill of Rights and Responsibilities Reference Group at the Ministry of Justice from 2007-2009.

² *Speech*, Institute for Public Policy Research, 13 January 2000.

³ For example, see Professor Philip Alston, *Promoting Human Rights through Bills of Rights*, OUP, 1999, pp 1 and 11. Professor Robert Wintemute has described the HRA as "*de facto* a domestic bill of rights", whilst lamenting the absence of a judicial strike down power in 'The Human Rights Act's First Five Years: Too Strong, Too Weak or Just Right?' (2006) 17 (2) King's College Law Journal, 209.

⁴ It included the right not to be inflicted with cruel or unusual punishment, to no excessive bail or fines, freedom from fines or forfeitures without trial, freedom for Protestants to bear arms, freedom to petition the monarch without fear of retribution, no royal interference with the law, no right of taxation without Parliament's agreement and free election of members of Parliament.

⁵ See Aisling Reidy, 'The House of Lords: in defence of human rights?', UCL Constitution Unit, October 1999.

⁶ Bill of Rights Bill debate, House of Lords, 26 November 1970.

⁷ 'English Law – the new dimension', Hamlyn Lectures, 1974.

- the all-party House of Lords Select Committee on a Bill of Rights in 1978, which unanimously agreed that “if there were to be a Bill of Rights it should be a Bill based on the European Convention”.⁸
- Margaret Thatcher’s 1979 manifesto pledge to establish all-party talks on a “possible Bill of Rights”.⁹
- Conservative MP Edward Gardner’s Human Rights Bill “to incorporate into British law the ECHR” in 1987.¹⁰
- Social and Liberal Democrat MP Robert Maclennan’s attempts to gain support for incorporation of the ECHR into UK law, for example his motion in 1989 for a debate on a Bill of Rights.¹¹
- Neil Kinnock’s 1992 manifesto commitment to a “democratically enforceable Bill of Rights”.¹²
- Lord Lester’s Bills attempting to incorporate the ECHR in 1995 and 1997.¹³

1.3 **In most cases, proposals for a UK Bill of Rights were modelled on the ECHR** on the basis that the government, but not the courts or other public authorities, was already bound to comply with its terms. In some cases this proposal was presented as the first stage towards a “constitutional Bill of Rights”,¹⁴ **but in no case was it ever suggested that an Act to incorporate the ECHR would need to be repealed to introduce a subsequent Bill of Rights.**

1.4 Whilst the HRA is an ‘ordinary Act of Parliament’, and in that sense could *not* be described as a ‘constitutional Bill of Rights’, **most of the features that characterise bills of rights in other jurisdictions are present in the HRA.** In a book on comparative bills of rights that includes the HRA, the internationally renowned expert, Professor Philip Alston, lists the “common characteristics” of bills of rights.¹⁵ These are all, to at least some degree, present in the HRA in the following form:

- **The rights in the HRA (Schedule 1) were drawn from the ECHR; a treaty which was inspired by the Universal Declaration of Human Rights with significant input from UK government drafters. It reflected a long pedigree of rights recognition in the UK.**¹⁶ Although UK governments had been committed to securing the rights in the ECHR “to everyone within their jurisdiction”¹⁷ since it came into force in 1953, individuals could not lay claim to them before UK courts before 2000. These rights were augmented by HRA ss12 and 13 concerning freedom of expression and freedom of thought, conscience and religion (respectively) and **could be supplemented by other additional rights, drawn from international treaties or the common law, in the future.**
- **Like all bills of rights, the HRA was deliberately crafted as a ‘higher law’,** to which all other law and policy must conform “so far as it is possible” (s3 HRA). The courts can both hold the executive to account (a power they were already developing for themselves, to some degree, through judicial review) **and can review Acts of Parliament for compliance with human rights standards;** a competence they did not possess before the HRA (outside the context of EU law).

⁸ Bill of Rights: Select Committee Report, HL Deb 29 November 1978 vol 396 cc1301-97.

⁹ *The Conservative Manifesto*, April 1979.

¹⁰ Human Rights Bill, HC Deb 06 February 1987 vol 109 cc1223-89.

¹¹ House of Commons, 19 June 1989.

¹² ‘It’s time to get Britain working again’, Labour Party Manifesto, 1992.

¹³ Human Rights Bill debates, House of Lords, 25 January 1995 and 5 February 1997.

¹⁴ Lord Lester, ‘First Steps Towards a Constitutional Bill of Rights’, (1997) 2 EHRLR 124.

¹⁵ Three common characteristics of bills of rights identified by Professor Alston can be summarised as: 1) “A formal commitment to the protection of those human rights which are considered, at that moment in history, to be of particular importance”; 2) “binding upon the government and can be overridden...only with significant difficulty”; 3) “some form of redress is provided” if “violations occur”. *Promoting Human Rights through Bills of Rights*, note 3, p10.

¹⁶ For example, Magna Carta 1215, Declaration of Arbroath 1320, Habeas Corpus Act 1679, Bill of Rights 1689, Claim of Right Act 1689.

¹⁷ ECHR Article 1

- **This review power does not allow judges to strike down Acts of Parliament** but only empowers them to issue a “Declaration of Incompatibility” where the courts deem a statute or statutory provision to be incompatible with HRA rights (s4 HRA).¹⁸ **Once such a Declaration has been made, it is then for Parliament to decide *whether and how* to proceed.**¹⁹ Whilst some experts would argue the absence of a strike down power calls into question the status of the HRA as a Bill of Rights, Professor Alston suggests this is not a definitive characteristic of bills of rights.²⁰ **The HRA model was deliberately crafted to work within the grain of the UK’s tradition of parliamentary sovereignty**, which the then Home Secretary, Jack Straw, labelled ‘the British model’²¹ (see *Appendix 2 for Klug and Singh’s proposals for a ‘British model’ of incorporation*). **Partly for this reason, there was no requirement in the HRA for the domestic courts to ‘follow’ the European Court of Human Rights (ECtHR) case-law (see paras 4.8-4.12).**
- Individuals can seek and obtain remedies for breaches of human rights in the domestic courts under the HRA in circumstances which were not available to them before. There is also an **opportunity for individuals to seek redress outside the court room, by reminding public authorities of their duty to comply with the HRA (s6)**, which has led to changes in practice and policy that would not have occurred before the HRA (see *Appendix 3*).

Question 2: What do you think a UK Bill of Rights should contain?

2.1 To comply with the terms of reference of the Commission on a Bill of Rights, any additional Bill of Rights for the UK must be one that “incorporates and builds on all our obligations under” the ECHR, most of which are contained in HRA Schedule 1. **It is sometimes suggested that these rights could (or should) be further qualified, or given clearer interpretation**, to address criticisms of the HRA that rights are claimed by unpopular groups or individuals.²² **To comply with the Commission’s terms of reference, great care would be needed if the language in HRA Schedule 1 (the Convention rights) were to be changed, or new interpretations of the rights were to be added.** The majority of these rights are already qualified or limited (see para 4.17 below) but it is difficult to see how any narrowing of the scope of these rights to apply only to certain categories of people, for example, would comply with the Commission’s terms of reference.

2.2 We note that the Commission’s terms of reference do not include any specific reference to the HRA. Nevertheless **the ‘spirit’ of the terms of reference is widely understood as augmenting, and certainly not decreasing, the level of protection currently afforded to individuals in the UK by the HRA.**²³ Support for an *additional or supplementary* Bill of Rights is commonly conditional on this being ‘HRA plus’.²⁴ For example, s6 HRA makes it unlawful for a public authority to act in a way which is incompatible with the rights in the HRA. This is not present in the ECHR but, as explained in para 1.4 above, this duty has provided significant protections to some of the most vulnerable members of our society (see *Appendix 4*). Many informed commentators who support a Bill of Rights would consider it to be highly regressive if such an obligation were to be watered down or removed.

¹⁸ 27 declarations of incompatibility have been made: 19 are still standing and 8 have been overturned on appeal.

¹⁹ *R v Shayler* [2002] 2 WLR 754 at para 53. See para 4.5 below.

²⁰ Note 3, p10.

²¹ Used in speeches and conversations.

²² For example, Dominic Grieve, then Shadow Attorney General, has said that a new Bill of Rights would provide “an opportunity to define the rights under the European Convention in clearer and more precise terms and provide guidance to the judiciary and government in applying human rights law when the lack of responsibility of a few threaten the rights of others” (‘Liberty and Community in Britain’, speech to Conservative Liberty Forum, 2 October 2006).

²³ In particular ss3-10 which have made the substantive rights in Schedule 1 enforceable in UK law.

²⁴ For example, response to the Commission on a Bill of Rights Discussion Paper by the Equality and Diversity Forum, British Institute for Human Rights and Rene Cassin.

2.3 It would, of course, be perfectly possible to introduce a Bill of Rights that is wider in scope and stronger in enforcement powers than the HRA. To ensure a new Bill of Rights fulfilled the Commission's terms of reference, **any additional rights** would need to cover new ground, or transparently supplement ECHR rights. They **should demonstrably enhance rights protection**.

2.4 The Bill of Rights and Responsibilities Reference Group at the Ministry of Justice (on which Francesca Klug sat; see footnote 1) considered which additional rights could be added to the rights in the HRA. These included: dignity; individual autonomy and independence; equality; good administration; justice; rights for victims and children; education; health; food, clothing and shelter; environment; access to public facilities and services; participation in the community.

2.5 **Several other models for bills of rights that could fairly be described as 'ECHR plus' (and post HRA, 'HRA plus') have already been drafted.** For example:

- IPPR published *A British Bill of Rights* in 1990 drafted by Anthony Lester QC and others, based on the ECHR and the UN's International Covenant on Civil and Political Rights.²⁵
- The Civil Liberties Trust drafted *A People's Charter* in 1991 which drew on a wide range of international and domestic provisions, including the Magna Carta and 1689 Bill of Rights.
- Richard Gordon QC published a draft constitution in 2010, which includes the HRA augmented with additional social and economic rights.²⁶
- The Joint Committee on Human Rights produced 'A Bill of Rights for the UK?' in 2008, based on the model of the HRA with additional rights.²⁷
- In 2008 the Northern Ireland Human Rights Commission (NIHRC) proposed a Bill of Rights for Northern Ireland,²⁸ in keeping with its mandate from the Belfast (Good Friday) agreement, suggesting rights "supplementary" to those in the HRA, including economic, social and cultural rights, children's rights and environmental rights (see para 3.2).

2.6 Many who are supportive of a new Bill of Rights are likely to call for economic and social rights to be included. Polling evidence suggests this would be strongly welcomed by many people.²⁹ However, based on the response to HRA cases involving access to healthcare or housing³⁰ (Articles 2, 3 or 8) it is unclear whether, at this time, there is sufficient consensus or political support for expanding the role of judges in decisions involving resource allocation.

Question 3: How do you think it should apply to the UK as a whole, including its four component countries of England, Northern Ireland, Scotland and Wales?

3.1 Experts on devolution have emphasised that **the HRA is an "important pillar of the constitutional framework of devolution"**.³¹ It underpins the devolution settlements, whilst "simultaneously elucidating the common values of the constituent nations".³² The ECHR is tied and embedded into the devolution statutes. These provide that the devolved institutions have no competence to act in any manner that is contrary to the 'Convention rights', defined as having the same meaning as in the HRA (section 1).³³ From a legal perspective, if the HRA were repealed or

²⁵ *A British Bill of Rights*, Anthony Lester et al, foreword by Francesca Klug, IPPR, 1990.

²⁶ Richard Gordon, *Repairing British Politics: A Blueprint for Constitutional Change*, Hart, 2010.

²⁷ Twenty-ninth report of session 2007-08, July 2008.

²⁸ 'A Bill of Rights for Northern Ireland: advice to the Secretary of State for Northern Ireland', Northern Ireland Human Rights Commission, 10 December 2008.

²⁹ Polling results show that there are high levels of support for the right to hospital treatment on the NHS being included in Bill of Rights, as well as for the right to housing for the homeless, the right to strike without losing one's job and the right to an abortion. See Joseph Rowntree Reform Trust and ICM 'State of the Nation' polls.

³⁰ For example, *R (Rogers) v Swindon NHS Primary Care Trust* (2006); *R (Condliff) v North Staffordshire PCT* (2011).

³¹ Alan Miller, Chair, Scottish HRC, 'The Human Rights Act from a Scottish perspective', in *Common Sense: reflections on the Human Rights Act*, Liberty, 2010.

³² Monica McWilliams, NIHRC Chief Commissioner, 'Human Rights Act underpins devolution', in *Common Sense*, *ibid*.

³³ Scotland Act 1998 s29, 54, 126; Northern Ireland Act 1998 s6, 24, 98; Government of Wales Act 2006 s81, 94, 158.

impliedly amended by a subsequent UK Bill of Rights, there would almost certainly be a need for amendments to the devolution statutes.³⁴

3.2 In **Northern Ireland** further complications arise due to the ECHR and “subsequently the HRA” being “crucial parts of a peace accord”.³⁵ The Belfast Agreement mandated the NIHR “to consult and to advise on the scope for defining, in Westminster legislation, rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience”.³⁶ There has been over 10 years of widespread consultation and consideration in Northern Ireland on a Bill of Rights which builds on the ECHR and HRA. Whilst there has not been all-party consensus on the *contents* of a supplementary Bill of Rights (despite evidence of cross-community, popular support for such a Bill) there *has* been **cross-party consensus for retaining the HRA**. According to Monica McWilliams, former Chief Commissioner of the NIHR, recent “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” given that the HRA is “central to the constitutional DNA of the UK”.³⁷

3.3 There is already arguably greater human rights protection in Scotland than at the UK level. Scottish courts can invalidate Acts of the Scottish Parliament that breach Convention rights. **Repeal of the HRA could arguably cement a two-tier system of human rights protection within the UK**, given that it is unlikely that the Scottish Parliament would seek to lower the level of protection of human rights in Scotland in relation to devolved areas (such as health and criminal justice).³⁸

3.4 According to the Director of *Justice*, Roger Smith, repealing or significantly amending the HRA would be “a legal and political nightmare” in the context of the devolution frameworks in Scotland, Wales and Northern Ireland.³⁹ It is reasonable to predict that the **introduction of a new UK Bill would understandably lead to demand for specific Bills of Rights for Scotland and Wales whilst the mandate for a Northern Ireland Bill of Rights will not be met by a UK bill**.

Question 4: Having regard to our terms of reference, are there any other views which you would like to put forward at this stage?

4.1 **To consider the case for a new UK bill of rights**, it is **useful to survey the different currents which are driving this debate**, many of which are largely incompatible with each other. It is also important to consider the main arguments for repealing and replacing the HRA.

4.2 In addition to supporting supplementary rights to the ECHR as discussed above, some human rights advocates and constitutional lawyers would welcome the introduction of a new bill of rights which is ‘judicially entrenched’, in the sense of granting the courts the power to strike down legislation deemed to breach its terms (as in the American or German models). There is also support from similar sources for a ‘**constitutionally entrenched**’ **bill of rights**, requiring special parliamentary majorities before it can be amended or repealed.⁴⁰ On the other hand, some legal academics like Nicholas Bamforth, whilst not claiming “special constitutional status” for the HRA, concedes that it has “a special constitutional role”, in so far as s3 lays down overriding and general

³⁴ See ‘Devolution and Human Rights’, Qudsi Rasheed, Justice, February 2010.

³⁵ Note 32.

³⁶ Good Friday Agreement 1998, section 6, para 4.

³⁷ Note 32.

³⁸ Note 31.

³⁹ Quoted in the law reform group, Justice, *press release*, 8 February 2010, see <http://www.justice.org.uk/data/files/resources/58/8feb10-Report-on-devolution-and-human-rights-warns-of-major-difficulties-ahead.pdf>

⁴⁰ For example, Geoffrey Marshall, ‘Two kinds of compatibility’, [1999] *Public Law* 377 and Tom R. Hickman, ‘Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998’, [2005] *Public Law* 306.

rules of statutory interpretation.⁴¹ Judges have on occasion commented similarly, for example Lord Bingham who remarked on the “constitutional shift”⁴² introduced by the recognition of a right to freedom of assembly in the HRA, a right once declared missing from “our constitution” by the famous 19th century legal theorist, A.V. Dicey.⁴³

4.3 Other vocal supporters of a new UK bill of rights have a **diametrically opposed view**. When the Prime Minister announced the establishment of the Commission on a Bill of Rights, he suggested that a **major purpose of any new Bill of Rights would be to remove powers from the courts to Parliament**:

“a commission will be established imminently to look at a British Bill of Rights, because it is about time we ensured that decisions are made in this Parliament rather than in the courts.”⁴⁴

Were a new Bill of Rights to be introduced for this purpose, this would probably be without precedence. On the basis of our research on comparative Bills of Rights⁴⁵ there is no instance we can find where a Bill of Rights has been passed in order to *reduce* the accountability of the executive or legislature to the courts, rather than the other way round.

4.4 **A similar debate, with similarly polarised views, was evident in the period preceding the introduction of the HRA.** Many of us who were involved in advising the government on the proposal, held the view that the interpretation of broad values inherent in all bills of rights – such as the right to free speech or the legitimate limits to a private life – often involves philosophical or quasi-political judgements that are better determined by elected representatives, with the **courts acting as a check on the executive, rather than as a primary decision taker or law maker**. The model adopted in the **HRA** (s3 and s4) was **deliberately designed to reflect this view**.

4.5 **Lord Hope**, in *Shayler*, emphasised that **where clearly expressed legislation cannot be interpreted to remove an incompatibility under HRA s3, “the position whether it should be amended so as to remove the incompatibility must be left to Parliament”**, and the only option left to the courts is to issue a Declaration of Incompatibility (DOI).⁴⁶ **Lord Hoffman** further clarified in the famous Belmarsh case⁴⁷ on indefinite detention of foreign nationals that, following a DOI, the decision as to *whether* to respond lies with parliament:

“Under the 1998 Act, the courts still cannot say that an Act of Parliament is invalid. But they can declare that it is incompatible with the human rights of persons in this country.

Parliament may then choose whether to maintain the law or not. The declaration of the court enables Parliament to choose with full knowledge that the law does not accord with our constitutional traditions.”⁴⁸

4.6 The then Home Secretary, Jack Straw, emphasized when introducing the Human Rights Bill that higher courts “could make a Declaration [of Incompatibility] that, subsequently, Ministers propose and Parliament accepts, should *not* be accepted”.⁴⁹ The example he gave was abortion law, but he might have added advertising restrictions, gun controls and election expenditure limits,⁵⁰ all issues that courts with strike down powers in other jurisdictions have controversially

⁴¹ ‘Same-sex Partnerships: some comparative constitutional lessons’, (2007) 1 EHRLR 47.

⁴² A phrase first employed by Justice Sedley in *Redmond-Bate v DPP* (2000) HRLR 249.

⁴³ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55.

⁴⁴ Prime Minister’s Questions, House of Commons, 16 February 2011.

⁴⁵ Professor Klug teaches comparative bills of rights on the LLM at the LSE.

⁴⁶ *R v Shayler* [2002] 2 WLR 754 at para 53. Our emphasis.

⁴⁷ *A and others v Secretary of State for the Home Department* [2004] UKHL 56, where s23 of the Anti-terrorism, Crime and Security Act 2001 was held to be incompatible with the Articles 5 (right to liberty) and 14 (freedom from discrimination). Parliament responded by repealing the provisions and putting in place a new regime of control orders.

⁴⁸ Para 90. Our emphasis.

⁴⁹ 317 HC 1301 (21 October 1998). Our emphasis.

⁵⁰ Although, constitutionally speaking, there was no obligation on the government to comply with the Belmarsh indefinite detention ruling (see note 47), realistically the ECtHR was likely to take a similar approach to the domestic courts on this issue. However in many other instances the ECtHR has or could apply the ‘margin of appreciation’,

determined breach their bills of rights⁵¹ but where Parliament, under the HRA, would retain the final say.

4.7 **Applying this model, from the government's point of view, the current controversy over foreign nationals relying on the right to respect for family life (Article 8) to challenge deportation on completion of their prison sentence, could be addressed through primary legislation** which is clear in its intention and express purpose and therefore could not, (on the *Shayler* principle) be re-interpreted to comply with the HRA. **Although the domestic courts may well issue a DOI as a consequence, the final decision as to whether and how to respond to this would rest with Parliament which could decide to take no further action.** There is varying opinion on whether the ECtHR would find against the UK in such circumstances. Most likely this would depend on the facts in a particular case, which vary considerably and often turn on the rights of children and partners rather than the deportee⁵² (see *Appendix 5 for a discussion of the impact of ECHR Article 8 on deportations*).

4.8 A related source of support for a UK or British Bill of Rights to replace the HRA (more often described as *British* in this context) is the **erroneous view that it requires the importation of ECHR case law along with the rights.** The Conservative MP, Dominic Raab, said recently that there was a "serious flaw in the Human Rights Act. We should not be importing the Strasbourg case law wholesale..."⁵³ This reflects confusion about the status and function of the HRA which has been compounded by domestic courts at times acting as if they are bound by the ECtHR jurisprudence.⁵⁴ **The plain words of the HRA, and the parliamentary debate which introduced it, make it clear that this is not what the Act requires.** There is a duty in s2 HRA for domestic courts to "take into account" Strasbourg jurisprudence, but there is no duty to follow it. Rejecting an amendment to the Human Rights Bill by the Conservative peer Lord Kingsland, which would have made our courts "bound by" ECtHR jurisprudence, the then Lord Chancellor, Lord Irvine, explained: "this amendment...suggests putting the courts in some kind of straitjacket where flexibility is what is required...our courts must be free to try to give a lead to Europe as well as to be led."⁵⁵

4.9 Conservative MP, Edward Leigh, subsequently observed that as a result of not tying domestic courts to Strasbourg case law the UK was "not simply incorporating the convention in our law but going much further". It was "creating...an entirely new bill of rights".⁵⁶ **The point of incorporating the rights in the ECHR into UK law, in other words, was to allow domestic courts to rule on their application and interpretation in the manner of a bill of rights,** rather than applicants having to go to the ECtHR in Strasbourg to claim a breach of their rights. As **Lord Hoffman** put it, if the HRA was "interpreted by United Kingdom courts as the American Bill of Rights is interpreted by American courts, [it] would be a perfectly serviceable British bill of rights".⁵⁷

4.10 Lord Gabor QC recently confirmed that "if Parliament had intended our courts to be bound by [Strasbourg] decisions it could and would have said so in terms. Instead the [HRA] adopted the 'must take into account' formula, which suggests that in an appropriate case it would

leaving the final decision with the domestic courts, whether a DOI is issued or not (for example, see *Evans v UK*, 2006; *Mosley v UK*, 2011; *Hatton v UK*, 2003; *Pretty v UK*, 2002).

⁵¹ Notably in the USA.

⁵² See for example, *AA v UK* (ECtHR, 2011) which found a breach of Article 8 and *Grant v UK* (ECtHR, 2009) which found no interference with Article 8 on the facts. See **Appendix 5** for more details on this issue.

⁵³ Quoted in the Times, 'Britain can ignore Europe on human rights: top judge', 20 October 2011.

⁵⁴ For example, Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] UKHL 26 said that the courts' duty under the HRA is "to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less".

⁵⁵ *Hansard*, HL vol.583, cols 514-5, 18 November 1997. The "distinctly British contribution" our courts would make to developing human rights jurisprudence was emphasised in the White Paper which heralded the HRA (*Rights Brought Home: The Human Rights Bill*, CM 3782, October 1997) and in the parliamentary debates on the Human Rights Bill.

⁵⁶ 313 HC 398 (3 June, 1998).

⁵⁷ 'The universality of human rights', Judicial Studies Board Annual Lecture, 19 March 2009, p26.

be open to our courts, having taken account of the Strasbourg decision, to reach a different conclusion.”⁵⁸ Both the Lord Chief Justice and the Attorney General have also recently confirmed that the duty in s2 HRA is to ‘take into account’, not to follow.⁵⁹

4.11 Our research suggests that whilst the interpretation of s2 has varied, **domestic courts interpreting the HRA do not act as if they are bound by ECtHR case law in a range of circumstances, relying on common law principles or other sources of law as well or instead** (see *Appendix 6*). There is nothing in the HRA to prevent this and there are indications this is likely to increase. In these cases the domestic courts give their own interpretation of the rights in the HRA, even when they conflict with Strasbourg case law.⁶⁰ For example, Justice Laws said in 2002: “...the court’s task under the HRA...is not simply to add on the Strasbourg learning to the corpus of English law... but to develop a municipal law of human rights...case by case, taking account of the Strasbourg jurisprudence as s2 [of the] HRA enjoins us to do.”⁶¹ The Supreme Court more recently held that on the “rare occasions” when the courts have concerns as to whether a decision of the ECtHR sufficiently appreciated particular aspects of our domestic process, our courts can decline to follow the ECtHR decision, giving Strasbourg the chance to reconsider, so that “a valuable dialogue” may take place.⁶² Although clear on the face of the statute, **it may well be that further guidance to the courts is required to clarify the intent and purpose of s2 HRA.**

4.12 **The duty of domestic courts under s2 HRA is, of course, distinct from the obligation on member states or governments to “abide by” judgments of the ECtHR** in cases against them, contained in Article 46 of the ECHR. This obligation has applied since the ECHR came into force in 1953.⁶³ David Cameron has argued that the “existence of a clear and codified British Bill of Rights will lead the European Court of Human Rights to apply the ‘margin of appreciation’” which gives states greater discretion in their interpretation of ECHR rights.⁶⁴ It is difficult to understand how a Bill of Rights which is less closely tied to the ECHR than the HRA (for example, by removing the obligation in s2 to take account of ECtHR jurisprudence altogether) is likely to have this effect. **Comparative research by Oxford University** has demonstrated that, if anything, **a British Bill of Rights would likely result in less leeway to parliament and stricter rights protections in British courts.**⁶⁵ In addition, Lord Hope, Deputy President of the UK Supreme Court, has argued that were the HRA to be repealed, “...we will still have to recognise that if we take a decision which is contrary to the [ECHR] somebody is going to complain to Strasbourg...So it’s very difficult to see how simply wiping out the Human Rights Act is really going to change anything...”⁶⁶

4.13 **One of the most compelling reasons given for introducing a new Bill of Rights is “so that all British citizens of different backgrounds feel ownership of it”.**⁶⁷ Whilst the HRA may never have been properly ‘owned’ as a bill of rights by the general public, there is consistent

⁵⁸ ‘Courts are free to ignore Strasbourg’, Letter to the Editor, The Times, 28 October 2011.

⁵⁹ Giving evidence to the House of Lords Select Committee on the Constitution on 19 October 2011, Lord Judge said: “it is at least arguable that, having taken account of the decisions of the court in Strasbourg, our courts are not bound by them. They have to give them due weight; in most cases obviously we would follow them but not, I think, necessarily.” Dominic Grieve in a speech on ‘European Convention on Human Rights – Current Challenges’ on 24 October stated: “British courts are not bound to follow the jurisprudence of the Strasbourg court. They must take it into account.”

⁶⁰ See for example, *In Re P* [2008] UKHL 38; *Campbell v MGN* [2004] UKHL 22; *EM (Lebanon) v SSHD* [2008] UKHL 64; *R (Limbuella) v SSHD* [2005] UKHL 66; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15; *R v Spear* [2002] UKHL 31.

⁶¹ *Runa Begum v Tower Hamlets* [2002] 2 All ER 668 para 17.

⁶² *R v Horncastle* [2009] UKSC 14.

⁶³ For inter-state petitions to Strasbourg (such as *Ireland v UK* in 1978) and for individual petitions from 1966.

⁶⁴ David Cameron ‘Balancing freedom and security – A modern British Bill of Rights’, Speech to the Centre for Policy Studies, 26 June 2006. The ECtHR developed the ‘margin of appreciation’ doctrine to apply in situations where national authorities with “direct democratic legitimation” are “in principle better placed than an international court to evaluate local needs and conditions” (*Hatton v UK*, 2003). It’s applicability varies with the issue and right at stake.

⁶⁵ ‘Public Protection, Proportionality and the Search for Balance’, Benjamin Gould et al, Ministry of Justice, 2007.

⁶⁶ Quoted by Joshua Rozenberg, ‘Are Supreme Court justices more assertive than they were as law lords?’, Law Society Gazette, 5 August 2010.

⁶⁷ Dominic Grieve, ‘Liberty and Community in Britain’, Speech for Conservative Liberty Forum, 2 October 2006.

polling evidence that the rights in the Act *are* popular.⁶⁸ It is often argued that the greatest benefit of introducing a new Bill of Rights is the process that would lead to it, which can help educate the public and create 'ownership'. It is true that besides the Labour Party discussion paper⁶⁹ and manifesto, alongside meetings with NGOs and lawyers, the HRA was not widely consulted upon, and there was almost no public education on it by the government which introduced it. Polling by Liberty found that less than 10% of people remember ever having received or seen information from the government explaining the HRA.⁷⁰ Most people therefore obtain their information on the HRA from the media⁷¹ (see Appendix 7 for corrections and clarifications of selective media reporting of the HRA).

4.14 However, **it is difficult to understand how simply labelling a new bill of rights *British*, as some commentators propose, would make it more popular.** If the terms of reference of the Commission are upheld, and a new Bill were to be based on all the rights in the ECHR without redefining their scope, our case law would be unlikely to change substantially. Indeed, **one of the prime purposes of Bills of Rights is to correct the tendency of all democracies based on majoritarian principles to ride roughshod over the needs of minorities** of any kind. Any honest consultation on a new UK Bill of Rights has to be clear about this point. Responding to popular perceptions of the way the HRA has operated, some grossly inaccurate, **it would be possible to claim that a 'British Bill of Rights' would remove rights from some of the most marginalised, or least popular, groups in our society but this would not be the case if the terms of reference of the Commission are respected.** To introduce a Bill of Rights for this purpose would anyway be without precedence anywhere in the modern democratic world.

4.15 There is no precedent for the introduction of a Bill of Rights resulting from the type of 'conversation' that is currently taking place in the UK. Research by the London Metropolitan University into the processes for developing bills of rights in other countries concluded that **"all previous Bills of Rights have been designed either to supplement existing human rights protection or to incorporate international human rights into domestic law. No Bill of Rights process in a modern democracy has permitted even the possibility of regression."**⁷² Another key finding of the London Metropolitan University research was that "politicians should be transparent about the purpose of a Bill of Rights". A coherent explanation from government is needed about why it is seeking a new Bill of Rights. The Prime Minister has spoken about the "twisting and misrepresenting of human rights" that is "now exerting such a corrosive influence on behaviour".⁷³ **If there is evidence that some public authorities have misunderstood the scope of their duties under the HRA, this could be rectified by suitably tailored education and training** but does not necessarily require a new bill of rights.

4.16 **There have also been calls by senior politicians to replace the HRA with "a clear articulation of citizen's rights that British people can use in British courts"**.⁷⁴ The underlying philosophy of human rights is that every human being is entitled to fundamental rights simply because they are human. Whilst voting rights and many benefits are usually dependent on citizenship or residence, **the fundamental rights in democratic bills of rights, like a fair trial, freedom from torture, privacy and free expression, generally apply to everyone within the jurisdiction of a state.** A new Bill of Rights that attempts to exclude non-citizens or unpopular groups from certain of its provisions, could certainly result in successful challenges at the ECtHR.

⁶⁸ Liberty polling results show for example that 95% of respondents believe the right to a fair trial is vital or important, 91% believe the right not to be tortured or degraded is vital or important and 94% believe that respect for privacy and family life is vital or important. 96% supported a law that protects rights and freedoms in Britain. <http://www.liberty-human-rights.org.uk/media/press/2010/britain-agrees-what-s-not-to-love-about-the-human-rights.php>

⁶⁹ 'Bringing Rights Home', Jack Straw and Paul Boateng, December 1996.

⁷⁰ Note 68.

⁷¹ 'Human Rights Insight Project', Ministry of Justice, 2008, page 27: "In terms of sources of knowledge about human rights and the Human Rights Act, the strongest was the media (64%)."

⁷² 'Developing a Bill of Rights for the UK', Alice Donald et al, Equality and Human Rights Commission, 2010.

⁷³ David Cameron, speech following the riots, Oxfordshire, 15 August 2011.

⁷⁴ David Cameron, Note 64.

4.17 Both the current government and the previous one have sought to give the impression that they will introduce a Bill of Rights to remedy a ‘responsibilities deficit’ in society. In the wake of the riots, the Prime Minister promised to look at “creating our own British Bill of Rights” to address the way “misrepresenting” human rights had allegedly “undermined personal responsibility”⁷⁵ and the Labour government introduced a Green Paper in 2009 making the case for a non-justiciable Bill of Rights and Responsibilities.⁷⁶ Very few rights in the HRA are absolute.⁷⁷ Some can be ‘limited’ in certain circumstances.⁷⁸ Many are ‘qualified rights’⁷⁹ where interference with an individual’s right can be justified where it is “necessary in a democratic society” to protect the rights of others or the common good, as the Home Secretary pointed out in her recent speech to the Conservative Party conference⁸⁰ (see *Appendix 8 on how the HRA has protected the rights of victims of crime*). For example, ‘wanted posters’ of suspects or convicts who have absconded can be justified under Article 8(2) as necessary for public safety, although there are often misleading reports in the press and by some politicians to the contrary.⁸¹

4.18 Responsibilities can be said to be implicit within the basic concept of human rights. As Lord Bingham has remarked: “**inherent in the whole of the ECHR is a search for balance between the rights of the individual and the wider rights of the society to which he belongs**”.⁸² **If it is desirable to highlight that responsibilities are implicit within the concept of human rights in any new Bill of Rights, this could be achieved by including references to responsibilities in a pre-amble.** Francesca Klug and others suggested this to the Ministry of Justice Bill of Rights and Responsibilities Reference Group in 2007-09. For example, the Australian state of Victoria has a Charter of Human Rights and Responsibilities Act 2006, largely modelled on the UK HRA, which includes in its preamble: “human rights come with responsibilities and must be exercised in a way that respects the human rights of others”.

4.19 The UK is widely seen as a leader on human rights and civil liberties protection, particularly within Europe.⁸³ Many people in this country are rightly proud of this reputation. When the Prime Minister says he wants to “...show that we can have a commitment to proper rights, but they should be written down here in this country”,⁸⁴ this could be interpreted as distancing ourselves from the European and international human rights framework that we demand other states adhere to.⁸⁵ Currently, every other member state of the Council of Europe has absorbed ECHR rights into its law through one mechanism or another. Whilst the UK has a much stronger record of compliance with ECtHR judgments than many other European states, being seen to effectively de-incorporate the ECHR from UK law (by further qualifying the rights or preventing the courts from ‘taking account’ of Strasbourg case law altogether) could start a precedent that other less compliant states may well wish to follow. **Repealing the HRA and replacing it with something less effective** (either in terms of the rights themselves, or the mechanisms to protect them) **would send a strong message to the rest of the world** about our commitment to international human rights norms, particularly to countries with far poorer human rights records than the UK.

⁷⁵ *Speech*, 15 August 2011, note 73.

⁷⁶ ‘Rights and Responsibilities: developing our constitutional framework’, Ministry of Justice, March 2009.

⁷⁷ The prohibition on torture, inhuman or degrading treatment (Article 3), the prohibition of slavery (Article 4) and the protection from retrospective criminal penalties (Article 7) are absolute rights.

⁷⁸ For example, the right to liberty (Article 5) can be limited only in specified circumstances, such as detention following conviction of an offence.

⁷⁹ For example, the right to respect for private and family life (Article 8), freedom to manifest one’s religion or belief (Article 9), freedom of expression (Article 10) and freedom of assembly and association (Article 11).

⁸⁰ Theresa May pointed out that “the right to a family life is not an absolute right” and read out Article 8(2) HRA. ‘Conservative values to fight crime and cut immigration’, Manchester, 4 October 2011.

⁸¹ See **Appendix 7** and <http://www.liberty-human-rights.org.uk/human-rights/blue-human-rights/the-human-rights-act/human-rights-act-myths/index.php>

⁸² *Leeds City Council v Price and others* [2006] UKHL 10, para 32.

⁸³ See ‘Churchill’s Legacy: The Conservative Case for the Human Rights Act’, J. Norman and P. Osborne, Liberty, 2009.

⁸⁴ Prime Minister’s Questions, House of Commons, 1 December 2010.

⁸⁵ See also ‘Developing a Bill of Rights for the UK’, note 72.

List of Appendices

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APPENDIX 1

Human Rights Futures Project

The Human Rights Futures Project explores and analyses the future direction of human rights discourse in the UK and elsewhere. The project particularly focuses on monitoring and evaluating the impact of the UK's Human Rights Act (HRA) inside and outside the courts to chart the evolving nature of human rights and challenge its characterisation as a technical, legalised discourse, focused solely on the relationship between the individual and the state.

Recently the Project has been engaging in the current political debates on the future of the HRA and proposals for a British Bill of Rights. Human Rights Futures provides ongoing academic research and analysis on the background and context to the debate and draws on comparative material to signal the global implications of moving away from international human rights norms to a more national focus. The Project is also involved in analysing political and philosophical debates about the nature of the state and human rights.

For more information and for a list of selected legal briefings see

<http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>

Professor Francesca Klug

Francesca Klug is a Professorial Research Fellow at the LSE and Director of the Human Rights Futures Project. Francesca was previously a Senior Research Fellow at the Human Rights Incorporation Project at King's College Law School where she assisted the government in devising the model for incorporating the European Convention on Human Rights into UK law reflected in the HRA. She was a Member of the Government Human Rights Task Force, to oversee implementation of the HRA, from 1998-2000 and acted as a Consultant on the HRA at the Home Office from 2000-01.

From 2006-09 Francesca was a Commissioner on the statutory Equality and Human Rights Commission. She is a frequent broadcaster and has written widely on human rights, including *Values for a Godless Age: the story of the UK Bill of Rights* (Penguin, 2000). Francesca's column for the *Guardian's* Comment is Free, 'Blogging the Bill of Rights', was published as a booklet by Liberty in June 2010. Francesca was awarded the Bernard Crick prize for the best article published by *Political Quarterly* in 2009 at the annual George Orwell Prize event in May 2010. Francesca was subsequently appointed as a member of the Political Quarterly Editorial Board. She co-edited a Special Issue of the *European Human Rights Law Review*, published in December 2010, to mark the 10th anniversary of the HRA. Francesca teaches on the Comparative Constitutional Law postgraduate class for the law department at the LSE.

For more information and a full list of publications see

<http://www2.lse.ac.uk/humanRights/whosWho/francescaKlug.aspx>

Helen Wildbore

Helen is a Research Officer on the Human Rights Futures Project. She carries out research for the Project, including monitoring and evaluating the impact of the HRA inside and outside the courts, drafting legal briefings and maintaining a case-law database.

Helen graduated from University College London in 2001 with a degree in Law and from the University of Nottingham in 2003 with a Masters in Human Rights Law. Her research interests include the impact of the HRA inside and outside the courts, Bills of Rights, human rights values, equality as a fundamental human rights value and the rights of the child.

For more information and a full list of publications see
<http://www2.lse.ac.uk/humanRights/whosWho/helenWildbore.aspx>

Selected publications on HRA / bills of rights

Professor Klug:

'The Human Rights Act: origins and intentions', in *Confronting the Human Rights Act: contemporary themes and perspectives*, Jo Milner et al (eds), Routledge (forthcoming).

'The Human Rights Act 10 Years On: Origins, Impact and Destination', *Scottish Human Rights Journal*, Issue 51, November 2010.

'Follow or lead? The Human Rights Act and the European Court of Human Rights', with Helen Wildbore, *European Human Rights Law Review*, Issue 6, 2010.

'Solidity or Wind? What's on the Menu in the Bill of Rights Debate?', (2009) 80(3) *The Political Quarterly* 420-426.

'A Bill of Rights: Do we need one or do we already have one?', *Public Law*, Winter 2007.

'A Bill of Rights – what for?' in *Towards a New Constitutional Settlement*, edited by Chris Bryant MP, The Smith Institute, 2007.

"The Long Road to Human Rights Compliance", *Northern Ireland Law Quarterly*, Special Issue on Human Rights and Equality, Spring 2006.

"Standing back from the Human Rights Act: How effective is it five years on?", with Keir Starmer, *Public Law*, Winter 2005.

"Judicial Deference under the Human Rights Act", *European Human Rights Law Review*, Issue 2, 2003.

"The Human Rights Act: the first two years", with Claire O'Brien, *Public Law*, Winter 2002.

"The Human Rights Act: a 'third way' or 'third wave' bill of rights?" *European Human Rights Law Review*, Issue 4, 2001.

Helen Wildbore:

'The protection of freedom under the Human Rights Act: What we've gained', *UCL Human Rights Review*, 2009.

'Protecting rights: how do we stop rights and freedoms being a political football?', with Professor Klug, published by Unlock Democracy, March 2009.

'Does Britain need a Bill of Rights?', *Politics Review*, April 2008.

APPENDIX 2

Appendix 2 is Francesca Klug and Rabinder Singh's proposals for the 'British model' of ECHR incorporation (dated 1997).

This document is available separately from the Human Rights Futures website:

<http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>

APPENDIX 3

Human Rights Act impact on everyday life – some examples

- **Soldiers on UK military bases in Iraq fall under the jurisdiction of the HRA**

A British soldier serving in Iraq who died from hyperthermia in a UK military base after complaining that he couldn't cope with the heat, was subject to the jurisdiction of the HRA. The circumstances of this soldier's death gave rise to concerns that there might have been a failure by the army to provide an adequate system to protect his life (Article 2). An inquest was necessary to establish by what means and in what circumstances he met his death.⁸⁶
- **HRA secures inquest into murder**

The human rights organisation Liberty used Article 2 (right to life) arguments to secure the re-opening of the inquest into the death of Naomi Bryant, who was killed in 2005 by convicted sex offender Anthony Rice.⁸⁷
- **Naming a deceased father on birth certificate**

Dianne Blood successfully challenged the provision of the Human Fertilisation and Embryology Act 1990 which prevented her from registering her deceased husband as the father of her two children conceived by IVF on the children's birth certificates. The provision was declared to be incompatible with the right to respect for private and family life under Article 8 and the right to be free from discrimination under Article 14.⁸⁸ The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.
- **Local authority snooping on family is intrusion of private life**

A council's surveillance of a mother and her children to determine whether they lived within a school catchment area was ruled unlawful and a breach of their right to respect for private life under the HRA. The Council used surveillance powers given to it by the Regulation of Investigatory Powers Act 2000 but a tribunal found their use of the powers was improper and unnecessary.⁸⁹
- **Unjustified intrusion into right to freedom of assembly**

The police stopped a coach of demonstrators reaching an anti-war demonstration in RAF Fairford in 2003 and decided to send the coaches home with a police escort to prevent a breach of the peace occurring at the demonstration when the passengers arrived. The court said that the police must take no more intrusive action than appeared necessary to prevent the breach of the peace. The police couldn't show that the actions they took were proportionate and constituted the least restriction necessary to the rights of freedom of speech and freedom of peaceful assembly. It was wholly disproportionate to restrict a person's exercise of these rights because she was in the company of others, some of whom might, at some time in the future, breach the peace. The House of Lords referred to the "constitutional shift" brought about by the Human Rights Act, so that is no longer necessary to debate whether we have a right to freedom of assembly.⁹⁰

⁸⁶ *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2010] UKSC 29.

⁸⁷ See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/bryantinquest-abandoned.shtml>

⁸⁸ *Blood and Tarbuck v Secretary of State for Health*, 2003, unreported.

⁸⁹ *Paton v Poole Borough Council*, decided by the Investigatory Powers Tribunal, 2 August 2010.

⁹⁰ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55

- Kettling to be used only as last resort**

To be lawful, crowd control measures by the police, such as kettling, must be resorted to in good faith, be proportionate and enforced for no longer than is reasonably necessary.⁹¹ The police must have a reasonable apprehension of an imminent breach of the peace, i.e. that it is "likely to happen". Kettling had to be a last resort and no more intrusive than appeared necessary to avoid a descent into violence. This test of necessity would only be met in extreme and exceptional circumstances. Kettling a group of protesters at the G20 summit where the risk of a breach of the peace was not imminent, was an unlawful deprivation of liberty under Art 5.⁹²
- Responsibly written articles on matters of public interest are protected**

The common law defence of qualified privilege in libel cases includes a public interest defence for the media.⁹³ Although this was developed in a case just before the HRA had come into force, but after it was passed, the court referred to the need for the common law to be developed and applied in a manner consistent with Article 10 (freedom of expression). The court listed ten matters to be taken into account in deciding whether the reporting was responsible. More recently, this list has been held to be guidance, not hurdles, and the defence is to be applied in a flexible and practical manner.⁹⁴ As a result, the media have much more freedom when reporting matters of public interest, where it may not be possible to subsequently prove the truth of the allegations, provided that they act responsibly and in the public interest.
- HRA provides protection against discrimination on grounds of sexual orientation**

The courts have used their powers under the HRA to eliminate the discriminatory effect of the Rent Act 1977 which meant that the survivor of a heterosexual couple could become a statutory tenant by succession but the survivor of a homosexual couple could not.⁹⁵
- Before closing a care home, the effect on the residents must be considered**

Where a local authority residential care home was being closed, the authority had to ensure that any consultation investigates the effect of the closure on the residents' emotional, psychological and physical health and comply with its obligations under the HRA.⁹⁶
- Duty to take positive action to secure physical integrity and dignity**

Where a local authority knew that a severely disabled tenant's housing was inappropriate and prevented her from having a normal family life but did not move her to suitably adapted accommodation, they failed in their duty to take positive steps to enable her and her family to lead as normal a family life as possible and secure her physical integrity and dignity. Damages were due for this failure.⁹⁷

⁹¹ *Austin v Commissioner of Police of the Metropolis* (2009) UKHL 5.

⁹² *R (Moos and McClure) v Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin).

⁹³ *Reynolds v Times Newspaper* (2001) 2 AC 127

⁹⁴ *Jameel v Wall Street Journal Europe* [2006] UKHL 44

⁹⁵ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30. Para 2, Schedule 1 of the Rent Act.

⁹⁶ *Cowl et al v Plymouth City Council* [2001] EWCA Civ 1935 and *R (Madden) v Bury MBC* [2002] EWHC 1882

⁹⁷ *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

Outside courts:

- **Disabled married woman secures special double bed**
A disabled woman who was unable to leave bed needed a special bed which would allow carers to give her bed baths. Her authority refused her request to have a double bed so that she could continue to sleep next to her husband, even though she offered to pay the difference in cost between a single and double bed. After she invoked her right to respect for private and family life, the authority agreed to pay the whole cost of the double bed.⁹⁸
- **Woman fleeing domestic violence prevents children being taken into care**
A woman fleeing her violent husband, who moved towns with her children whenever he tracked them down, eventually arrived in London and was referred to the local social services department. Social workers told the mother that she was an 'unfit' parent and that she had made the family intentionally homeless. An advice worker helped the mother challenge this claim using the right to respect for family life and prevented the children being placed in foster care. Instead the mother was offered help to secure accommodation.⁹⁹
- **Learning disabled couple challenge use of CCTV in their bedroom at night**
A couple with learning disabilities were living in residential care with their child so that their parenting skills could be assessed by social services. CCTV cameras were installed to observe them performing parental duties, including in their bedroom, even though the baby slept in a separate nursery. The couple were distressed by the use of the cameras in the bedroom at night and successfully used their right to private life to get the cameras switched off during the night.¹⁰⁰

⁹⁸ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

⁹⁹ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹⁰⁰ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

APPENDIX 4

Briefing on landmark developments under the Human Rights Act

*This is a selection of landmark legal cases under the Human Rights Act (HRA), plus a few examples of how the HRA is having an impact outside the courts. Some European Court of Human Rights decisions have also been included (marked with *) as illustrations of the development of human rights law which, as a result of the HRA (section 2), the domestic courts are bound to “take into account”. Prior to the HRA, European Court of Human Rights decisions were not part of the domestic legal framework.*

Some examples of what difference the HRA has made

Protest

- **Preventing demonstrators reaching a protest is unjustified intrusion into right to freedom of assembly**

The decision by the police to stop a coach of demonstrators reaching an anti-war demonstration in 2003 was challenged under the HRA. The police concluded that a breach of the peace was not imminent but decided to send the coaches home with a police escort to prevent a breach of the peace occurring at the demonstration when the passengers arrived. The court said that the police must take no more intrusive action than appeared necessary to prevent the breach of the peace. The police had failed to discharge the burden of establishing that the actions they took were proportionate and constituted the least restriction necessary to the rights of freedom of expression (Article 10) and freedom of peaceful assembly (Article 11). It was wholly disproportionate to restrict a person's exercise of her rights under Articles 10 and 11 because she was in the company of others, some of whom might, at some time in the future, breach the peace. The House of Lords referred to the “constitutional shift” brought about by the Human Rights Act, so that its no longer necessary to debate whether we have a right to freedom of assembly.¹⁰¹

- **Kettling to be used only as last resort**

To be lawful, crowd control measures by the police, such as kettling, must be resorted to in good faith, be proportionate and enforced for no longer than is reasonably necessary.¹⁰² The police must have a reasonable apprehension of an imminent breach of the peace, i.e. that it is “likely to happen”. Kettling had to be a last resort and no more intrusive than appeared necessary to avoid a descent into violence. This test of necessity would only be met in extreme and exceptional circumstances. Kettling a group of protesters at the G20 summit where the risk of a breach of the peace was not imminent, was an unlawful deprivation of liberty under Article 5.¹⁰³

Freedom of expression and the media

- **Responsibly written articles on matters of public interest are protected**

The common law defence of qualified privilege in libel cases includes a public interest defence for the media.¹⁰⁴ Although this was developed in a case just before the HRA had come into force, but after it was passed, the court referred to the need for the common law

¹⁰¹ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55

¹⁰² *Austin v Commissioner of Police of the Metropolis* (2009) UKHL 5.

¹⁰³ *R (Moos and McClure) v Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin). See also *Castle et al v Commissioner of the Police of the Metropolis* [2011] EWHC 2317 where kettling was justified as a breach of the peace was imminent.

¹⁰⁴ *Reynolds v Times Newspaper* (2001) 2 AC 127

to be developed and applied in a manner consistent with the right to freedom of expression (Article 10). The court listed ten matters to be taken into account in deciding whether the reporting was responsible. More recently, this list has been held to be guidance, not hurdles, and the defence is to be applied in a flexible and practical manner.¹⁰⁵ As a result, the media have much more freedom when reporting matters of public interest, where it may not be possible to subsequently prove the truth of the allegations, provided that they act responsibly and in the public interest.

- **Anonymity orders set aside to protect media's right to free expression**

A group of media organisations successfully applied to set aside anonymity orders made in favour of individuals who were alleged to have links with Al-Qaeda and were suspected of facilitating acts of terrorism. The individuals had been designated under the Terrorism (United Nations Measures) Order 2006 and their assets were frozen. The Supreme Court had to weigh the competing claims of the right to free expression of the press (Article 10) and the right to respect for private life of a relative of two of the individuals (Article 8), who would be identified if the anonymity orders were lifted. The court ruled that, in the circumstances, there was a powerful general public interest in identifying the relative which justified curtailment of his right to respect for private life. The anonymity orders were therefore set aside.¹⁰⁶

- **Freedom of expression includes the right to receive information**

The right to freedom of expression (Article 10) includes not only the freedom to impart information and ideas but also to receive. The media have been granted access to a hearing in the Court of Protection,¹⁰⁷ when such hearings had previously been closed.¹⁰⁸

Privacy

- **Damages awarded for unjustified intrusion into private life**

Where an invasion of private life is a matter of legitimate public interest because a public figure had previously lied about the matter, there will be a strong argument in favour of freedom of expression under Article 10 that will often defeat a claim of privacy under Article 8. The publication of the fact that a public figure had taken drugs and was seeking treatment was necessary to set the record straight given her previous statements to the contrary, but the additional information published in the stories, including a photograph, was an unjustified intrusion into private life. Balancing the competing interests, the right to privacy under Article 8 outweighed the newspaper's freedom of expression under Article 10 and damages were awarded for the breach.¹⁰⁹

- **Retention of DNA and fingerprint evidence a breach of right to private life**

The blanket and indiscriminate retention of fingerprints, cellular samples and DNA profiles of people suspected but not convicted of offences failed to strike a fair balance between the competing public and private interests. The court* ruled that it was a disproportionate interference with the right to respect for private life (Article 8) and could not be regarded as necessary in a democratic society.¹¹⁰

Following this decision at the European Court of Human Rights, two men have brought a case in the domestic courts claiming that the retention of their DNA and fingerprints is a

¹⁰⁵ *Jameel v Wall Street Journal Europe* [2006] UKHL 44

¹⁰⁶ *In the matter of Guardian News and Media Ltd and others Sub Nom Mohammed Jabar Ahmed and others v HM Treasury: Mohammed Al-Ghabra v HM Treasury: HM Treasury v R (Hani El Sayed Sabaei Youssef)* [2010] UKSC 1

¹⁰⁷ The Court of Protection adjudicates about people who lack mental capacity to make decisions themselves.

¹⁰⁸ *A v Independent News and Media and others* [2010] EWCA Civ 343.

¹⁰⁹ *Campbell v Mirror Group Newspapers* [2004] UKHL 22. See also *Douglas v Hello! Ltd* (2005) EWCA Civ 595 and *HRH Prince of Wales v Associated Newspapers* [2006] EWCA Civ 1776.

¹¹⁰ *Marper v UK* European Court of Human Rights Grand Chamber, 4 December 2008.

breach of their right to respect for private life (Article 8). One was arrested but released without charge, the other was charged of an offence but acquitted at trial. Both men had their requests to destroy their samples refused by the police, as there were no 'exceptional circumstances' for destroying them, as stated in the Association of Chief Police Officers guidelines. The court made a declaration under the HRA that those guidelines on retention of biometric data are unlawful because they are incompatible with Article 8. The court noted that it was the intention of the government to bring new legislation on this issue into force later this year.¹¹¹

- **Local authority snooping on family is intrusion of private life**

A council's surveillance of a mother and her children to determine whether they lived within a school catchment area was ruled unlawful and a breach of their right to respect for private life (Article 8). The Council used surveillance powers given to it by the Regulation of Investigatory Powers Act 2000 but a tribunal found their use of the powers was improper and unnecessary.¹¹²

- **Stop and search regime a breach of ECHR**

The stop and search powers under section 44 of the Terrorism Act 2000 are a breach of the right to respect for private life (Article 8). Under section 44 senior police officers can authorise the police to stop and search vehicles and people without the precondition of reasonable grounds of suspicion. Authorisations under section 44 covering the whole of Greater London have been made continuously for successive periods since section 44 came into force in February 2001. The court* ruled that the use of coercive powers conferred by anti-terrorism legislation to require an individual to submit to a detailed search of their person, clothing and personal belongings amounted to a clear interference with the right to respect for private life. The powers of authorisation and confirmation as well as of stop and search under s44-45 were not in accordance with the law, in violation of Article 8.¹¹³

Family life

- **Naming a deceased father on birth certificate**

Dianne Blood successfully challenged the provision of the Human Fertilisation and Embryology Act 1990 which prevented her from registering her deceased husband as the father of her two children conceived by IVF on the children's birth certificates. The provision was declared to be incompatible with the right to respect for private and family life (Article 8) and the right to be free from discrimination (Article 14).¹¹⁴ The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003.

- **Right to respect for family life includes establishing details of identity**

A woman conceived by artificial donor insemination successfully challenged the decision by the Department of Health and the Human Fertilisation and Embryology Authority not to secure for her any information (even non-identifying information) relating to her donor parents. Referring to need for 'flexible concept' of family life and positive obligations, the High Court said that the right to respect for private and family life (under Article 8) means that everyone should be able to establish details of their identity, including a right to information about biological parents.¹¹⁵ The law was amended through the Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 so that people conceived as a result of sperm, egg or embryo donation are able once they

¹¹¹ *R (GC) v Commissioner of Police of the Metropolis; R(C) v Commissioner of Police of the Metropolis* [2011] UKSC 21

¹¹² *Paton v Poole Borough Council*, decided by the Investigatory Powers Tribunal, 2 August 2010.

¹¹³ *Gillan and Quinton v UK*, European Court of Human Rights 12.01.10

¹¹⁴ *Blood and Tarbuck v Secretary of State for Health*, 2003, unreported.

¹¹⁵ *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin)

reach the age of 18 to request non-identifying information about their donor from the Human Fertilisation and Embryology Authority.

- **Lower rates of benefits to foster carers who were family members of the child than to non-relative foster carers was discriminatory**

A successful challenge was made to a council's blanket and inflexible application of limits on payments to family fosterers. The council had failed to submit any evidence justifying the levels paid. The benefit payments were encompassed by the local authority's positive duties to respect family life (Article 8) so should not be made in a discriminatory manner. There was a difference in treatment on grounds of family status and a breach of the prohibition on discrimination (Article 14).¹¹⁶

- **Unmarried couples protected from unjustified discrimination**

The Adoption (Northern Ireland) Order 1987, which said only married couples or single people could be considered as adoptive parents, was successfully challenged under the HRA by an unmarried couple. The court said their right to respect for family life (Article 8) was engaged and therefore the policy could not be applied in a discriminatory way (under Article 14, the prohibition on discrimination). As the HRA prohibited discrimination against married people, the court said it must follow that discrimination on the grounds of not being married must also be prohibited. The discrimination against unmarried couples would have to be justified. The court ruled that, although the state was entitled to consider that generally it was better for a child to be brought up by parents who were married, it was altogether another thing to say that no unmarried couples could be suitable adoptive parents. The presumption in the Adoption Order contradicted the fundamental adoption principle of the best interest of the child and was disproportionate. The court declared that the unmarried couple were entitled to apply to adopt a child.¹¹⁷

- **Scheme to prevent sham marriages disproportionately interferes with right to marry**

The scheme under the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, which required certain people subject to immigration control to obtain a certificate of approval from the Secretary of State before they were allowed to marry, other than in an Anglican ceremony, was challenged under the HRA. The court said while states have the right to regulate marriage and to seek to prevent marriages of convenience, the conditions imposed by the scheme were relevant to immigration status but had no relevance to the genuineness of the proposed marriage. The scheme imposed a blanket prohibition on the exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages were marriages of convenience or not (although there was a discretionary exception for compassionate circumstances). That was a disproportionate interference with the exercise of the right to marry under Article 12. The court used their powers under the HRA to read the legislation compatibly with Article 12. The court also made a formal declaration that the legislation was incompatible with the prohibition of discrimination (Article 14) as it discriminated between civil and Anglican marriages.¹¹⁸ A remedial order under s10 HRA was laid before Parliament to abolish the certificate of approval scheme.¹¹⁹

Outside courts:

- **Fostered children secure visits to their mother in supported care**

A mother with mental health problems was placed in 24 hour supported care and her children were fostered. The agreed three meetings per week for the children were gradually reduced to just one a week due to the authority's lack of staff. This greatly distressed the mother and children. The mother's advocate invoked the children's right to respect for family life (Article 8) and convinced the mental health team to invite children's services staff

¹¹⁶ *R (L and others) v Manchester City Council*, High Court, 26.09.01

¹¹⁷ *Re P and others* [2008] UKHL 38

¹¹⁸ *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53.

¹¹⁹ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial Order) 2010.

to the next care programme approach meeting so that the children's interests could be represented. The three visits per week were restored as a result.¹²⁰

Protecting right to life

- **Right to life can include positive obligation to protect life**

The right to life under Article 2 not only prevents the State from intentionally taking life, it also requires States to take appropriate steps to safeguard life. The court* ruled that the State's duty includes putting in place effective criminal law provisions to deter the commission of offences and law-enforcement machinery. Article 2 may also go beyond that to imply in certain well-defined circumstances a positive obligation on authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual. This duty will be breached where it can be shown that the authorities failed to do all that could reasonably be expected of them to avoid a "real and immediate" risk to the life of an identified individual about which they knew, or ought to have known.¹²¹

- **Jurisdiction of HRA extends beyond UK territory**

The duty on public authorities under the HRA to comply with the Convention rights applies not only when a public authority acts within the UK but also when it acts outside the territory of the UK but within the jurisdiction of the UK. This will apply when the authority has effective control over the area outside the UK. A man who had died as a result of injuries sustained in a detention unit in a British military base in Iraq was "within the jurisdiction" of the UK and covered by the HRA. Iraqi civilians who, it was claimed, had been unlawfully killed by members of British armed forces in southern Iraq in 2003, had not been within the jurisdiction of the UK when they were killed because the British troops did not have effective control over the area where the killings occurred.¹²²

- **Soldiers on UK military bases in Iraq fall under the jurisdiction of the HRA**

A British soldier serving in Iraq who died from hyperthermia in a UK military base after complaining that he couldn't cope with the heat, was subject to the jurisdiction of the HRA. The circumstances of this soldier's death gave rise to concerns that there might have been a failure by the army to provide an adequate system to protect his life (Article 2). An inquest was necessary to establish by what means and in what circumstances he met his death.¹²³

Investigations into deaths

- **Duty to investigate death in custody**

Where a death has occurred in custody the state is under a duty to publicly investigate before an independent judicial tribunal with an opportunity for relatives of the deceased to participate.¹²⁴

- **HRA secures inquest into murder**

The human rights organisation Liberty used right to life (Article 2) arguments to secure the re-opening of the inquest into the death of Naomi Bryant, who was killed in 2005 by convicted sex offender Anthony Rice.¹²⁵

¹²⁰ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹²¹ *Osman v UK* European Court of Human Rights, 28 October 1998.

¹²² *R (Al-Skeini) v Secretary of State for the Defence* [2007] UKHL 26

¹²³ *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2010] UKSC 29.

¹²⁴ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. See also *R (Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10; *R (Takoushis) v HM Coroner for Inner North London et al* [2005] EWCA Civ 1440 and *D v Secretary of State for the Home Department* [2006] EWCA Civ 143.

¹²⁵ See <http://www.liberty-human-rights.org.uk/news-and-events/1-press-releases/2010/bryantinquest-abandoned.shtml>

Disability

- **Duty to take positive action to secure physical integrity and dignity**

Where a local authority knew that a disabled tenant's housing was inappropriate and prevented her from having a normal family life, but did not move her to suitably adapted accommodation, they failed in their duty to take positive steps to enable her and her family to lead as normal a family life as possible and secure her physical integrity and dignity (under Article 8). Damages were due for this failure.¹²⁶

- **Policies on lifting must consider competing rights**

Health and Safety Executive guidance on manual lifting was updated in 2002, highlighting the need to comply with the HRA and the Disability Discrimination Act. It was aimed at a balance between health and safety policy and the needs and rights of disabled people.¹²⁷ A lifting policy should balance the competing rights of the disabled person's right to dignity and participation in community life and the care workers' right to physical and psychological integrity and dignity (Articles 3 and 8). Following a challenge under the HRA, East Sussex local authority amended its Safety Code of Practice on Manual Handling to include consideration of the dignity and rights of those being lifted. This was circulated to other local authorities, NHS trusts and care providers to encourage them to review their policies.¹²⁸

- **Keeping autistic man in support unit against his and his family's will violates HRA**

A 21 year old man with autism and a severe learning disability who lived with his father moved into his local authority's support unit for a couple of weeks when his father was ill, as part of his respite care regime. The local authority then kept him there for nearly a year, against his and his father's wish whilst it considered a long-term residential placement. The Court of Protection¹²⁹ ruled that the positive obligation under Article 8 (the right respect for family life) meant that the removal of vulnerable adults from their relatives or carers could only be justified when the state would provide better quality of care. Keeping this man away from his home for almost a year was a breach of Article 8 HRA, and also Article 5 HRA (the right to liberty and to have a speedy decision by a court of the lawfulness of detention).¹³⁰

Outside courts:

- **Disabled married woman secures special double bed**

A disabled women who was unable to leave her bed, needed a special bed which would allow carers to give her bed baths. Her authority refused her request to have a double bed so that she could continue to sleep next to her husband, even though she offered to pay the difference in cost between a single and double bed. After she invoked her right to respect for private and family life (Article 8), the authority agreed to pay the whole cost of the double bed.¹³¹

- **Deaf patient challenged lack of interpreter during operation**

Ms J, a profoundly deaf patient, was treated for a heart condition in Manchester in 2001. The hospital consultant refused to allow a British Sign Language interpreter into the operating theatre on health and safety grounds. This meant that during part of the procedure – carried out under local anaesthetic – Ms J was conscious but with no interpreter present was unable to communicate with medical personnel, which she found extremely frightening. She contacted RNID who reminded the hospital that qualified interpreters work to very high standards and follow a Code of Practice. The relevant human

¹²⁶ *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

¹²⁷ Health and Safety Executive, 'Handling Home care: Achieving safe, efficient and positive outcomes for care workers and clients', 2002.

¹²⁸ *R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin)

¹²⁹ The Court of Protection adjudicates about people who lack mental capacity to make decisions themselves.

¹³⁰ *Hillingdon London Borough Council v Neary* [2011] EWHC 1377.

¹³¹ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

rights that the hospital should have considered included freedom of expression (Article 10), prohibition of discrimination (Article 14), and prohibition of degrading treatment (Article 3). The hospital admitted its error and apologised to Ms J, and agreed to provide an interpreter for future operations, ensuring the dignity and equal treatment of disabled patients.¹³²

- **Learning disabled couple challenge use of CCTV in their bedroom at night**

A couple with learning disabilities were living in residential care with their child so that their parenting skills could be assessed by social services. CCTV cameras were installed to observe them performing parental duties, including in their bedroom, even though the baby slept in a separate nursery. The couple were distressed by the use of the cameras in the bedroom at night and successfully used their right to private life to get the cameras switched off during the night.¹³³

Age

- **Before closing a care home, the effect on the residents must be investigated**

Where a local authority residential care home was being closed, the authority had to ensure that any consultation investigated the effect of the closure on the residents' emotional, psychological and physical health and comply with its obligations under the HRA.¹³⁴

Outside courts:

- **Older couple helped to stay together in care home**

A husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to join him but was told by the local authority that she did not fit the criteria. After a public campaign by the family, supported by the media and older people's organisations, which argued that the local authority had breached the couple's right to respect for family life (Article 8), the authority agreed to reverse its decision and offered the wife a subsidised place in the care home with her husband.¹³⁵

- **Older woman supported to stay at home rather than move to residential care**

An older woman was staying in hospital following a number of strokes. She suffered a range of trauma related mental health problems following her internment as a prisoner of war in WWII and was observed re-enacting various behaviours from this period. Against her wishes, the hospital sought to discharge her and move her into residential care on cost grounds. Her advocate was concerned that being in an institution was causing her regression and used human rights arguments that she should not be placed in residential care but allowed to return home as she wanted. As a result, funding was secured to support her care at home.¹³⁶

Sexual orientation

- **HRA provides protection against discrimination on grounds of sexual orientation**

The courts have used their powers under the HRA to eliminate the discriminatory effect of para 2, Schedule 1 of the Rent Act 1977 which meant that the survivor of a heterosexual couple could become a statutory tenant by succession but the survivor of a homosexual couple could not (in breach of the prohibition on discrimination under Article 14, read in conjunction with the right to respect for private and family life under Article 8).¹³⁷

¹³² 'Human Rights and the Human Rights Act', Equality and Diversity Forum, June 2006.

¹³³ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹³⁴ *Cowl et al v Plymouth City Council* [2001] EWCA Civ 1935 and *R (Madden) v Bury MBC* [2002] EWHC 1882

¹³⁵ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹³⁶ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹³⁷ *Ahmad Raja Ghaidan v Antonio Mendoza* [2004] UKHL 30

- **Same-sex partner given ‘nearest relative’ status**

The same-sex partner of a detained mental health patient, whom the local council had refused to afford the status of ‘nearest relative’, challenged this decision under the right to respect for private life (Article 8) arguing that private life includes issues of sexuality, personal choice and identity. The court accepted that same-sex partners should be covered by the co-habiting rule applied to heterosexual couples who qualify as ‘nearest relative’ after 6 months co-habitation.¹³⁸

Race and religion

- **Changes to cell-sharing policies**

Following the murder of a prisoner by his racist cell-mate and a successful challenge under the HRA for a public inquiry (under the right to life in Article 2), the Prison Service introduced changes to its policy and procedures relating to cell-sharing risks, allowing information-sharing to identify high risk factors.¹³⁹

- **An attack against a religious group which is incompatible with the values of the ECHR will not enjoy the protection of Article 10**

A member of the BNP who placed a poster in the window of his house depicting one of the Twin Towers in flames that said “Islam out of Britain” and “Protect British people” was convicted of an offence under section 5 of the Public Order Act and of committing the offence in a religiously aggravated way and fined. His appeal to the High Court was rejected¹⁴⁰ on the grounds that the restriction upon his right to freedom of expression (Article 10) was proportionate to the legitimate aim of protecting the rights and freedoms of others, given also the fact that the speech arguably fell within Article 17 of the Convention (no right to act with the aim of destroying the rights in the Convention).¹⁴¹ His appeal to the European Court of Human Rights was found inadmissible because the anti-Islam images were a public attack on all Muslims in the UK and fell within Article 17, being incompatible with the values proclaimed in the Convention, so did not enjoy the protection of Articles 10 or 14 (prohibition on discrimination).¹⁴²

- **A school uniform did not breach the right to religion**

A uniform policy that did not allow students to wear a jilbab did not breach their right to manifest their religion (Article 9), and that even if it did, the school’s decision was objectively justified. The court stressed the need in some situations to restrict freedom to manifest religious belief, the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness and the need for balance and compromise.¹⁴³ New guidance was issued to schools by the Department for Children, Schools and Families stating that schools must be sensitive to the needs of all pupils and should consult the community, parents and pupils before setting or changing a uniform policy. Schools must act reasonably in accommodating pupils’ requirements but may have to balance the rights of an individual against the best interests of the whole school community. It is for a school to determine what sort of uniform policy is appropriate for it.¹⁴⁴

¹³⁸ *R (SG) v Liverpool City Council* October 2002 (unreported)

¹³⁹ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51

¹⁴⁰ *Norwood v DPP* [2003] EWHC 1564 (Admin)

¹⁴¹ Art 17: “Nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

¹⁴² *Norwood v UK* (2005) 40 EHRR SE11

¹⁴³ *R (Begum) v Denbigh High School* [2006] UKHL 15. See also *R (X) v Y School* [2006] EWHC 298 (Admin).

¹⁴⁴ See www.teachernet.gov.uk/management/atoz/u/uniform

Gender

- **Gender re-assignment requires legal recognition**

A successful challenge was made against the different treatment for transsexual people in obtaining marriage certificates and a declaration was made that the Matrimonial Causes Act 1973 was incompatible with the right to respect for family life (Article 8) and the right to marry (Article 12). The government altered the law and the Gender Recognition Act 2004 now entitles a transsexual person to be treated in their acquired gender for all purposes, including marriage.¹⁴⁵

- **Separation of mother and baby in prison requires flexibility**

Following a challenge to the blanket Prison Services rule, requiring compulsory removal of all babies from imprisoned mothers at 18 months, the Prison Service amended the requirements for the operation of Mother and Baby Units. The removal of the child had to be a proportionate interference with her right to respect for family life (Article 8). It was necessary to consider the individual circumstances and whether it was in the child's best interest to be removed.¹⁴⁶

- **HRA protects against modern-day slavery**

The Metropolitan police accepted that their failure to investigate a victim's report of threats and violence by her employer, who withheld her passport and wages, had breached the prohibition of slavery and forced labour (Article 4) after the human rights organisation Liberty took judicial review proceedings under the HRA. The police agreed to reopen the investigation and the employer was found guilty of assault.¹⁴⁷

Outside courts:

- **Woman fleeing domestic violence helped to find accommodation**

A woman fleeing her violent husband, who moved towns with her children whenever he tracked them down, eventually arrived in London and was referred to the local social services department. Social workers told the mother that she was an 'unfit' parent and that she had made the family intentionally homeless. An advice worker helped the mother challenge this claim using the right to respect for family life (Article 8) and prevented the children being placed in foster care. Instead the family was offered help to secure accommodation.¹⁴⁸

Children

- **Unnecessary physical restraint of young people in custody is a breach of HRA**

The Secure Training Centre (Amendment) Rules 2007 allowed officers working in these institutions for young offenders to physically restrain and seclude a young person to ensure 'good order and discipline'. These amendments were passed with very limited consultation and with no race equality impact assessment. The court ruled that any system of restraint that involves physical intervention against another's will and carries the threat of injury or death, engages the prohibition on inhuman and degrading treatment (Article 3). This is particularly so when it applies to a child who is in the custody of the state. The Secretary of State could not establish that the system was necessary for ensuring 'good order and discipline' and the Rules breached Article 3. The Rules were quashed.¹⁴⁹

¹⁴⁵ *Bellinger v Bellinger* [2003] UKHL 21. See also *Goodwin v UK*, European Court of Human Rights, 2002.

¹⁴⁶ *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151

¹⁴⁷ See <http://www.liberty-human-rights.org.uk/human-rights/victims/forced-labour/index.php>

¹⁴⁸ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹⁴⁹ *R (C) v Secretary of State for Justice* [2008] EWCA 882.

- **Procedural rights for children in decisions affecting their family life**

The right to respect for private and family life (Article 8) affords children procedural rights in relation to decision-making processes which fundamentally effect their family life. If the child has sufficient understanding, and direct participation in such proceedings would not pose an obvious risk of harm, separate representation may be required. The court had to accept, in the case of articulate teenagers, that the right to freedom of expression (Article 10) and participation outweighed the paternalistic judgment of welfare.¹⁵⁰

- **Right to religion did not allow corporal punishment in schools**

Although the ban on corporal punishment in schools did interfere with parents and teachers right to manifest their religion (Article 9), this interference was necessary in a democratic society for the protection of the rights of children. The court ruled that corporal punishment involved deliberately inflicting physical violence and its ban was intended to protect children against the distress, pain and other harmful effects this infliction of physical violence might cause. The means chosen to achieve that aim were appropriate and not a violation of the right to manifest one's religion.¹⁵¹

Outside courts:

- **Young girl with learning disabilities secures school transport**

A local authority had a policy of providing school transport for children with special educational needs living more than 3 miles from their school. A young girl with learning disabilities lived 2.8 miles from the special school she attended but was denied the transport, despite being unable to travel independently. A parent supporter helped the girl's mother to challenge the decision using the right to respect for private life (Article 8), given the failure to consider her special circumstances, and the decision was reversed.¹⁵²

Mental health

- **Reversal of onus of proof in mental health cases**

The Mental Health Act 1983 was successfully challenged under the HRA, leading to an amendment to put the burden of proving that continued detention for treatment for mental illness is justified under the right to liberty (Article 5) on the detaining authority, and not the patient. The court made a formal declaration of incompatibility under the HRA, which was followed by a fast-track remedial order to bring the law into line with Article 5.¹⁵³

- **Protection of an incapacitated person in a psychiatric hospital**

Where an autistic man, who lacked the capacity to consent or object to medical treatment, was admitted as an 'informal patient' at a psychiatric hospital and then eventually detained under s5(2) of the Mental Health Act, he successfully challenged the time spent in the psychiatric hospital as an informal patient as a deprivation of his liberty (Article 5). The court* said that the right to liberty is too important in a democratic society for a person to lose its protection because they may have given themselves up to be taken into detention, especially when it is not disputed that someone 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).¹⁵⁴

¹⁵⁰ *Mabon v Mabon* [2005] EWCA Civ 634

¹⁵¹ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15

¹⁵² 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

¹⁵³ *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1

¹⁵⁴ *HL v UK* European Court of Human Rights, 5 October 2004.

Destitution of asylum seekers

- **Restrictions and deprivations on asylum seekers should not result in inhuman or degrading treatment**

A group of asylum seekers were excluded from support for accommodation and essential living needs under asylum legislation¹⁵⁵ because the secretary of state had decided that they had not made their claims for asylum as soon as reasonably practicable after their arrival in the UK. They challenged this under the HRA. The court ruled that as soon as an asylum seeker makes it clear that there is an imminent prospect of his treatment reaching inhuman and degrading levels (Article 3) – such as sleeping in street, being seriously hungry and unable to satisfy basic hygiene requirements – the secretary of state had a power under asylum legislation and a duty under the HRA to avoid it.¹⁵⁶ Following the court's decision, the Immigration and Nationality Directorate adopted a new approach to s55 to comply with the CA judgment: "no claimant who does not have alternative sources of support, including adequate food and basic amenities, such as washing facilities and night shelter, is refused support."¹⁵⁷

No torture

- **Evidence procured by torture must not be admitted in court**

The Special Immigration Appeals Commission (Procedure) Rules 2003, which said the Commission could receive evidence that would not be admissible in a court of law, did not extend to statements procured by torture. The Commission could not receive evidence that had or might have been procured by torture inflicted by officials of a foreign state even without the complicity of the British authorities. This conclusion was based on the common law rule excluding evidence procured by torture and gave effect to the absolute prohibition against torture in Article 3. The Commission should refuse to admit evidence if it concluded on a balance of probabilities that the evidence had been obtained by torture. If the Commission was left in doubt as to whether the evidence had been obtained by torture, then it should admit it, but it had to bear its doubt in mind when evaluating the evidence.¹⁵⁸

- **Deportation where there is a real risk of torture would violate ECHR**

Deporting an individual to a country where there was a real risk that they would be subjected to torture, inhuman or degrading treatment would be a breach of Article 3. The court* ruled that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3. The prospect that the person might pose a serious threat to a community if not returned to his country of origin did not reduce in any way the degree of risk of ill treatment that the person may be subject to if deported.¹⁵⁹

¹⁵⁵ They were excluded from support granted under the Immigration and Asylum Act 1999 Part VI by the Nationality, Immigration and Asylum Act 2002 s.55(1).

¹⁵⁶ *R (Limbuella and others) v Secretary of State for the Home Department* [2005] UKHL 66

¹⁵⁷ Home Office, 'Asylum Statistics: 4th quarter 2005 UK', 2005.

¹⁵⁸ *A and others v Secretary of State for the Home Department* [2005] UKHL 71

¹⁵⁹ *Saadi v Italy* European Court of Human Rights Grand Chamber, 28.02.08

Liberty

- **Detention of suspected international terrorists without trial is breach of HRA**

A group of foreign nationals who had been certified by the secretary of state as suspected international terrorists under the Anti-terrorism, Crime and Security Act 2001, and detained without charge or trial, challenged their detention. 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 or immigration status. 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 the prohibition of discrimination (Article 14) and could not be justified. The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders.¹⁶⁰ The claimants received (modest) damages for the violation of their right to liberty (Article 5) at the European Court of Human Rights.¹⁶¹

- **Control orders must not violate right to liberty**

The non-derogating 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. The government responded by issuing new orders, subjecting the men to less restrictive conditions.¹⁶²

Fair trial

- **Secret evidence in control order cases violates right to fair trial**

Control orders have also been successfully challenged under the right to a fair trial (Article 6) due to the use of 'secret' evidence. The right to a fair hearing means that a defendant must be given sufficient information about the allegations against him to enable him to give effective instructions to the special advocate representing him.¹⁶³ A trial will not be fair where the case against the 'controlled person' is based on 'closed materials', the nature of which is not disclosed to them. As a result of the case, the Home Secretary has revoked two control orders rather than disclose the 'secret' evidence against the 'controllees'.¹⁶⁴

The government sought to get around this problem by introducing control orders with lighter, more limited obligations on 'controlled persons' that they said did not require them to disclose further evidence (the 'controlled persons' were still required to report to a police station daily and give two days written notice if they wished to sleep outside their present address). The High Court rejected the government's argument and ruled that there was an "irreducible minimum" of information that had to be provided even in the case of light control orders: "the approach to disclosure is the same for any control order".¹⁶⁵

* In this case the European Court of Human Rights

¹⁶⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

¹⁶¹ *A and others v UK*, European Court of Human Rights Grand Chamber, 19.02.09

¹⁶² *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45. See also *Secretary of State for the Home Dept v AP* [2010] UKSC 24 where a control order which required the controllee to move 150 miles from his family was also found to breach Art 5 and the residence requirement was quashed by the Supreme Court.

¹⁶³ *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.

¹⁶⁴ See *Secretary of State for the Home Department v AN* [2009] EWHC 1966 (Admin). A further control order was quashed by the Court of Appeal on the basis that evidence relied upon to impose it was too vague and speculative; *BM v Secretary of State for the Home Department* [2011] EWCA Civ 366.

¹⁶⁵ *Secretary of State for the Home Department v BC and BB*, QB (Admin), decided 11/11/09.

APPENDIX 5

Deportation and the right to respect for family life under Article 8

Background

- **Long before the HRA was passed**, when deciding whether to deport criminals, the Secretary of State had to balance the public interest in deportation against any compassionate circumstances and the **courts could exercise discretion to prevent deportation on compassionate grounds**.¹⁶⁶
- This **discretion was narrowed** when the **UK Borders Act 2007** was passed, **making deportation automatic** for adult foreign criminals sentenced to over 12 months in prison. An exception listed in the 2007 Act is where deportation would breach the ECHR,¹⁶⁷ but the previous, wider discretion has been removed.
- There was a 'suggestion' in the recent Home Office consultation,¹⁶⁸ for a **'general rule', so that only in 'exceptional circumstances' would it be a breach of Article 8 to deport a person who meets the threshold for automatic deportation** under the 2007 Act. This would narrow the court's discretion further.
- The **Court of Appeal** have **already stated** that Parliamentary intervention through the 2007 Act of **automatic deportation for foreign criminals "is arguably a matter which should be taken into account in giving greater weight to [policy factors in favour of deportation] when drawing the balance of proportionality under Art 8"**.¹⁶⁹

Media coverage

- Our research¹⁷⁰ has shown that many of the press stories on the application of Article 8 to prevent deportations are based on misreporting, or fail to explain the full facts.
- **Whilst not intending to defend every court decision in this area**, our look behind the headlines revealed that the **cases are highly fact sensitive** and that 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.
- In the vast majority of such cases, deportation is successfully challenged on Article 8 grounds because of the **deportees' relationships with family members - mostly their children - or because they have been in the UK since childhood**.
- Our research also showed examples of cases where the courts found that deportation would *not* breach Article 8, illustrating that **public interest considerations are already part of the balance generally applied by the courts in Article 8 cases**.

¹⁶⁶ Under the Immigration Rules, the Secretary of State had to take into account factors including the person's domestic circumstances, their strength of connections with the UK and their personal history.

¹⁶⁷ UK Borders Act 2007, s33(2). Other exceptions relate to the Refugee Convention, Community treaties, extradition and orders under the Mental Health Act.

¹⁶⁸ 'Family Migration: a consultation', Home Office, July 2011.

¹⁶⁹ Carnwath LJ in *AP (Trinidad and Tobago) v Secretary of State for the Home Department* [2011] EWCA Civ 551, para 44.

¹⁷⁰ See 'Deportation and the right to respect for family like under Article 8' briefing at <http://www2.lse.ac.uk/humanRights/research/projects/humanRightsFutures.aspx>

Strasbourg or UK leading?

- Dominic Raab MP has claimed that the “rising tide of cases where the applicant relies on the right to family life” is a result of the HRA: “I am not aware of any case prior to the Human Rights Act where the UK *or Strasbourg courts* blocked deportation of a convicted criminal under Article 8”.¹⁷¹
- **Strasbourg developed jurisprudence on this issue several years prior to the HRA** which says that there are circumstances where the expulsion of an alien will give rise to a violation of Art 8.¹⁷²
- For example, in 1991 the ECtHR found a breach of Art 8 where the Belgium authorities had deported a Moroccan national following offences committed in adolescence.¹⁷³ The breach of Art 8 was found on the facts of the case, in particular that the applicant had lived in Belgium since the age of two and that all his close relatives lived there.
- **If the HRA were repealed**, or if a new Bill of Rights altered the way Article 8 is incorporated into domestic law and the UK remained signed up to the ECHR, **individuals would still be able to claim a breach of Article 8 ECHR at Strasbourg** and the government would remain bound by that court’s decision (under Art 46 ECHR).

Figures on deportations

There is a discrepancy in the figures on deportation, between those from the Court Service and those from the UK Border Agency. **In 2010 there were between 102 and 425 deportations prevented on grounds of Article 8:**

- According to Court Service figures, in 2010, 233 people won their appeal against deportation and of these 102 were successful on grounds of Article 8.¹⁷⁴
- According to figures from the Independent Chief Inspector of the UK Border Agency, in 2010, 425 foreign national prisoners won their appeal against deportation and these were “won primarily on the grounds of Article 8”.¹⁷⁵

However, **compared to the number of deportations that took place in 2010, the number of deportations that were prevented on Article 8 grounds is relatively very small:**

- **In 2010 5,235 foreign national prisoners were deported from the UK.**¹⁷⁶
- Therefore, of those people who faced deportation in 2010, **the proportion who won their appeal on Article 8 grounds is between 2%¹⁷⁷ and 8%.¹⁷⁸**

Most appeals against deportation are unsuccessful. In 2010 32% of appeals lodged by foreign national prisoners against deportation were successful.¹⁷⁹ Very many appeals against deportation on Article 8 grounds are unsuccessful.¹⁸⁰

¹⁷¹ ‘Frustrating Deportation’, Dominic Raab MP blog, 12 June 2011, www.dominicraab.com. My emphasis.

¹⁷² For example, *Moustaquim v. Belgium* (1991), *Beldjoudi v. France* (1992), *Boultif v. Switzerland* (2001), *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yilmaz v. Germany*, no. 52853/99, 17 April 2003.

¹⁷³ *Moustaquim v. Belgium* (1991).

¹⁷⁴ Figures obtained from the Ministry of Justice.

¹⁷⁵ ‘A thematic inspection of how the UK Borders Agency manages foreign national prisoners’, John Vine, Independent Chief Inspector of the UK Borders Agency, 2011. Figures cited are between February 2010 and January 2011.

¹⁷⁶ *Ibid.*

¹⁷⁷ According to Court Service figures. 102 of 5468.

¹⁷⁸ According to UK Border Agency figures, note 175. 425 of 5660. This is likely to be an overestimate as the figure assumes that all the successful appeals against deportation were on Article 8 grounds.

¹⁷⁹ Note 175. Figures cited are between February 2010 and January 2011.

¹⁸⁰ For example, see *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094; *JO (Uganda) v Secretary of State for the Home Department* [2010] EWCA Civ 10; *Grant v UK* (2009); *Onur v UK* (2009).

APPENDIX 6

Follow or lead? The Human Rights Act and the European Court of Human Rights

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European Human Rights Law Review

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Abstract

Since the Human Rights Act 1998 (HRA) came into force ten years ago a debate has rumbled on about its larger purpose. It was drafted in response to a long-standing campaign for a bill of rights for the UK which attracted support across the political spectrum. But to what extent can its legal form serve that purpose if, as has been suggested, the HRA was intended not just to incorporate most of the rights in the European Convention on Human Rights (ECHR) into domestic law, but the totality of its case law? To shed light on the debate, this article examines the duty in HRA s.2 for domestic courts to “take into account” Strasbourg jurisprudence when considering a Convention right. We identify three broad approaches taken by the domestic courts to European Court of Human Rights jurisprudence: the mirror approach, the dynamic approach and the municipal approach. The parliamentary debate on s.2 reveals that the language of that section was purposefully drafted to avoid the domestic courts from being bound by Strasbourg jurisprudence, whilst still requiring them to take it into account. Developing this further, we suggest that the purpose of the HRA was to allow the courts to use the ECHR as a source of rights and freedoms to be interpreted domestically in the manner of a bill of rights, in order to enhance human rights in the UK.

Introduction

Of the many questions raised by the introduction of the HRA, few have generated more discussion and controversy than the impact of the case law of the European Court of Human Rights (European Court) on the domestic courts. The legal route to this debate lies in the courts' interpretation of s.2 of the HRA. Section 2(1) states that domestic courts must “take into account” the jurisprudence of the Strasbourg institutions, in so far as it is “relevant” to the case in question when considering a Convention right.¹ We will suggest that there have been three broad categories of interpretation of s.2 by judges in UK courts. Their significance lies in the light they shed on the intent and purpose of the HRA; in particular, the extent to which the Act has the capacity to operate as a bill of rights for the UK or is merely the incorporation of the ECHR, *along with* its current case law, into domestic law--no less but certainly no more.²

The history behind section 2

The HRA was passed in response to a long campaign for a bill of rights which took root in the 1970s. Mostly led by prominent lawyers and the then Liberal Party, with encouragement from some leading members of the other main political parties, the campaign gained further impetus in the late 1980s with the establishment of the constitutional reform pressure group, Charter 88.³ Supporters of a bill of rights generally argued that it should be based on the rights in the ECHR, on the grounds that the state was already bound by them. This approach was adopted by the late Labour Leader, John Smith, in 1993. However, by 1996 (what was by then) New Labour developed a “triangulated” message which simultaneously promoted the HRA as an example of radical constitutional reform *and* as a technical, tidying up exercise to incorporate the ECHR into UK law. Depending on the audience and the minister, both before and during its introduction into Parliament, ministers presented variable purposes for the HRA.⁴

Rights Brought Home, the fairly narrow title of the White Paper which heralded the Act, suggested it had a simple, technical aim.⁵ The purpose was to “enable people to enforce their human rights in

the courts of the United Kingdom rather than having to take their case to Strasbourg ... [to provide] better and easier access to rights which already exist".⁶ However, ministers also declared that the HRA was designed as a constitutional measure⁷ to modernise and democratise the political system⁸ and lead to cultural change beyond the courts.⁹

The parliamentary debate on section 2

The "distinctly British contribution"¹⁰ our courts would make to developing human rights jurisprudence was emphasised in the parliamentary debates on the Human Rights Bill and the accompanying White Paper:

"The Convention is often described as a 'living instrument' ... In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention."¹¹

The Home Secretary explained:

"Through incorporation we are giving a profound margin of appreciation to British courts to interpret the convention in accordance with British jurisprudence as well as European jurisprudence."¹²

Strasbourg jurisprudence would not be binding.¹³ The government rejected an amendment by the Conservative peer, Lord Kingsland, in the House of Lords to make our courts "bound by"¹⁴ the jurisprudence of the European Court of Human Rights. The Lord Chancellor, Lord Irvine, said it would be "strange" to require our courts to be bound by all European Court of Human Rights decisions when the UK is not bound in international law to follow that Court's judgments in non-UK cases. The Bill would "of course" permit domestic courts to depart from Strasbourg decisions and "upon occasion it might be appropriate to do so". The Tory amendment, he said, would risk "putting the courts in some kind of straitjacket where flexibility is what is required ... our courts must be free to try to give a lead to Europe as well as to be led".¹⁵

Lord Irvine later addressed the question which has subsequently occupied the courts; the extent to which they would want to *mirror* Strasbourg:

"Should a United Kingdom court ever have a case before it which is a precise mirror of one that has been previously considered by the European Court of Human Rights, which I doubt, it may be appropriate for it to apply the European court's findings directly to that case; but in real life cases are rarely as neat and tidy ... The courts will often be faced with cases that involve factors perhaps specific to the United Kingdom ... it is important that our courts have the scope to apply that discretion so as to aid in the development of human rights law."¹⁶

The decision to allow the courts what Lord Irvine described as "flexibility and discretion" in "developing human rights law",¹⁷ carried the obvious implication that the HRA would serve as the UK's bill of rights. This point was emphasised by Conservative MP, Edward Leigh, who in referring supportively to Kingsland's amendment, commented that through the flexibility of s.2:

"[W]e are in danger of not simply incorporating the convention in our law, but going much further. What we are creating is an entirely new Bill of Rights."¹⁸

Responding to another Conservative amendment,¹⁹ Geoffrey Hoon, Parliamentary Secretary in the Lord Chancellor's Department, confirmed:

"The word 'must' in this context clearly means that the courts must take into account the jurisprudence ... That [does] not mean that there has to be uniform jurisprudence."²⁰

The late Lord Bingham, eminent former Law Lord and Lord Chief Justice who has been described as "the greatest judge of our time",²¹ outlined his projection of s.2 during the debate in the House of Lords:

“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. But incorporation will also mean, I hope, that when cases from this country reach Strasbourg ... the court will have the benefit of a considered judgment by a British judge on the point in issue. That will mean, I hope, that some of our more idiosyncratic national procedures and practices may be better understood.”²²

How section 2 has been used by the courts

Our research suggests that it is possible to identify three broad approaches to the interpretation of s.2 by the domestic courts, reflecting a difference of interpretation among judges themselves.²³ First, where the courts have acted as if they are effectively bound by Strasbourg jurisprudence and have generally sought to use it as both a floor and a ceiling. This is sometimes referred to as the *mirror approach*.²⁴ Secondly, where the courts generally accept the confines of the ECHR as a floor but not necessarily as a ceiling. We've called this the *dynamic approach*. Thirdly, where the courts, whilst considering Strasbourg jurisprudence, largely decline to follow it in a particular case, but seek to develop a domestic interpretation of Convention rights in specific circumstances. We call this the *municipal approach*.

1. The mirror approach

As probably the most common approach, examples of the courts using Strasbourg jurisprudence as a ceiling can be split into (at least) three sub-groups. First, courts act as if bound by Strasbourg when there is clear, established Strasbourg jurisprudence to follow. This was decided very early in the life of the HRA in *Alconbury*. Lord Slynn said:

“Although the [HRA] does not provide that a national court is bound by [the decisions of the European Court of Human Rights] it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights.”²⁵

This was endorsed by Lord Bingham in *Anderson*²⁶ the following year:

“While the duty of the House under section 2(1)(a) [HRA] is to take into account any judgment of the European Court, whose judgments are not strictly binding, the House will not without good reason depart from the principles laid down in a carefully considered judgment of the court sitting as a Grand Chamber: [*Alconbury*, para.26] ... I am satisfied that the House should, in accordance with the will of Parliament expressed in the [HRA], seek to give effect to the decision of the European Court in *Stafford*.”²⁷

Whilst leaving open the possibility of departing from Strasbourg jurisprudence by reference to “some special circumstances” or “good reason”, the strong inference is that domestic courts should normally follow Strasbourg jurisprudence. Legal academic Aileen Kavanagh has pointed out that the House of Lords interpretation of s.2 gives Strasbourg jurisprudence the same status or precedential weight as the House of Lord's own precedents.²⁸ Yet under s.2, the courts' duty is only to “take [it] into account”. Had Parliament intended s.2 to be read differently, Lord Kingsland's amendment that European Court of Human Rights jurisprudence be binding, or a qualified version of it, would have been supported.

In the second sub-group, domestic courts have acted as if bound by Strasbourg jurisprudence where they think that there is, or should be, consensus or uniformity on the meaning of ECHR rights across Europe. This proposition was famously set out in *Ullah* by Lord Bingham: “[Lord Slynn's statement in *Alconbury*, above] reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only

by the Strasbourg court. 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. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”²⁹

In the absence of any statutory duty to this effect, the most controversial phrase in this statement, and the one that has attracted most attention, is “no more”.³⁰ As legal academic Elizabeth Wicks argues, a failure to *take account of* Strasbourg jurisprudence may result in a court acting unlawfully under s.6,³¹ but it is hard to find the justification for maintaining that the courts would be acting incompatibly with a Convention right should they interpret it *differently*, including more strongly than Strasbourg. Although there is not a *duty* to go further than Strasbourg, there is a *power* to do so.³² Lord Bingham himself, of course, still left open the possibility to depart from Strasbourg jurisprudence with his reference to “strong reason”.

The hollowness of our courts trying to imitate Strasbourg, which does not rely on precedent but gives vent to the *living instrument* principle,³³ was demonstrated by the *Marper* case.³⁴ The House of Lords held that the question of whether the retention of DNA samples and fingerprint evidence engages art.8(1) should receive a uniform interpretation throughout Member States, unaffected by different cultural traditions. At that time Strasbourg case law³⁵ didn't support the argument that there had been a violation of art.8 in this case. The European Court of Human Rights subsequently decided otherwise.³⁶ Baroness Hale has remarked (extra-judicially) that it “does not make much sense” to act with restraint because the interpretation of the Convention should be uniform throughout the Member States when “we cannot commit other Member States or the European Court to our interpretation of the rights--so why should they mind what we do, as long as we do at least keep pace with the rights as they develop over time?”³⁷

The third sub-group involves the domestic courts acting as if they are bound by Strasbourg jurisprudence in marginal cases where they may rule more cautiously because the government cannot appeal to Strasbourg, but an unsuccessful claimant can. An example is *Al-Skeini*, on the question of jurisdiction, where Lord Brown commented on Lord Bingham's speech in *Ullah* : “I would respectfully suggest that last sentence could as well have ended: ‘no less, but certainly no more’. There seems to me, indeed, an even greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly.”³⁸ Although *Ullah* hasn't been overturned and for a time the “no more, certainly no less” doctrine looked to have become a “mantra for the [House of Lords] in adjudication under the HRA”,³⁹ it is possible to distinguish two approaches where courts notably depart from this doctrine in practice.

2. The dynamic approach

As an exception to the “no more” doctrine of the *mirror approach*, the courts have explicitly exceeded Strasbourg jurisprudence in two broad circumstances. First, where the margin of appreciation applies.⁴⁰ In *P*⁴¹ the House of Lords stated that where Strasbourg had deliberately declined to lay down an interpretation of rights for all Member States (such as where the margin of appreciation applies), the justifications for following the *mirror approach*⁴² outlined in *Ullah* do not apply and it is for UK courts to interpret the rights themselves. Lord Hope noted that Lord Bingham in *Ullah* had said:

“‘no more, but certainly no less’. Not, it should be noted, ‘certainly no more’. The Strasbourg jurisprudence is not to be treated as a straightjacket from which there is no escape.”⁴³

Referring to the White Paper and Parliamentary debates which preceded the HRA, Baroness Hale concluded that Parliament intended our courts to be able to “go further” than Strasbourg.

“[I]f there is a clear and consistent line of Strasbourg jurisprudence, our courts will follow it. But if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment.”⁴⁴

There was no Strasbourg decision on the issue in this case⁴⁵ so the House of Lords broke new ground in finding for the applicants. However, the *dynamic* approach that their Lordships took was slightly tempered by the fact that the majority of them anticipated that Strasbourg would come to the same conclusion.⁴⁶

Secondly, the courts have gone further than European Court of Human Rights when there is no established Strasbourg jurisprudence on a particular issue, beyond broad principles. In *Campbell* the House of Lords found a breach of art.8 in a case involving two private persons, before the landmark European Court of Human Rights ruling in *Von Hannover* was determined similarly.⁴⁷ Baroness Hale stated that “Convention jurisprudence offers us little help”.⁴⁸

Similarly in *EM*,⁴⁹ on whether the deportation of a mother and son to Lebanon would breach art.8 where the father would automatically obtain custody of a child he had never reared, no previous Strasbourg case had succeeded on this point.⁵⁰ The House of Lords held there was a real risk of a flagrant denial of the deportees' art.8 rights.⁵¹ The House of Lords also went further than Strasbourg had done in *Limbuela*, in finding a breach of art.3 for a failure to provide support to destitute asylum seekers.⁵²

Dominic Grieve, as Shadow Justice Secretary (now the Attorney General), was critical of the courts approach in *EM*, describing it as a “remarkable interpretation of Article 8, far removed from its application anywhere else and surely far removed from the intention of those who drafted it”.⁵³

Grieve has both criticised our courts for going further than Strasbourg and for “a marked deference to Strasbourg”.⁵⁴ The Conservatives committed before the election to replacing the HRA with what they described as a “British Bill of Rights”⁵⁵ or a “UK Bill of Rights”.⁵⁶ Grieve said they would “reconsider” the duty in s.2 and reword it to “emphasise the leeway of our national courts to have regard to our own national jurisprudence and traditions” while still “acknowledging the relevance of Strasbourg Court decisions”. Yet this is exactly what they can, and sometimes do, now.⁵⁷

The *dynamic* approach can be said to be a half-way house between the *mirror* and *municipal* approaches. It is distinguishable from the *mirror* approach as the cases circumvent the “no more” doctrine and distinguishable from the *municipal* approach as the cases do not depart from Strasbourg jurisprudence other than to go further, often using parallel Strasbourg jurisprudence to justify doing so.

3. The municipal approach

There have been three circumstances in which the domestic courts have acted as if they are not bound by Strasbourg jurisprudence and have departed from it, mainly to find against the applicant claiming a breach of Convention rights. First, where there was no settled, consensual practice on an issue across Europe, or the margin of appreciation applies. In *Animal Defenders*,⁵⁸ the House of Lords held that the absolute ban on political advertising in broadcast media did not breach art.10 and declined to follow a Strasbourg decision with similar facts which found a breach.⁵⁹ Their Lordships noted that there was a lack of consensus among states on this issue and consequently a wide margin of appreciation.⁶⁰ In contrast to Baroness Hale who still maintained that the “rights are those defined in the Convention, the correct interpretation of which lies ultimately with Strasbourg”,⁶¹ Lord Scott took what Laws L.J. in *Begum* described as the “municipal approach”⁶² and said:

“In so far as the articles are part of domestic law, this House is ... the court of final appeal whose interpretation of the incorporated articles will ... be binding in domestic law. In so far as the articles are part of international law they are binding on the UK as a signatory of the Convention and the European Court is, for the purposes of international law, the final arbiter of their meaning and

effect ... [Under s.2] the judgments of the European Court ... constitute material, very important material, that must be taken into account, but domestic courts are nonetheless not bound by the European Court's interpretation of an incorporated article."⁶³

Secondly, the courts have departed from Strasbourg jurisprudence where they considered that Strasbourg had a poor appreciation of domestic law, the constitution or the facts. In the case of *Spear*,⁶⁴ which concerned courts martials, the House of Lords declined to follow a previous Strasbourg decision on the same issue⁶⁵ and found no breach of art.6. Strasbourg subsequently revised its earlier view.⁶⁶ More recently, in *Horncastle*,⁶⁷ the Supreme Court rejected the submission that they were bound to apply a Strasbourg decision on the same issue.⁶⁸ They said the s.2 requirement would normally result in the Supreme Court applying principles clearly established by Strasbourg but there will be "rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course." This would give Strasbourg the chance to reconsider, so that a "valuable dialogue" may take place.⁶⁹

Several judges have spoken (extra-judicially) of the advantages of such a dialogue. Lady Justice Arden argued that, as Strasbourg has reconsidered its jurisprudence in light of disagreement by national courts, the "superior national court should not simply apply the Strasbourg jurisprudence with which it has a serious disagreement, but should state its disagreement and, if it reaches a different conclusion from the Strasbourg court, leave the applicant to his remedy in Strasbourg ...".⁷⁰ Lord Neuberger likewise said there needs to be "a more robust approach by our courts through their judgments--*R v Horncastle* being an example of this--and through informal dialogue with Strasbourg, to explaining the common law position and exactly how and why it sets out a perfectly consistent means of facilitating the rule of law and protecting fundamental rights".⁷¹ Lord Phillips, President of the Supreme Court, has commented: "whenever Strasbourg gives a judgment which ... leads us to believe that perhaps they haven't fully appreciated how things work in this country, we invite them to think again".⁷²

Thirdly, the domestic courts have departed from Strasbourg jurisprudence where they are restricted by UK precedent from a higher authority. In *Kay/Price* the the Court of Appeal⁷³ was faced with an inconsistency between decisions of the House of Lords⁷⁴ and Strasbourg.⁷⁵ The Court of Appeal held that the "only permissible course" was to follow the domestic precedent and give leave to appeal to the House of Lords. On appeal, the House of Lords agreed with this course.⁷⁶ This approach was followed by Moses L.J., on the issue of retention of DNA profiles and fingerprints.⁷⁷

Unsurprisingly, since the HRA has been in force, the House of Lords/Supreme Court has not declined to follow a *final* judgment of the European Court of Human Rights in a case to which the UK was party, even if they disagree with the Strasbourg Court's conclusion.⁷⁸ This is consistent with the ECHR requirement that Member States abide by judgments of the European Court of Human Rights they are party to.⁷⁹ For example, in *AF* the House of Lords found that the Grand Chamber decision in *A v UK* concerning closed material in control order proceedings, a little over a week before the domestic hearing began, provided a definitive resolution to the issue before them. Some Lordships spoke of having to "submit"⁸⁰ because "Strasbourg has spoken, the case is closed".⁸¹

Where the courts have departed from Strasbourg jurisprudence in these cases, they draw on the domestic common law, comparative common law jurisprudence and their understanding of domestic legal traditions and cultures to develop what can be described as a "municipal" jurisprudence on human rights.⁸² However, the courts still strain to find common ground or congruence between UK and Strasbourg case law where they can and carefully justify departures from Strasbourg jurisprudence. They appear more liable to take this approach of departing from Strasbourg jurisprudence when they are ruling that there has been no breach of the applicants' rights.

Conclusion

Some commentators maintain that the cases cited in this paper can ultimately fall under the broad approach of the *mirror* category, which does allow for exceptions.⁸³ However, this would be to discount the extra-judicial debate between judges on how to interpret s.2, referred to throughout this article. For example, Lord Judge has asked whether “we are becoming so focused on Strasbourg and the Convention that instead of incorporating Convention principles within and developing the common law accordingly as a single coherent unit, we are allowing the Convention to assume an unspoken priority over the common law”.⁸⁴ The *dynamic* and *municipal* approaches demonstrate that there are now several circumstances in which the courts will circumvent the “no more, no less” principle. Are we nearing the point at which these circumstances are no longer so “special”?

As the parliamentary debate illuminates, the language of s.2 was purposefully drafted so as *not* to bind the domestic courts to Strasbourg jurisprudence but merely to “take [it] into account”, whether this results in a departure from Strasbourg jurisprudence or a development of it.⁸⁵ Of course the consequences of this will not always be to everyone's liking, but that is in the nature of the broad values of any bill of rights, which can be open to wide interpretation.⁸⁶ This does not mean that the domestic courts have no guidance as to the purpose of the HRA. Its preamble points us in the right direction. Echoing that of the ECHR, it suggests that its purpose is to enhance fundamental rights, not restrict them.⁸⁷

The HRA was preceded by a long campaign for a bill of rights for the UK. The parliamentary debate which introduced it strongly suggests that the purpose of the HRA was to empower the courts to use it (or more precisely Sch.1⁸⁸) as a source of rights to be interpreted domestically, whilst still taking account of Strasbourg jurisprudence. As Lord Hoffmann put it, “interpreted by United Kingdom courts as the American Bill of Rights is interpreted by American courts, [the HRA] would be a perfectly serviceable British bill of rights”.⁸⁹

1. Section 2(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. We are here deliberately paraphrasing a frequently cited statement by Lord Brown in *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26.

3. See “Common Sense: Reflections on the Human Rights Act”, Francesca Klug et al., Liberty, 2010, chapter 2.

4. Francesca Klug, “The Human Rights Act: origins and intentions”, Salford Human Rights Conference, June 4, 2010.

5. *Rights Brought Home: The Human Rights Bill*, CM 3782, October 1997.

6. Lord Chancellor, Lord Irvine, Hansard, HL vol.585, col.755 (February 5, 1998)

7. See Francesca Klug, “The Human Rights Act 1998, Pepper v. Hart and All That” [1999] *Public Law* 246.

8. Jack Straw, then Home Secretary, said on introducing the Human Rights Bill: “The Bill falls squarely within [our] constitutional programme. It is a key component of our drive to modernise our society and refresh our democracy ... to bring about a better balance between rights and responsibilities, between the powers of the state and the freedom of the individual” *Hansard*, HC vol.306, cols 782-783 (February 16, 1998).

9. Lord Irvine made many statements to the effect that: “Our courts will develop human rights throughout society. A culture of awareness of human rights will develop” *Hansard*, HL vol.582, col.1228 (November 3, 1997).

10. *Rights Brought Home*, para.1.14. The consultation document which preceded the White Paper makes no reference to domestic courts having to take into account Strasbourg jurisprudence. It said that the failure to incorporate the ECHR meant that “British judges are denied the opportunity of building a body of case law on the Convention which is properly sensitive to British legal and constitutional traditions” and that the European Court of Human Rights “has not been able to benefit from the experience of the UK legal system or to

develop an appreciation of British legal principles and traditions". See *Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law*, Jack Straw and Paul Boateng, December 1996.

11. Rights Brought Home, para.2.5.

12. *Hansard*, HC vol.313, col.424 (June 3, 1998).

13. *Rights Brought Home*, para.2.4.

14. *Hansard*, HL vol.583, col.511 (November 18, 1997).

15. *Hansard*, HL vol.583, cols 514-515 (November 18, 1997).

16. *Hansard*, HL vol.584, cols 1270-1271 (January 18, 1998).

17. *Hansard*, HL vol.584, cols 1270-1271 (January 18, 1998).

18. *Hansard*, HC vol.313, col.398 (June 3, 1998) Lord Kingsland made a similar point in *Hansard*, HL vol.583, col.512 (November 18, 1997).

19. Attempting to replace the word "must" [take into account] with the word "may". *Hansard*, HC vol.313, col.389 (June 3, 1998).

20. *Hansard*, HC vol.313, col.402 (June 3, 1998)

21. Sir Louis Blom-Cooper quoted in the *Guardian*, "Tributes to Lord Bingham, 'the greatest judge of our time'", September 13, 2010.

22. *Hansard*, HL vol.582, col.1245 (November 3, 1997).

23. Sometimes this applies within a case and not just between cases.

24. Jonathan Lewis (lawyer), "The European Ceiling on Human Rights" [2007] P.L. 720.

25. *R (Alconbury et al) v Secretary of State for Environment, Transport and the Regions* [2001] UKHL 23 at [26].

26. *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at [18].

27. *Stafford v UK* (2002) 35 E.H.R.R. 32. This was despite the fact that the European Court of Human Rights had recently changed its jurisprudence on the issue at hand, whether the Secretary of State was entitled to fix the tariff element of a mandatory life sentence for murder.

28. Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009), p.148.

29. *R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 at [20]. This passage was affirmed recently by Lord Hope in *HM Treasury v Ahmed* [2010] UKSC 2.

30. Our emphasis.

31. Elizabeth Wicks, "Taking Account of Strasbourg? The British Judiciary's Approach to Interpreting Convention Rights" (2005) 11(3) *European Public Law* 405 at 416.

32. This is of course subject to the constraints of s.3 HRA that courts read and give effect to legislation in a way which is compatible with Convention rights "so far as it is possible to do so". See Jane Wright, "Interpreting Section 2 of the HRA 1998: Towards an Indigenous Jurisprudence of Human Rights" [2009] *Public Law* 595 at 599.

33. The European Court of Human Rights has held on several occasions that the ECHR is a "living instrument which must be interpreted in light of present-day conditions". For example, *Tyrer v UK* (1979-80) 2 E.H.R.R. 1 at [31].

34. *R (LS and Marper) v Chief Constable of South Yorkshire Police* [2004] UKHL 39. Other cases in this category include *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54 and *Secretary of State for Work and Pensions v M* [2006] UKHL 11. See the analysis of the latter case by the lawyer Jonathan Lewis in "The European Ceiling on Human Rights" [2007] *Public Law* 720 where he argues at p.736 that the House of Lords' approach in this case defeats the very aim of the HRA.

35. Reflected in decisions of the Commission from 1981 and 1996: *McVeigh O'Neill and Evans v UK* (1981) 25 DR 15 and *Kinnunen v Finland* (App. No.24950/94) (unreported), May 15, 1996.

36. *S and Marper v UK* (2009) 48 E.H.R.R. 50.

37. Baroness Hale, Salford Human Rights Conference, June 4, 2010.

38. *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26 at [106]. See also Eric Metcalfe, "Free to Lead as Well as to be Led': Section 2 of the Human Rights Act and the Relationship between the UK Courts and the European Court of Human Rights", [2010] *JUSTICE Journal* 7(1).

39. Ian Leigh and Roger Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Hart, 2008), p.78.

40. In the well-known formula, the European Court of Human Rights has frequently acknowledged that, "by reason of their direct and continuous contact with the vital forces of their countries, the national authorities [including the courts] are in principle better placed than an international court to evaluate local needs and conditions" *Buckley v UK* (1996) 23 E.H.R.R. 101 at [75].

41. *In Re P* [2008] UKHL 38.

42. Lord Hoffmann refers to "good reasons" for following the interpretation of rights adopted by Strasbourg: that courts will try to construe legislation that is based on an international treaty in a way that does not put the UK in breach of its international obligations, the ordinary respect for the decision of a foreign court on the

same point and the general desirability of a uniform interpretation of ECHR in all Member States (*In Re P* [2008] UKHL 38 at [35]-[36]). See Jonathan Lewis, "Re P: An Exception to the 'No More, Certainly No Less' Rule" [2009] P.L. 43 on whether Hoffmann's exception should swallow the rule.

43. *In Re P* [2008] UKHL 38 at [50]. This of course contradicts Lord Brown's comments in *Al-Skeini* of "no less, but certainly no more", quoted above.

44. *In Re P* [2008] UKHL 38 at [120].

45. Discrimination against unmarried couples in the context of adoption.

46. *In Re P* [2008] UKHL 38, Lord Hoffmann at [27], Lord Hope at [53] and Lord Mance at [125].

47. *Von Hannover v Germany* (2005) 40 E.H.R.R. 1.

48. *Campbell v Mirror Group Newspapers* [2004] UKHL 22 at [140].

49. *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

50. Although, the possibility of such a case finding a violation of art.8 was acknowledged in two previous European Court of Human Rights decisions. See *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64 at [45].

51. The House of Lords referred to the "exceptional facts" in the case that led to the decision. The House of Lords quashed the Secretary of State's decision to return them to Lebanon.

52. *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66. It should be noted that *Ullah* was also a case in which the domestic courts went slightly further than Strasbourg. The House of Lords held that an article of the ECHR other than art.3 could be engaged in relation to a removal of an individual from the UK where the anticipated treatment in the receiving state would be in breach of the requirements of the Convention but such treatment did not meet the minimum requirements of art.3. The European Court of Human Rights had contemplated the possibility but it had not yet taken it. The Lords held that such a possibility could not be ruled out, unless the European Court of Human Rights had ruled it out.

53. "Can the Bill of Rights do Better than the Human Rights Act?", Middle Temple Hall, November 30, 2009.

54. "Can the Bill of Rights do Better than the Human Rights Act?", Middle Temple Hall, November 30, 2009.

55. Conservative Party, "Where we stand: democracy", November 2009.

56. "Invitation to join the government of Britain: the Conservative manifesto 2010", April 2010.

57. See also Dominic Grieve, "It's the interpretation of the Human Rights that's the problem--not the ECHR itself", Conservative Home Platform blog, April 14, 2009 where Grieve also suggests a British Bill of Rights would reduce the powers of the courts under ss.3 and 10.

58. *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.

59. *VgT Verein gegen Tierfabriekn v Switzerland* (2001) 34 E.H.R.R. 159.

60. *R (Animal Defenders International)* at [35]. Lord Bingham also pointed out that Strasbourg had not considered the full strength of the argument that the rights of others in art.10(2) must include a right to be protected against the potential mischief of partial political advertising, at [28]-[29].

61. *R (Animal Defenders International)* at [53].

62. *Runa Begum v Tower Hamlets* [2002] EWCA Civ 239, Laws L.J. at [17]: "... the court's task under the HRA, in this context as in many others, is not simply to add on the Strasbourg learning to the corpus of English law, as if it were a compulsory adjunct taken from an alien source, but to develop a *municipal law of human rights* by the incremental method of the common law, case by case, taking account of the Strasbourg jurisprudence as HRA s.2 enjoins us to do" (our emphasis). This approach echoes that of *Morritt VC in Parochial Church Council of Aston Cantlow and Wilmcote with Billesley v Wallbank* (2001) 3 W.L.R. 1323 at [44]: "Our task is not to cast around in the European Human Rights Reports like blackletter lawyers seeking clues. In the light of s.2(1) of the HRA it is to draw out the broad principles which animate the Convention."

63. *R (Animal Defenders International)* at [44]. Lord Scott also said that the "possibility of a divergence" between the opinion of the European Court of Human Rights as to the application of a right and the opinion of the House of Lords is "contemplated, implicitly at least, by the [HRA]".

64. *R v Spear* [2002] UKHL 31.

65. *Morris v UK* (2002) 34 E.H.R.R. 52.

66. *Cooper v UK* (2004) 39 E.H.R.R. 8. Other examples where the European Court of Human Rights has reconsidered an earlier decision following domestic criticisms include *Z v UK* (2002) 34 E.H.R.R. 3, see also *Roche v UK* (2006) 42 E.H.R.R. 30.

67. *R v Horncastle* [2009] UKSC 14. This case concerned the use of hearsay evidence in criminal trials, which was found not to breach the right to fair trial.

68. *Al-Khawaja and Tahery v UK* (2009) 49 E.H.R.R. 1.

69. Other cases in this category include *Doherty v Birmingham City Council* [2008] UKHL 57.

70. "Peaceful or problematic? The relationship between national supreme courts and supranational courts in Europe", Annual Sir Thomas More Lecture, November 10, 2009, p.17. See also Lord Kerr, "The conversation between Strasbourg and national courts--dialogue or dictation?", John Maurice Kelly Memorial Lecture, University College Dublin, November 20, 2009.

71. "The incoming tide: the civil law, the common law, referees and advocates", the European Circuit of the Bar's First Annual Lecture, Gray's Inn, June 24, 2010, p.20.

72. Speaking at a press conference at the end of the Supreme Court's first full legal year, July 29, 2010. Lord Hope added "we certainly won't lie down in front of what they [Strasbourg] tell us".
73. *Kay v London Borough of Lambeth; Leeds City Council v Price* [2004] EWCA Civ 926.
74. *Harrow London Borough Council v Qazi* [2004] 1 A.C. 983.
75. *Connors v UK* (2004) 40 E.H.R.R. 189.
76. The House of Lords modified their previous jurisprudence on the issue, in light of the European Court of Human Rights decision. *Kay v London Borough of Lambeth; Leeds City Council v Price* [2006] UKHL 10.
77. *R (C) v Commissioner of the Police of the Metropolis* [2010] All E.R. (D) 174 (Jul). A "leapfrog" appeal to the Supreme Court was granted.
78. Eric Metcalfe, " 'Free to Lead as well as to be Led': Section 2 of the Human Rights Act and the Relationship between the UK Courts and the European Court of Human Rights" [2010] *JUSTICE Journal* 7(1).
79. Article 46(1) ECHR states: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."
80. *AF et al v Secretary of State for the Home Department* [2009] UKHL 28, Lord Hoffmann at [70].
81. Lord Roger at [98]. The reasons given for following *A* included the obligation under s.2 to "take into account" Strasbourg jurisprudence when it "could hardly be more authoritative, contemporary or close in point than it is" (Lord Brown at [114]). This can be distinguished from *Horncastle* above as that case concerned whether to follow a chamber decision and not a final judgment of the Grand Chamber. In fact, the government had requested that the chamber decision in question in *Horncastle* be referred to the Grand Chamber and the European Court of Human Rights had put that referral on hold until after the Supreme Court judgment. Therefore, the opportunity for a dialogue with the European Court of Human Rights was left wide open in that case.
82. See Laws L.J. in *Runa Begum v Tower Hamlets* [2002] EWCA Civ 239.
83. See Eric Metcalfe, " 'Free to Lead as Well as to be Led': Section 2 of the Human Rights Act and the Relationship between the UK Courts and the European Court of Human Rights" [2010] *JUSTICE Journal* 7(1). See also Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act*, (Cambridge University Press, 2009).
84. The Judicial Studies Board Lecture 2010, Inner Temple, March 17, 2010, p.8.
85. See Ian Leigh and Roger Masterman: "...in terms of the construction of section 2(1) the courts' obligation could arguably be satisfied by simply considering the Strasbourg authority put before it; having taken the decision into account it would not be obliged to follow or apply its reasoning." *Making Human Rights Real: The Human Rights Act in its First Decade*, Oxford: Hart Publishing, 2008 at p53.
86. As the White Paper that heralded the 1990 New Zealand Bill of Rights put it, "In a great many cases where controversial issues arise for determination, there is no 'right' answer". 'A Bill of Rights for New Zealand: A White Paper', 1985 [1984-85] I AJHR A6, presented to the House of Representatives by the Hon. Geoffrey Palmer, Minister of Justice.
87. The HRA preamble says it is intended to "give further effect" to the ECHR rights and the injunction in the ECHR's preamble is the "further realisation human rights and fundamental freedoms". See Judge Sibrand Karel Martens, 'Incorporating the European Convention: the role of the judiciary', (1998) 1 *E.H.R.L.R.* 5 at 14; Roger Masterman, 'Taking the Strasbourg jurisprudence into account: developing a 'municipal law of human rights' under the Human Rights Act', (2005) 54 *International and Comparative Law Quarterly* 907, at 911.
88. "The Convention rights".
89. 'The universality of human rights', Judicial Studies Board Annual Lecture, 19 March 2009, p26.

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APPENDIX 7

Human Rights Act Reporting in the Media: corrections and clarifications

Wanted posters

"Police can't put up 'Wanted' posters of dangerous criminals on the run because of their human rights"

Since 2007 there have been reports that police are unable to release photographs of dangerous criminals on the run because this would breach their human rights. However, the Human Rights Act (HRA) itself protects the right to life and imposes an obligation on the State to protect people from serious criminal attack. In some circumstances the Government may actually be under a duty under human rights law to publicise photographs of dangerous convicted criminals if this would protect others. The right to privacy can be limited for the protection and detection of crime as long as it is necessary and proportionate to do so – seeking to locate dangerous criminals and warn the public is certainly not a breach of human rights law.
(Liberty website)

The Derbyshire example

Dominic Grieve, then Shadow Justice Secretary, claimed the Derbyshire police force had refused to release pictures of two fugitive murderers because it could have impinged on their human rights.

"How many times have we seen police or probation officers say they can't disclose the identity of a criminal because of his privacy under the Human Rights Act – police in Derbyshire refused to disclose photos of fugitive murderers. That's complete nonsense and we'll end it straight away."
(Grieve at Tory Party Conference, 7 October 2009)

He was referring to the convicted murderers Jason Croft and Michael Nixon, who walked out of Sudbury jail in 2006. Police initially did not release their photographs because they believed both men were not in Derbyshire, and there was no policing purpose to showing their faces.

An official statement released by the Derbyshire force said: "The publicity surrounding the release of the photographs of the absconders from Sudbury prison was based on misreporting. The Derbyshire Constabulary has never refused to release photographs on the grounds of the human rights of the offenders."¹⁸¹

Deportation and family life

The Human Rights Act is often criticised by the media for preventing the deportation of foreign criminals where it would breach their right to respect for family life (Article 8 HRA). For example, immigration judges ruled in 2010 that to deport a failed Iraqi asylum seeker, Aso Mohammed Ibrahim, would be a breach of his Article 8 rights. Ibrahim had been convicted of failing to stop after an accident in which his car hit and killed a 12-year-old girl. The immigration decision led to several media articles calling for the Human Rights Act to be repealed.
(for example The Sun, 18 December 2010; Express, 8 January 2011)

¹⁸¹ 'Tories slammed over attack on Derbyshire police during party conference', ThisIsDerbyshire.co.uk, 8 October 2009.

However, such articles often fail to make clear that the right to family life in deportation cases is generally primarily about partners or, more importantly, children. In the case of Ibrahim, there were no moves by the authorities to remove him from the UK at the time of his conviction or release. The immigration judge revealed that had such moves been taken then, it is likely that Ibrahim would have been deported to Iraq. But no such steps were taken, allowing him the time to settle here, marry and father two children, as well as becoming stepfather to two more children. The immigration judge took into account the best interest of the children and the fact that they could not be expected to leave the UK to move and live in Iraq. Were it not for the children, the judge said his view on the matter might have been different.

The cat example

It has been reported in several newspapers that a Bolivian man has been spared deportation on Article 8 grounds (right to respect for family life) because of his pet cat. (for example, The Sun, 9 February 2011; Sunday Telegraph, 12 June 2011; Daily Mail, 17 June 2011)

The Home Secretary also referred to this case in her party conference speech in 2011, saying:
“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 pet a cat. This is why I remain of the view that the Human Rights Act needs to go.”¹⁸²

In fact the immigration judge found that it would be disproportionate on Article 8 grounds to remove this claimant because he had a long-term relationship with a person settled in the UK and they had lived together for four years.¹⁸³ The reference to the cat was one detail amongst many provided by the couple as evidence of the genuineness of their long-term relationship. The judge also relied on a former Home Office policy¹⁸⁴ which said that if an individual lived in the UK with a settled spouse for two years or more without enforcement action being taken against them, they were entitled to leave to remain. The Home Office appealed but a senior immigration judge upheld the decision on the basis of the former Home Office policy.¹⁸⁵ All other factors in the original determination, including ownership of the cat, were deemed “immaterial”.

Learco Chindamo

The decision of the Immigration Tribunal not to deport Chindamo, the 15 year old killer of head master Phillip Lawrence, upon his release from custody, is often cited as an example of a decision under the HRA.

(See for example, the Times 21 August 2007)

Although the HRA was a factor in the case, the Court made it clear that the decision not to deport was not made under the HRA. In fact it was made under the European Union laws on freedom of movement restricting the expulsion of citizens of one member state from another member state. (EHRC Human Rights Inquiry Report, 2009)

¹⁸² Speech to Conservative Party Conference, Manchester, 4 October 2011.

¹⁸³ Judge Devittie, Asylum and Immigration Tribunal, October 2008.

¹⁸⁴ DP3/96.

¹⁸⁵ Judge Gleeson, Asylum and Immigration Tribunal, 10 December 2008.

Anthony Rice

'Freed to kill . . . because his human rights were held sacred'
(Daily Mail, 11 May 2006)

In November 2004 sex offender Anthony Rice was released from prison on parole after having served 16 years of a life sentence for a violent attempted rape. He had previous convictions for rape and indecent assault. In August 2005 he raped and murdered Naomi Bryant while on release on licence. The following year the Chief Inspector of Probation carried out a review of the Parole Board's decision to release, which concluded that it was a result of a series of mistakes, misjudgements and miscommunications. The review found that the Parole Board's decision that Rice was safe to release gave insufficient weight to the underlying nature of his risk of harm to others. It found that this happened for a number of reasons, including the "major mistake" of failing to look at his previous offending behaviour, in particular that he had offended against children. One of the other factors was that "the people managing this case started to allow its public protection considerations to be undermined by its human rights considerations". Following this it was widely reported that Rice was freed 'because of his human rights'.¹⁸⁶

The Chief Inspector of Probation later wrote that "it was a huge distortion of our findings when some newspapers said that Rice was released in order to 'meet his human rights'." The Joint Committee on Human Rights has concluded that "there was no clear causal connection between any interpretation or application of the HRA and the death of Naomi Bryant, because Rice was not in fact released 'in order to meet his human rights'."¹⁸⁷

Originally the Coroner decided not to hold an inquest into Bryant's death after Rice confessed to her murder. Liberty used Article 2 of the Human Rights Act (right to life) to secure an inquest into her death.¹⁸⁸ The inquest also dispelled the myth that the Human Rights Act was the reason for Rice's release. It found that Bryant was unlawfully killed due to a catalogue of public authority failings. The jury found that errors by the prison, parole board, probation services and other agencies directly contributed to her death.

Dennis Nilsen

"The Human Rights Act 2000 allowed: SERIAL killer Dennis Nilsen to win a case to look at hardcore pornographic magazines in his cell. He successfully argued that existing rules, which allowed him to look at soft porn magazines, infringed his human rights."
(Daily Mail, 21 November 2006)

Nilsen was denied access to the gay art book he requested by the Prison Governor. The legal case he brought fell at the first hurdle when he was refused permission to have his case heard because he could not establish that there was any breach of his human rights. The decision of the Prison Governor stood.
(EHRC Human Rights Inquiry Report, 2009)

¹⁸⁶ For example, 'Freed to kill...because his human rights were held sacred', Daily Mail, 11 May 2006.

¹⁸⁷ 'The Human Rights Act: the DCA and Home Office Reviews', Joint Committee on Human Rights, 32nd report of session 2005-06.

¹⁸⁸ See <http://www.liberty-human-rights.org.uk/media/press/2011/inquest-secured-by-human-rights-act-finds-institutional-.php>

Fast food

“How a suspected car thief...was granted his human right to a KFC bargain bucket and a 2-litre bottle of Pepsi”
(Daily Mail, 7 June 2006)

The HRA does not give any prisoner making a roof top or any similar protest the right to the meal of his choice. The police responded to his refreshment demands as part of their negotiating strategy
(Human Rights Fact and Fiction, Ministry of Justice)

Too much power to judges?

The media often misleadingly report on the power of judges under the HRA and that when a court makes a declaration that legislation is incompatible with a right in the HRA, that is the ‘final say’ on the matter. For example, when the Supreme Court issued a declaration that inclusion on the sex offenders register for life without the opportunity for review was a breach of the HRA, it was reported that “the next Government will have to bring in legislation” to remedy this.
(Independent, 22 April 2010)

In fact, the HRA does not leave the final say with the courts. When a declaration of compatibility is made, it is then for Parliament to choose whether and how to respond.¹⁸⁹ The courts cannot use the HRA to force Parliament to change the law.

Costs of complying with European Court of Human Rights

A report by the Taxpayers’ Alliance on the cost of complying with the decisions of the European Court of Human Rights has been reported in several newspapers, as costing the UK £42 billion to date.
(for example, ‘Human Rights Laws Cost Britain £42bn’, Daily Mail, 7 December 2010)

In fact, our research shows that the Taxpayers’ Alliance report appears to contain some serious flaws:

- The report asserts that complying with the Court’s judgments costs £2.1 billion a year. However, of the 37 cases listed in the report, in only 7 is evidence provided of a direct link between the judgment and the cost and of how the cost was calculated.
- The assertion that “the growth of a ‘compensation culture’ fostered by the Court costs a further £7.1 billion a year” is allotted to one judgment (about a suicide in prison), whilst the costs cited appear to relate to all compensation claims, not merely those relating to prisons, nor just those that might be linked to the HRA.

(Human Rights Futures Project research)

¹⁸⁹ *R v Shayler* [2002] 2 WLR 754 at para 53.

Numbers of human rights cases

“Courts are dealing with at least 10 significant human rights battles every week since controversial new laws were introduced a decade ago, a study has found.”

(‘Human rights cases filling courtrooms’, Daily Telegraph, 14 February 2011)

The statistics on human rights cases, as quoted above, can be highly misleading without further clarification. The article states that 5,107 human rights cases have been reported on the legal newswires in the ten years since the Human Rights Act came into force. But the article doesn’t explain that the vast majority of these cases would have been taken anyway, with human rights being used as an additional argument in the case. The statistic also includes all such cases, whether they were successful or not.

(Human Rights Futures Project research)

Sex offenders

“More criminals freed to protect human rights. Fury as more sex offenders are freed early under law on Human Rights”.

(Daily Mail, 16 May 2006)

Whilst the headline may say human rights, this is not really a human rights issue but relates to decisions made by the Parole Board.

(Human Rights Fact and Fiction, Ministry of Justice)

Health tourism

‘Human rights law promotes health tourism’

(Daily Mail, 10 May 2006)

Whilst on a legitimate visa a Nigerian woman was taken ill and told she couldn’t fly. As she was not entitled to be placed on a priority list for either British or EU citizens she died in hospital while awaiting treatment. She was not a tourist.

(Human Rights Fact and Fiction, Ministry of Justice)

APPENDIX 8

Victims of Crime and the Human Rights Act

Below are some examples of how the Human Rights Act (HRA) has protected the rights of victims and witnesses of crime and their families. Prior to the HRA, the rights in the European Convention on Human Rights could not be claimed in domestic courts, and victims had to take their claim to the European Court of Human Rights (ECtHR) in Strasbourg. Some ECtHR decisions have been included below to illustrate this.

Section 1: The HRA and protection of victims of crime

Section 2: The HRA and protection of witnesses

Section 3: The HRA and families of victims of crime: inquests

1. The HRA and protection of victims of crime

HRA cases:

- **Minimising accidental contact between a convicted murderer and his victim's family by imposing an exclusion zone was lawful under Article 8(2)**¹⁹⁰

A murderer's (C's) license for release had a condition that he not contact the victim's family or enter the Newcastle/North Tyneside area, as requested by the family and recommended by the Parole Board. C claimed that his Art 8 rights were breached as he couldn't visit his ill parents or get a job in that area. The exclusion zone was reduced by the Home Secretary to allow C access to his family and to work. C claimed that this new exclusion zone still breached his Art 8 right.

Prisoners do not necessarily lose Art 8 rights in prison, or on license. C's Art 8 rights were engaged, as were his family's rights. The exclusion zone was therefore only lawful if justified under Art 8(2). The court held that **"a democratic society should be sensitive to the emotional harm caused to victims of crime, particularly of the most serious of crimes, to their anxieties and concerns, and to the risks of emotional or psychological harm in the event of an encounter between convicted murderer and the family of his victim"**.

The right of the victim's family to go about its business with a minimum of anxiety and without undue restriction on its movements therefore fell within the 'rights and freedoms of others' under Art 8(2). The new exclusion zone accommodated the competing interests of both families. **The interference with C's Art 8 right was therefore justified under Art 8(2) and the exclusion zone was lawful.**

- **Imposing a condition on a released sexual offender that restricted his access to his own property was justified under Article 8(2) as the property was near the home of his victims**¹⁹¹

D had been convicted of sexual offences against his own children. When released on license, one condition was that he not go within 2 miles of the street where his ex-wife and one of the victims still lived. D wanted access to the street because he owned a property in it. He argued that the conditions on his license breached his rights under Art 8.

The judge held that **"the feelings of the victims of the family...are plainly relevant factors for the Secretary of State in considering the imposition of conditions on**

¹⁹⁰ *R (Craven) v Sec State Home Dept* [2001] EWHC Admin 850 (QBD: 05/10/2001).

¹⁹¹ *R (Davies) v Sec State Home Dept* [2004] EWHC Admin 1512 (QBD: 16/06/2004).

licences of released prisoners". It was irrelevant that experts considered D unlikely to re-offend: "there is no suggestion, as I understand it, that the fear is one that he will commit some further offence or offences against the victim. That is not the point. The point is the stress and emotional effect of his proximity." The feelings of the ex-wife should be considered because, though not a direct victim, she was "intimately and closely affected". The court considered the conditions entirely appropriate, and in any case they were limited to 18 months: they were therefore justified under Article 8(2).

- **The Crown Prosecution Service were wrong to drop a prosecution when they believed the victim would not be a credible witness because of his history of mental illness**¹⁹²

The CPS decided not to proceed with the prosecution for serious assault on the morning of the trial. The High Court found that the CPS decision was wrong, either due to a misreading of the medical evidence or because of unfounded stereotyping of people with a history of mental health problems. The victim's Article 3 rights (to be free from inhuman and degrading treatment) had been breached as dropping the prosecution amounted to a failure to provide legal protection for the victim.

The court held the CPS had not met "the State's positive obligation to provide protection against serious assaults through the criminal justice system", but instead had "increased the victim's sense of vulnerability and of being beyond the protection of the law". The victim was awarded £8,000 in compensation.

- **A rape victim received compensation for police incompetence when she claimed they had breached their duty under Article 3**¹⁹³

C reported that she had been raped in December 2005. In February 2006 she contacted the police to find out how the investigation was going, to find out that nothing had been done and it hadn't been recorded as a crime. By this point it was too late to recover CCTV footage which would identify the rapist. C made a formal complaint and those responsible were giving warnings and 'words of advice'.

C brought a claim against the police arguing that they had failed to meet their duty under Article 3 to investigate cases where somebody had been subjected to inhuman and degrading treatment. The police offered her £1,000 in compensation, and later £3,500, which she accepted.

Pre HRA case at the ECtHR:

- **The police have a positive duty to protect a person whose life they are aware or should be aware is at risk**¹⁹⁴

Police did not react appropriately to a year of signs that a teacher was obsessed with one of his students. The teacher shot the student and his father, and the deputy headmaster and his son. The father survived and he and his wife sued the police for negligence. Their claim was dismissed by the UK courts.

The right to life under Article 2 not only prevents the State from intentionally taking life, it also requires States to take appropriate steps to safeguard life. The European Court of Human Rights ruled that the State's duty includes putting in place effective criminal law

¹⁹² *R (B) v DPP* [2009] EWHC Admin 106 (QBD: 27/01/2009).

¹⁹³ 'Rape complaint woman reaches settlement with police', BBC News, 1 December 2009 (<http://news.bbc.co.uk/1/hi/uk/8387622.stm>).

¹⁹⁴ *Osman v United Kingdom* [1999] 1 FLR 193 (ECtHR: 28/10/1998).

provisions to deter the commission of offences and law-enforcement machinery. Article 2 may also go beyond that to imply in certain well-defined circumstances a **positive obligation on authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual**. This duty will be breached where it can be shown that the authorities failed to do all that could reasonably be expected of them to avoid a “real and immediate” risk to the life of an identified individual about which they knew, or ought to have known.

Section 6 HRA makes it unlawful for public authorities to act incompatibly with the HRA rights. Consequently, there have been substantial changes to both national and local policing policies and procedures. **Most of the 43 police forces in the UK have a policy on threats to life that are derived directly from Article 2 and Osman**. The Association of Chief Police Officers produced a set of minimum standards relevant to ‘protective services’. *Osman* principles are referred to in Public Protection guidance about vulnerable people, children and the mentally ill, and the Murder Investigation Manual. There also exists a procedure for issuing ‘Osman warnings’ to members of the public.¹⁹⁵

2. The HRA and protection of witnesses

HRA case:

- **Statements from witnesses who have died or are too scared to give oral evidence are allowed as evidence**¹⁹⁶

The Criminal Justice Act 2003 (s116) allows such statements to be used as evidence and judges may warn a jury that the evidence has not been cross-examined. However, the ECtHR in *Al-Khawaja v UK* (2009) disallowed such statements to be used as evidence when they were the sole or decisive reason for a person being convicted. Under s2 HRA, UK courts must “take into account” decisions of the ECtHR.

The Supreme Court declined to follow to ECtHR. If the ‘sole or decisive rule’ was **applied rigidly it would be to the detriment of victims**. Defendants would be acquitted when there was cogent evidence of their guilt. **The provisions in s116 of the 2003 Act struck 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 had given critical evidence in a statement that could be shown to be reliable, died or could not be called for some other reason.

Pre HRA case at the ECtHR:

- **Screening witnesses giving evidence when they fear for their own safety is justified**¹⁹⁷

Screening witnesses so that defendants, public and press cannot see them does not violate the defendant’s right to a fair and public trial under Article 6(1) if screening is “in the interest of public order or national security”, and “strictly necessary [because] publicity would prejudice the interests of justice”. Furthermore, **if a witness’ evidence is neutral as to guilt, it does not matter if only the Crown and not even the judge knows the witness’ identity**.

¹⁹⁵ See ‘Human Rights Inquiry’, Equality and Human Rights Commission, 2009.

¹⁹⁶ *R v Horncastle et al* [2009] UKSC 14 (SC: 09/25/2009).

¹⁹⁷ *X v United Kingdom* (1993) 15 EHHR CD 113 (EComHR: 01/01/1993).

3. The HRA and families of victims of crime: inquests

HRA cases:

- **HRA secures inquest into murder**¹⁹⁸

Naomi Bryant was murdered in August 2005 by Anthony Rice. He was released from jail in November 2004 after serving 16 years for rape, indecent assault and actual bodily harm.

Originally the Coroner decided not to hold an inquest into her death after Rice confessed to her murder. Liberty used Article 2 of the HRA (right to life) to secure an inquest into Naomi Bryant's death.

The inquest found that Bryant was unlawfully killed as a result of errors by the prison, parole board, probation services and other agencies. For example, the jury heard that documents containing information about Rice's violent offences against children may never have been read by officials overseeing his release.

The inquest therefore dispelled the myth that the HRA was responsible for Rice's release,¹⁹⁹ and brought relief to Naomi's mother, who said: "it is now clear that there were many, many occasions where individuals could have, and should have, acted differently. There were also several serious institutional failings that meant the true level of threat that this man posed was never fully appreciated. Because of Article 2 of the Human Rights Act and the efforts of Liberty, a full inquest has finally been held into Naomi's death and all these failings have been exposed."

- **The State has a duty under Art 2 to provide a convincing explanation of how a death in custody occurred**²⁰⁰

Zahid Mubarek was killed by his cellmate in a Young Offenders Institution. The cellmate's history of racist and disturbed behaviour had been well known to the prison. He was later convicted of Zahid's murder. Because he pleaded guilty there was no significant inquiry at trial into any possible role that the prison's policy, procedures or conduct might have had in Zahid's death. Zahid's uncle sought a public inquiry on the grounds that the state's positive obligation to protect the right to life under Article 2 required an effective investigation into the death, held in public, and with the participation of Zahid's family.

The House of Lords held that the State has a duty to provide a convincing explanation of how a death in custody occurs. This explanation should be the result of an independent inquiry; with sufficient public scrutiny to ensure accountability; and that involves next of kin to the extent necessary to safeguard their interests.²⁰¹

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.

¹⁹⁸ Liberty, 'Inquest Secured by Human Rights Act Finds Institutional Failings Contributed to Death of Naomi Bryant', Liberty, 10 March 2011. (<http://www.liberty-human-rights.org.uk/media/press/2011/inquest-secured-by-human-rights-act-finds-institutional.php>)

¹⁹⁹ Daily Mail, 'Freed to kill... because his human rights were held sacred' (Daily Mail: 11/05/2006); David Cameron, 'Balancing freedom and security – A modern British Bill of Rights', Speech to the Centre for Policy Studies, London, 26 June 2006.

²⁰⁰ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.

²⁰¹ See *Jordan v UK*, ECtHR, 2001.