

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.¹

- **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.² 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 5.³

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.⁴ 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 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

¹ *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55

² *Austin v Commissioner of Police of the Metropolis* (2009) UKHL 5.

³ *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.

⁴ *Reynolds v Times Newspaper* (2001) 2 AC 127

hurdles, and the defence is to be applied in a flexible and practical manner.⁵ 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.⁶

- **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,⁷ when such hearings had previously been closed.⁸

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.⁹

- **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.¹⁰

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 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

⁵ *Jameel v Wall Street Journal Europe* [2006] UKHL 44

⁶ *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

⁷ The Court of Protection adjudicates about people who lack mental capacity to make decisions themselves.

⁸ *A v Independent News and Media and others* [2010] EWCA Civ 343.

⁹ *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.

¹⁰ *Marper v UK* European Court of Human Rights Grand Chamber, 4 December 2008.

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.¹¹

- **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.¹²

- **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 8.¹³

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).¹⁴ 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.¹⁵ 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 reach the age of 18 to request non-identifying information about their donor from the Human Fertilisation and Embryology Authority.

¹¹ *R (GC) v Commissioner of Police of the Metropolis; R(C) v Commissioner of Police of the Metropolis* [2011] UKSC 21

¹² *Paton v Poole Borough Council*, decided by the Investigatory Powers Tribunal, 2 August 2010.

¹³ *Gillan and Quinton v UK*, European Court of Human Rights 12.01.10

¹⁴ *Blood and Tarbuck v Secretary of State for Health*, 2003, unreported.

¹⁵ *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] EWHC 1593 (Admin)

- 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).¹⁶
- 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.¹⁷
- 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.¹⁸ A remedial order under s10 HRA was laid before Parliament to abolish the certificate of approval scheme.¹⁹

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 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.²⁰

¹⁶ *R (L and others) v Manchester City Council*, High Court, 26.09.01

¹⁷ *Re P and others* [2008] UKHL 38

¹⁸ *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53.

¹⁹ Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial Order) 2010.

²⁰ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

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.²¹

- **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.²²

- **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.²³

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.²⁴

- **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.²⁵

²¹ *Osman v UK* European Court of Human Rights, 28 October 1998.

²² *R (Al-Skeini) v Secretary of State for the Defence* [2007] UKHL 26

²³ *R (Smith) v Oxfordshire Assistant Deputy Coroner and Secretary of State for Defence* [2010] UKSC 29.

²⁴ *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.

²⁵ See <http://www.liberty-human-rights.org.uk/media/press/2011/inquest-secured-by-human-rights-act-finds-institutional-.php>

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.²⁶
- **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.²⁷ 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.²⁸
- **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 Protection²⁹ 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).³⁰

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.³¹
- **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

²⁶ *R (Bernard) v Enfield* [2002] EWHC 2282 Admin

²⁷ Health and Safety Executive, 'Handling Home care: Achieving safe, efficient and positive outcomes for care workers and clients', 2002.

²⁸ *R (A and B) v East Sussex County Council* [2003] EWHC 167 (Admin)

²⁹ The Court of Protection adjudicates about people who lack mental capacity to make decisions themselves.

³⁰ *Hillingdon London Borough Council v Neary* [2011] EWHC 1377.

³¹ '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.³²

- **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.³³

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.³⁴

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.³⁵

- **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.³⁶

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).³⁷

³² 'Human Rights and the Human Rights Act', Equality and Diversity Forum, June 2006.

³³ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

³⁴ *Cowl et al v Plymouth City Council* [2001] EWCA Civ 1935 and *R (Madden) v Bury MBC* [2002] EWHC 1882

³⁵ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

³⁶ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

³⁷ *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.³⁸

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.³⁹

- **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 rejected⁴⁰ 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).⁴¹ 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).⁴²

- **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.⁴³ 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.⁴⁴

³⁸ *R (SG) v Liverpool City Council* October 2002 (unreported)

³⁹ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51

⁴⁰ *Norwood v DPP* [2003] EWHC 1564 (Admin)

⁴¹ 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.”

⁴² *Norwood v UK* (2005) 40 EHRR SE11

⁴³ *R (Begum) v Denbigh High School* [2006] UKHL 15. See also *R (X) v Y School* [2006] EWHC 298 (Admin).

⁴⁴ 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.⁴⁵

- **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.⁴⁶

- **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.⁴⁷

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.⁴⁸

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.⁴⁹

⁴⁵ *Bellinger v Bellinger* [2003] UKHL 21. See also *Goodwin v UK*, European Court of Human Rights, 2002.

⁴⁶ *R (P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151

⁴⁷ See <http://www.liberty-human-rights.org.uk/human-rights/victims/forced-labour/index.php>

⁴⁸ 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

⁴⁹ *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.⁵⁰

- **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.⁵¹

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.⁵²

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 5.⁵³

- **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).⁵⁴

⁵⁰ *Mabon v Mabon* [2005] EWCA Civ 634

⁵¹ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15

⁵² 'The Human Rights Act – Changing Lives', Second Edition, British Institute of Human Rights, 2008.

⁵³ *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1

⁵⁴ *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 legislation⁵⁵ 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.⁵⁶ 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."⁵⁷

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.⁵⁸

- **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.⁵⁹

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

⁵⁵ 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).

⁵⁶ *R (Limbuella and others) v Secretary of State for the Home Department* [2005] UKHL 66

⁵⁷ Home Office, 'Asylum Statistics: 4th quarter 2005 UK', 2005.

⁵⁸ *A and others v Secretary of State for the Home Department* [2005] UKHL 71

⁵⁹ *Saadi v Italy* European Court of Human Rights Grand Chamber, 28.02.08

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.⁶⁰ The claimants received (modest) damages for the violation of their right to liberty (Article 5) at the European Court of Human Rights.⁶¹

- **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.⁶²

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.⁶³ 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'.⁶⁴

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".⁶⁵

* In this case the European Court of Human Rights

⁶⁰ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

⁶¹ *A and others v UK*, European Court of Human Rights Grand Chamber, 19.02.09

⁶² *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 controlee to move 150 miles from his family was also found to breach Art 5 and the residence requirement was quashed by the Supreme Court.

⁶³ *Secretary of State for the Home Department v AF and others* [2009] UKHL 28.

⁶⁴ 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.

⁶⁵ *Secretary of State for the Home Department v BC and BB*, QBD (Admin), decided 11/11/09.