



Ministry  
of Justice

# **Responding to Human Rights judgments**

Report to the Joint Committee on Human  
Rights on the Government's response to  
Human Rights judgments 2016–17

December 2017

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Report to the Joint Committee on Human Rights on  
the Government's response to Human Rights judgments  
2016–17

Presented to Parliament  
by the Lord Chancellor and Secretary of State for Justice  
by Command of Her Majesty

Ministry of Justice

December 2017



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## Introduction

This is the latest report to the Joint Committee on Human Rights (the Joint Committee) setting out the Government's position on the implementation of adverse human rights judgments from the European Court of Human Rights (ECtHR) and the domestic courts.<sup>1</sup>

This report covers the period 1 August 2016 to 31 July 2017. Following the approach in previous reports, it is divided into three sections:

- general introductory comments, including **wider developments in human rights and the process for implementation of adverse judgments**;
- **recent ECtHR judgments** involving the UK and **progress on the implementation of ECtHR judgments**; and
- **declarations of incompatibility** in domestic cases.

The Government welcomes correspondence from the Joint Committee should it require further information on anything in this report.

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<sup>1</sup> Previous reports are published at <https://www.gov.uk/government/collections/human-rights-the-governments-response-to-human-rights-judgments>

## General comments

This paper focuses on two types of human rights judgments:

- **judgments of the European Court of Human Rights** in Strasbourg against the UK under the European Convention on Human Rights (ECHR); and
- **declarations of incompatibility** by UK courts under section 4 of the Human Rights Act 1998 (HRA).

A feature of these judgments is that their implementation may require changes to legislation, policy, practice, or a combination thereof.

### European Court of Human Rights judgments

Under Article 46(1) of the ECHR, the UK is obliged to implement judgments of the ECtHR in any case to which it is a party. The implementation (or 'execution') of judgments of the ECtHR is overseen by the Committee of Ministers of the Council of Europe (the Committee of Ministers) under Article 46(2).

The Committee of Ministers is a body on which every member State of the Council of Europe is represented. It is advised by a specialist Secretariat (the Department for the Execution of Judgments) in its work overseeing the implementation of judgments.

There are three parts to the implementation of a Strasbourg judgment:

- the payment of *just satisfaction*, a sum of money awarded by the court to the successful applicant;
- other *individual measures*, required to put the applicant so far as possible in the position they would have been in, had the violation not occurred; and
- *general measures*, required to prevent the violation happening again or to put an end to an ongoing violation.

### Declarations of incompatibility

Under section 3 of the HRA, legislation must be read and given effect, so far as possible, in a way which is compatible with the Convention rights.<sup>2</sup> If a higher court<sup>3</sup> is satisfied that legislation<sup>4</sup> is incompatible with a Convention right, it may make a declaration of incompatibility under section 4 of the HRA. Such declarations constitute a notification to Parliament that the legislation is incompatible with the Convention rights.

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<sup>2</sup> The rights drawn from the ECHR listed in Schedule 1 to the HRA.

<sup>3</sup> Of the level of the High Court or equivalent and above, as listed in section 4(5) of the HRA.

<sup>4</sup> Either primary legislation, or subordinate legislation if the primary legislation under which it is made prevents removal of the incompatibility (except by revocation).

A declaration of incompatibility neither affects the continuing operation or enforcement of the legislation in question, nor binds the parties to the case in which the declaration is made.<sup>5</sup> This respects the supremacy of Parliament in the making of the law. Unlike judgments of the ECtHR, there is no legal obligation on the Government to take remedial action following a declaration of incompatibility or on Parliament to accept any remedial measures the Government may propose.

Remedial measures in respect of both declarations of incompatibility and ECtHR judgments may, depending on the provisions proposed in any particular case, be brought forward by way of a **remedial order** under section 10 of the HRA.

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<sup>5</sup> Section 4(6) of the HRA.

## **Wider developments in human rights**

### **Current Government policy on human rights**

The Government is committed to furthering the United Kingdom's status as a global, outward-looking nation, playing an active, leading role in the world. We will continue to support an international order in which rules govern state conduct, and to champion the British values of freedom, democracy, tolerance and the rule of law. We will continue to comply with our international human rights obligations and take action to tackle any abuse of those rights.

The Government has stated that the UK will remain party to the ECHR for the duration of this Parliament. We will consider our human rights legal framework further when the process of leaving the European Union (EU) concludes, and consult fully on proposals in the full knowledge of the new constitutional landscape.

### **Fundamental Rights in the EU**

Fundamental rights are general principles of EU law, which bind both the EU and, when acting within the scope of EU law, its Member States.

The Charter of Fundamental Rights is the EU's catalogue of rights. It was given binding legal force in 2009 by the Lisbon Treaty. Most of the rights in the ECHR have been recognised as fundamental rights in EU case law and are re-affirmed in the Charter. The Charter did not create any new rights, or extend the circumstances in which national laws can be challenged – it simply restated and made more visible the rights which already existed in EU law.

The Charter of Fundamental Rights is only one element of the UK's human rights architecture. Most of the rights protected in the Charter are also protected in UK law, most notably under the Human Rights Act 1998, in the common law and via specific statutory protections (for example those in equalities legislation). International agreements to which the UK is a party will also continue to form part of the UK's human rights architecture.

In July 2017, the Government introduced the European Union (Withdrawal) Bill in Parliament. The Bill sets out that, after exit, the Charter of Fundamental Rights will no longer apply in UK law. The Government's intention is that the removal of the Charter from UK law in itself should not affect the substantive rights that individuals benefit from in the UK, as the Charter was never the source of those rights. The Bill will preserve the source law which underpins the Charter. Existing case law of the Court of Justice of the European Union will also be preserved, and references to the Charter will be read as references to the source rights.

### **Reporting to United Nations (UN) Human Rights Monitoring Bodies**

The Government takes its international human rights obligations seriously and remains committed to continuing to play a full role in UN reporting and examination processes. Our commitment enables us to apply pressure on other countries, with poor human rights records, to do the same.

The UK also remains fully committed to the Universal Periodic Review (UPR) process,<sup>6</sup> an essential mechanism for sharing best practice on human rights, and for promoting the continual improvement of human rights on the ground. As part of the monitoring process, the UK Government is committed to constructive engagement with the UK's National Human Rights Institutions and interested non-governmental organisations.

From 1 August 2016 to 31 July 2017, the UK has completed the following milestones:

- August 2016: UN dialogue on the UK periodic report under the International Convention on the Elimination of All Forms of Racial Discrimination (Department for Communities and Local Government lead)
- August 2016: follow up information to the UN under the International Covenant on Civil and Political Rights (Ministry of Justice lead)
- February 2017: UK national report under the Universal Periodic Review (Ministry of Justice lead)
- May 2017: dialogue with the UN under the Universal Periodic Review (Ministry of Justice lead)
- July 2017: UK response to the list of issues under the Convention on the Rights of Persons with Disabilities (Department for Work and Pensions lead).

The UK expects to reach the following milestones in the period ahead:

- Follow up information to the UN under the International Convention on the Elimination of All Forms of Racial Discrimination (Department for Communities and Local Government lead)
- UK response to the recommendations under the Universal Periodic Review (Ministry of Justice lead)
- Periodic report to the UN under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ministry of Justice lead)
- Periodic report to the UN under the Convention on the Elimination of All Forms of Discrimination Against Women (Government Equalities Office lead).
- Update to the UN on up to five recommendations under the Universal Periodic Review (Ministry of Justice lead).

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<sup>6</sup> Details can be found at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

## The UK's approach to the implementation of human rights judgments

### Coordinating the implementation of human rights judgments

There have been no significant changes to the Government's arrangements for coordinating the implementation of judgments since the last report.

As outlined in previous Government reports, the Ministry of Justice is the light-touch coordinator for the implementation of adverse judgments. It coordinates information from the government departments leading on each case and is responsible for its transmission to the UK Delegation to the Council of Europe (UKDel). This system has been in place for some time and has helped to ensure implementation takes place in a timely and effective manner.

Lead responsibility for the implementation of a particular judgment rests with the relevant government department, whilst UKDel represents the UK at the Committee of Ministers' meetings on the execution of judgments.

On receiving notice of an adverse judgment against the UK, the lead government department completes an implementation form. This ensures the information needed for the effective oversight of the implementation process is provided to the Ministry of Justice. The information on the form is also used as the basis for drafting the Action Plan for implementation required by the Committee of Ministers.

The Ministry of Justice monitors cases involving other Council of Europe member States to identify those that have relevance for existing UK cases and issues. In addition to communicating developments directly to relevant departments, the department produces a weekly email update to highlight significant cases and judgments.

However, it is not feasible for any one department to identify all the judgments that may be relevant. As a consequence all government departments are expected to identify judgments relevant to their area of work, for onward dissemination as appropriate to bodies for which they are responsible. The Ministry of Justice's role is supplementary to and supports this work.

### Access to information on the implementation of judgments

Information regarding the implementation of judgments is available in the public domain from a number of sources.

Domestically, the Government sets out information on **declarations of incompatibility** in the list annexed to this paper. The department with responsibility for a new declaration of incompatibility is responsible for bringing it to the Joint Committee's attention. The Ministry of Justice encourages lead departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility.

Forthcoming **judgments of the ECtHR** are announced a few days in advance on the ECtHR's website.<sup>7</sup> The ECtHR's decisions and judgments are available online from the HUDOC database.<sup>8</sup>

The Council of Europe's Department for the Execution of Judgments has a website explaining the process of **implementation of ECtHR judgments**<sup>9</sup> and a database called HUDOC-EXEC which records details of the implementation of each judgment.<sup>10</sup>

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<sup>7</sup> <http://www.echr.coe.int/Pages/home.aspx?p=home>

<sup>8</sup> <http://hudoc.echr.coe.int>

<sup>9</sup> <http://www.coe.int/en/web/execution>

<sup>10</sup> <http://hudoc.exec.coe.int>

## European Court of Human Rights judgments in UK cases in August 2016 – July 2017

Nine judgments were handed down during the reporting period. Four of these found violations of the applicant's ECHR rights.<sup>11</sup>

The following details are given for each judgment: name of applicant, application number, court, violation, date of original judgment, date judgment became final.

### 1. VM (49734/12) – Chamber (First Section) – violation of Article 5

Original judgment: 01/09/2016      Final judgment: 30/01/2017

This case (linked with *JN*) concerns an excessive length of detention pending deportation from the UK.

Whilst finding that the system of immigration detention in the UK did not in principle fall short of the requirements of Article 5, the ECtHR found that from 19 June to 14 December 2009 the applicant's detention violated Article 5(1) due to the authorities' failure to pursue deportation with sufficient diligence and expedition.

The ECtHR considered that there was a 'lengthy delay' between the applicant making new representations in June 2009 and the Secretary of State refusing to treat them as a fresh claim for asylum in December 2009. Although the period was relatively short, the ECtHR considered it to be significant given the 'overall length of detention and the applicant's deteriorating mental health'.

See the section 'Consideration of adverse judgments that have become final in August 2016 – July 2017' for details of implementation.

### 2. Ibrahim and Others (50541/08, 50571/08, 50573/08, 40351/09) – Grand Chamber – violation of Article 6

Original judgment: 13/09/2016      Final judgment: 13/09/2016

The applicants, four individuals involved in an attempted terrorist attack in London in 2005, complained that the restriction of their right to legal advice whilst they were first being questioned by police (by virtue of the use of an exceptional power contained within Schedule 8 to the Terrorism Act 2000) and the use of the evidence taken from those sessions at their trial was a violation of Article 6.

In December 2014 the Chamber (Fourth Section) rejected the applicants' claim. The Grand Chamber accepted their request for a referral.

The Grand Chamber found that the Government had convincingly demonstrated in the case of three applicants the existence of an urgent need to avert serious adverse consequences for

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<sup>11</sup> Full details can be found on HUDOC (<http://hudoc.echr.coe.int>) and HUDOC-EXEC (<http://hudoc.exec.coe.int>)

the life and physical integrity of the public such that there were compelling reasons for the temporary restrictions on the right to legal advice and the proceedings as a whole were fair.

In the case of the fourth applicant (who was convicted of various accounts of assisting the second applicant and for failing to disclose information), the Grand Chamber found a violation of Article 6. The Grand Chamber concluded that the Government had not shown compelling reasons for restricting his access to legal advice and for failing to inform him of his right to remain silent. The decision of the police not to caution him once they realised that he was a potential suspect and not just a witness was significant.

See the section 'Consideration of adverse judgments that have become final in August 2016 – July 2017' for details of implementation.

### **3. British Gurkha Welfare Society and Others (44818/11) – Chamber (First Section) – no violation**

Original judgment 15/09/2016                      Final judgment: 30/01/2017

The applicants claimed that the significantly lower pension entitlement of Gurkha soldiers who retired or served before 1 July 1997 amounted to unjustified differential treatment on the basis of nationality, race and age, representing a violation of Article 14 read together with Article 1 of Protocol 1.

The ECtHR found the complaints concerning discrimination on grounds of national origin and age admissible, but that there had been no violation of Article 14 read together with Article 1 of Protocol 1.

The difference in treatment was justified in that the Gurkhas' home base moved to the UK in July 1997. Any pension entitlement accrued before then was accrued at a time when they had 'no ties to the United Kingdom and no expectation of settling there following their discharge from the Army'.

The claim of race discrimination was ruled inadmissible as it had not been pursued before the domestic courts.

The applicants' request for referral to the Grand Chamber was refused.

### **4. Simon Price (15602/07) – Chamber (First Section) – no violation**

Original judgment: 15/09/2016                      Final judgment: 30/01/2017

The applicant was convicted for offences relating to an attempt to import cocaine into the UK. Relying on Article 6(1) and 6(3)(d), he alleged that his trial had been unfair on the grounds that:

- hearsay evidence was admitted from a customs broker based in Antwerp who refused to attend court to give evidence;
- the prosecution allegedly withheld evidence; and
- screens were used due to allegations of previous jury fixing; he claimed that this prejudiced him in the eyes of the jury.

The Court found that the admission of hearsay evidence did not violate Article 6(1) read in conjunction with 6(3)(d). The remainder of the application was found to be inadmissible.

The applicant's request for referral to the Grand Chamber was refused.

### **5. Daniel Faulkner (68909/13) – Chamber (First Section) – no violation**

Original judgment: 06/10/2016      Final judgment: 06/03/2017

The applicant is serving a life sentence. He claimed that delays to his Parole Board review have led to his detention becoming arbitrary and therefore in violation of Article 5(1).

The ECtHR found no violation of Article 5(1). Barring exceptional circumstances, a complaint of delay falls under Article 5(4) only; the nature and length of the delay in holding the applicant's Parole Board review did not make his detention arbitrary and thus in violation of Article 5(1).

### **6. McNamara (22510/13) – Committee (First Section) – violation of Article 6**

Original judgment: 12/01/2017      Final judgment: 12/01/2017

The applicant founded Arakin Ltd ('Arakin') which later became involved in a number of commercial disputes. Tods Murray Solicitors ('TMS') acted on their behalf in these disputes but their fees were not paid in full. TMS issued proceedings against Arakin to recover their fees, and Arakin counter-claimed alleging professional misconduct and negligence. The dispute gave rise to four sets of overlapping proceedings which were considered by the courts between 1996 and 2014 when the Outer House of the Court of Session gave a final decision on expenses in favour of TMS.

The applicant made multiple complaints to the ECtHR, including under Article 6(1) that the civil proceedings were not concluded within a reasonable time which was the only part of the application to be declared admissible.

The ECtHR noted that the litigation took on a scale and duration incommensurate with the simple nature of the underlying claim, lasting over 18 years.

Whilst the ECtHR noted that the applicant's own actions generated the vast majority of the delay, it also highlighted certain stages of the proceedings which were protracted, in particular, a period of just over 1 year and 5 months, between the conclusion of the November 2004 hearing on the notes of objections and delivery of the subsequent judgment, and a period of around 7 months after the conclusion of the 2011 hearing on the facts, and the delivery of the relevant judgments.

The ECtHR found that to this limited extent the overall length of proceedings was excessive and failed to meet the reasonable-time requirement, and accordingly there had been a violation of Article 6. The ECtHR held that this declaration alone constituted just satisfaction but did award the applicant 500 euros in costs.

See the section 'Consideration of adverse judgments that have become final in August 2016 – July 2017' for details of implementation.

## 7. Hutchinson (57592/08) – Grand Chamber – no violation

Original judgment: 17/01/2017      Final judgment: 17/01/2017

The applicant is serving a life sentence with a whole life order (WLO) having been convicted in 1983 of three counts of murder, rape and aggravated burglary. He claimed that this sentence amounted to inhuman and degrading treatment contrary to Article 3.

In 2014 the Court of Appeal in *McLoughlin* held that the Secretary of State for Justice was obliged under domestic law to consider releasing a person detained on a whole life order where exceptional circumstances could be shown to exist, and that this power of release was reviewable by the domestic courts.

In 2015 the ECtHR found in *Hutchinson v UK* (by a 6:1 majority) that WLOs do not give rise to a violation of Article 3. Having regard to *R v McLoughlin*, where the Court of Appeal held that the Secretary of State for Justice was required to exercise the power of release on compassionate grounds in exceptional circumstances under section 30 of the Crime (Sentences) Act 1997 compatibly with Article 3, the ECtHR concluded that prisoners serving a WLO did have a prospect of release and a possibility of review of their sentence and that WLOs were therefore compatible with Article 3.

The case was referred to the Grand Chamber at the applicant's request.

A 14:3 majority of the Grand Chamber agreed with the Chamber judgment, finding that WLOs do not lead to a violation of Article 3.

The Grand Chamber considered that the Court of Appeal in *R v McLoughlin* had clarified the scope and grounds of review by the Secretary of State, the manner in which it should be conducted, and the Secretary of State's duty to release a WLO prisoner where continued detention could no longer be justified on legitimate penological grounds.

## 8. Ahmed (59727/13) – Chamber (First Section) – no violation

Original judgment: 02/03/2017      Final judgment: 03/07/2017

The applicant, a Somali national, came to the UK in December 1999 and was granted exceptional leave to remain until 2004. During this time he received a number of criminal convictions and was sentenced to a term of imprisonment. On 8 February 2008, he became eligible for release from prison but he was detained, under paragraph 2 of Schedule 3 to the Immigration Act 1971, pending his deportation. The applicant was released on bail on 13 July 2011.

The applicant alleged that his detention from 8 February 2008 until 13 July 2011 violated Article 5. He argued that the relevant legislation was not precise, accessible and foreseeable and therefore his detention was 'not in accordance with a procedure prescribed by law' as required by Article 5(1). He also argued his detention was excessive and the Government had failed to act with 'due diligence' and so he was not detained with a 'view to deportation', as required by Article 5(1)(f), in particular in relation to the last 25 months when a Rule 39 measure was in place preventing his removal to Somalia. Finally, he argued that repeated offers for him to join a 'facilitated returns scheme' to Somalia were in violation of Article 34.

Applying the decision in *JN v UK*, the ECtHR held that the legal provisions regarding detention were sufficiently clear and therefore there was no violation of Article 5(1).

The ECtHR held that given the length of detention after the Rule 39 measure had been ordered, the applicant's case deserved anxious scrutiny but held, on the facts, that there was no violation of Article 5(1)(f). The ECtHR expressed 'some concern' in relation to the length of detention but noted that the Rule 39 measure was not used as a justification for indefinite detention, his detention was reviewed on a monthly basis and it was open to him to apply for judicial review at any time.

By majority, the ECtHR also held that there was no violation of Article 34 on the facts.

The applicant's request for referral to the Grand Chamber was refused.

### **9. SMM (77450/12) – Chamber (First Section) – violation of Article 5**

Original judgment: 22/06/2017

Final judgment: 13/11/2017

The applicant was a Zimbabwean national who arrived in the UK in 2001 as a visitor, with six months' leave to enter, whose application for asylum was refused in 2005 on non-compliance grounds. He was served with notice of liability to removal, but in 2007 was convicted of a serious criminal offence and sentenced to three years' imprisonment. He made a second asylum claim while in prison, which was also refused. He was served with a notice of liability to automatic deportation, and remained in detention under immigration powers after completing his custodial sentence. He had been prescribed medication for serious mental illness and has claimed to be at risk of torture in Zimbabwe. He complained to the ECtHR that his detention was in violation of Article 5, alleging that the Secretary of State failed to apply relevant policies including the mental health concession and the torture concession. He claimed that it had been unreasonable, arbitrary and disproportionate.

The ECtHR found a violation of Article 5(1) as the authorities did not act with sufficient 'due diligence' from 28 June 2010 to 8 February 2011. The ECtHR acknowledged that the conduct of the applicant contributed to the delay, however it considered that the Secretary of State should have taken more decisive steps to bring the decision-making process swiftly to a close. The ECtHR noted that whilst the applicant was considered sufficiently well to be detained it was accepted that he had serious mental health problems, making him vulnerable. There was therefore a heightened duty on the authorities to act with 'due diligence' in order to ensure that he was detained for the shortest time possible. The ECtHR also noted that the Government had chosen to put in place a system where there are no fixed time limits on immigration detention. Where an applicant is subject to an indeterminate period of detention, the necessity of procedural safeguards becomes decisive. Accordingly, the ECtHR considered that the necessity to ensure the effectiveness of the available procedural safeguards meant that there was a particular need for the authorities to act with appropriate due diligence in managing the decision-making process and following up the deadline ultimately imposed.

The ECtHR rejected the applicant's complaints concerning the 'lawfulness' and arbitrariness of his detention.

The applicant's request for referral to the Grand Chamber was refused.

## The UK at the ECtHR: statistics from 1959 to 2016

The following tables summarise figures from the ECtHR's statistical reports to illustrate the number of applications made against the UK at the ECtHR between 1959 and the end of 2016.<sup>12</sup> The tables show the outcomes of the applications, both in terms of the number that were declared inadmissible or struck out and the much smaller number that resulted in a judgment.

Applications have been on a downward trend since 2010. Numbers in 2016 are only 14% of their peak in 2010.

**Table 1. Applications against the UK allocated to a judicial formation<sup>13</sup>**

1959–2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
12,008	851	1233	1127	2744	1542	1702	908	720	575	373	<b>23,783</b>

Due to the time lag between an application being made and being allocated for consideration, the number of inadmissible applications cannot be directly compared to applications on a year-by-year basis. However, it is noteworthy that since 2010 more applications have been declared inadmissible than new ones being allocated.

**Table 2. Applications against the UK declared inadmissible or struck out<sup>14</sup>**

1959–2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
10,447	403	1240	764	1175	1028	2047	1633	1970	533	360	<b>21,600</b>

The numbers of judgments and adverse judgments continue to be low.

**Table 3. Judgments in UK cases (judgments finding violation)<sup>15</sup>**

1959–2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
318	50	36	18	21	19	24	13	14	13	14	<b>526</b>
(197)	(19)	(27)	(14)	(14)	(8)	(10)	(8)	(4)	(4)	(7)	<b>(305)</b>

<sup>12</sup> <http://echr.coe.int/Pages/home.aspx?p=reports>

<sup>13</sup> Source: Analysis of statistics 2016. This is the first stage of consideration by the Court. Single judges can declare inadmissible / strike out applications where this decision can be taken without further examination. By unanimity, Committees take similar decisions to single judges but can also declare an application admissible and give a judgment if the underlying question is already well-established in the case-law of the Court. Where neither a single judge nor a Committee has taken a decision or made a judgment, Chambers may decide on admissibility and merits.

<sup>14</sup> Source: Analysis of statistics 2016

<sup>15</sup> Source: Violations by Article and by State 2016; Violations by Article and by State 1959–2016. A judgment can cover more than one application.

## Ongoing applications against the UK: statistics for 2016

The number of ongoing applications against the UK under consideration by the ECtHR continues to fall both in absolute terms and as a proportion of all States' applications.

**Table 4. Caseload of the ECtHR<sup>16</sup>**

<b>Year</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>
<b>UK</b>	1,243	256	231
<b>Total</b>	69,924	64,834	79,750
<b>Proportion</b>	1.8%	0.4%	0.3%

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<sup>16</sup> Source: Analysis of statistics 2016, 2015, 2014, page 12.

## The UK's record on the implementation of ECtHR judgments

At the end of 2016, the UK was responsible for 21 (0.2%) of a total 9,941 pending judgments before the Committee of Ministers (i.e. adverse judgments whose implementation is still being supervised). This is lower than for other States with a similar population (see Annex B).<sup>17</sup>

In 2016, all payments of just satisfaction were made within the three-month deadline. The Ministry of Justice continues to liaise with other government departments to ensure prompt payment.

Further statistics and the numbers of pending judgments for all States for the years 2014–2016 can be found at Annex B. This annex also lists all judgments that found a violation against the UK that were still under the supervision of the Committee of Ministers at the end of July 2017.

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<sup>17</sup> Data are taken from the 10th Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights'. See <http://www.coe.int/en/web/execution/annual-reports>

## Consideration of adverse judgments that became final in August 2016 – July 2017

Six adverse judgments became final in this period and therefore required the Government to take measures. Only one of these, *Hammerton*, is still open for supervision by the Committee of Ministers.

### 1. JN (37289/12) (closed)

### 2. VM (49734/12) (closed)

These judgments concern the excessive length of detention of two individuals, pending their deportation from the UK. Whilst finding that the system of immigration detention in the UK did not in principle fall short of the requirements of Article 5, the ECtHR found that from mid-2008 to 14 September 2009 (in *JN*) and from 19 June to 14 December 2009 (in *VM*), the applicants' detention was in violation of Article 5(1) due to the authorities' failure to pursue their deportation with sufficient diligence and expedition.

In the case of *VM*, the ECtHR considered that there was a 'lengthy delay' between the applicant making new representations in June 2009 and the Secretary of State refusing to treat them as a fresh claim for asylum in December 2009. Although the period was relatively short, the ECtHR considered it to be significant given the 'overall length of detention and the applicant's deteriorating mental health'.

The Government considers no general legislative measures to be necessary because the ECtHR held that the immigration detention system and the domestic remedies available to a detained person are in principle compatible with Article 5 (see in particular paragraphs 97–99 of *JN*).

The source of the violations found by the ECtHR was the lack of due diligence taken by the authorities in the pursuit of the applicants' deportation. A number of measures are now in place to ensure that all measures are taken to pursue deportations of those in detention with sufficient diligence and that any new representations submitted by an individual in detention are considered rapidly.

**The Government considers that all necessary measures have been taken. The Council of Europe has closed its supervision of these cases.**

### 3. Hammerton (6287/10)

The applicant was committed to prison for three months for contempt of court for breach of an undertaking. On appeal, the Court of Appeal held that the proceedings violated his right to a fair trial under Article 6 as he should have had the right to legal assistance. They expressed a view that this violation had caused the applicant to spend an extra four weeks in prison.

In 2008, the applicant unsuccessfully sought damages under the HRA. As the judge's errors did not amount to bad faith, section 9(3) of the HRA precluded the payment of damages for the violation of Article 6 and the additional time spent in prison.

The applicant complained to the ECtHR on the basis of Articles 5, 6, 13 and 14.

The ECtHR held that the applicant's right to liberty under Article 5 had not been violated. They held that the violation of Article 6 in this case did not amount to a 'flagrant denial of justice' and the detention could not be deemed arbitrary or unlawful and was therefore justified by Article 5(1)(a).

The ECtHR declared that there had been a violation of the applicant's right to a fair trial under Article 6 in respect of the applicant's lack of representation during his committal hearing.

The ECtHR also concluded that as the applicant could not obtain financial compensation for the violation of Article 6, he could not receive adequate redress in the domestic courts. Therefore, there was a violation of the applicant's right to an effective remedy under Article 13.

The applicant's claim under Article 14 was dismissed as manifestly ill-founded.

**The Government is considering the legislative measures that may be required to implement the judgment.**

#### **4. Ibrahim and Others (50541/08, 50571/08, 50573/08, 40351/09) (closed)**

The applicants, four individuals involved in an attempted terrorist attack in London in 2005, complained that the restriction of their right to legal advice whilst they were first being questioned by police (by virtue of the use of an exceptional power contained within Schedule 8 to the Terrorism Act 2000) and the use of the evidence taken from those sessions at their trial was a violation of Article 6.

In December 2014 the Chamber (Fourth Section) rejected the applicants' claim. Their request to have their case heard by the Grand Chamber was granted.

The Grand Chamber found that the Government had convincingly demonstrated in the case of three applicants the existence of an urgent need to avert serious adverse consequences for the life and physical integrity of the public such that there were compelling reasons for the temporary restrictions on the right to legal advice and the proceedings as a whole were fair.

In the case of the fourth applicant (who was convicted of various accounts of assisting the second applicant and for failing to disclose information), the Grand Chamber found a violation of Article 6. The Grand Chamber concluded that the Government had not shown compelling reasons for their actions, importantly, the deliberate restricting his access to legal advice and for failing to inform him of his right to remain silent. The decision of the police not to caution him once they realised that he was a potential suspect and not just a witness was significant.

The Government considers no general legislative measures to be necessary because the violation of Convention rights identified by the Grand Chamber arises from an operational failure in Mr Abdurahman's case to correctly apply the relevant domestic law. The Grand Chamber did not identify any defect or incompatibility in that system of law, or in the operational processes based on it, which might require general legislative measures to address.

Indeed, as recognised by the Grand Chamber, the Police and Criminal Evidence Act (PACE) and the applicable code of practice (Code C) already clearly govern the detention, treatment

and questioning of persons by police officers including access to legal advice. The applicable code of practice made it clear that where in the course of questioning, the answers given provided grounds for suspicion that the person committed an offence, a caution had to be administered before any further questioning took place (see §§ 181 and 229).

The Government considers that publication and dissemination of the judgment to the Metropolitan Police Service will be sufficient to ensure that, in future, the police will correctly apply the relevant domestic law and applicable code of practice and will therefore formally arrest, caution and notify an individual of their procedural rights, should a similar situation arise. It is also worth confirming in this context that procedural training and guidance in relation to witness and suspect interviews is provided to UK police services. Training also includes teaching of relevant legislation and best practice methods, thus similar violations will be avoided in the future.

**The Government considers that all necessary measures have been taken. The Council of Europe has closed its supervision of the case.**

### **5. O'Neill and Lauchlan (41516/10, 75702/13) (closed)**

The applicants were first interviewed by the Scottish police in connection with a murder in 1998, when they were both serving sentences for sexual offences. They were charged with the murder in 2005 but in 2006 a decision was taken not to proceed with the prosecution at that time because of a lack of evidence. The applicants were ultimately indicted in September 2008. Their attempt to have those charges dismissed was refused by the Supreme Court in February 2010, after which the trial went ahead in May 2010.

On 10 June 2010, the applicants were both convicted of murder and of attempting to pervert the course of justice. O'Neill received a life sentence, with a minimum of 30 years, and Lauchlan was sentenced to life imprisonment with a tariff of 26 years.

The applicants appealed against conviction and sentence to the Appeal Court on a number of grounds, including that of delay. It had been a consistent feature of their positions before the Scottish courts that proceedings against them commenced when they were first detained in 1998.

Before the applicants' appeals were decided by the Appeal Court, they appealed to the Supreme Court on the question of the starting point used by the lower courts in the assessment of reasonable time under Article 6. On 13 June 2013 the Supreme Court found that the date on which the reasonable time began for the purposes of Article 6 was 5 April 2005 and the proceedings were then remitted to the Appeal Court. On 27 March 2014 the Appeal Court dismissed the applicants' appeals against conviction. On 19 June 2014 the Appeal Court dismissed the applicants' appeals against sentence.

The ECtHR held that there had been a violation of Article 6(1) because certain stages of the proceedings were protracted, particularly the period of almost four years taken to determine the applicants' appeals. The applicants' own actions in pursuing multiple avenues of recourse had greatly contributed to the delay, but given the need for diligence triggered by the significant lapses of time both between the commission of the offences and the laying of charges and between the laying of charges and the convictions becoming final the overall length of the proceedings was excessive and failed to meet the 'reasonable time' requirement in Article 6(1).

The Government considers no further general measures to be necessary because there is no wider systemic problem with excessive length of criminal proceedings and, in any event, the Government has already taken the following measures in regard to the Scottish courts:

- (i) In early 2008, the High Court of Justiciary identified an increase in the number of outstanding appeals against conviction. When planning the Appeal Court programme for 2009 it was recognized that there was a backlog of appeals against conviction. Throughout 2009 and 2010 two Criminal Appeal Courts sat continuously with a view to dealing with that backlog. The number of days the Criminal Appeal Court sat each year to hear appeals against conviction increased from 189 sitting days in 2007 to 377 sitting days in 2009. In addition, the Lord Justice General appointed four administrative judges to support the efficient management of court business, one of whom was appointed to deal with appeals against conviction.
- (ii) Further, the Government draws attention to the recent material changes in the law and practice relating to criminal appeals, e.g. reforms to the appeal procedure in the High Court of Justiciary. In particular:
  - Rule 15.15A of the Act of Adjournment (Criminal Procedure Rules) 1996, which came into force on 1 November 2010, required that, ordinarily, an appellant must within 42 days of the granting of leave to appeal, lodge a case and argument inter alia, setting out, for each ground of appeal, a succinct and articulate statement of the facts founded upon and the propositions of law being advanced, as well as an estimate of the duration of the appeal. The case and argument must be signed by counsel or the solicitor advocate instructed to represent the appellant or by the appellant where he intends to conduct the appeal himself.
  - Practice Note No. 2 of 2011 states that where a written case and argument is lodged, the Court will ordinarily fix a procedural hearing and that the Court will ordinarily fix the date and time for the substantive hearing of the appeal at the procedural hearing.
  - Section 82 of the Criminal Justice (Scotland) Act 2016 provides for appointment, at the preliminary hearing, of a trial diet (a date for the trial hearing), with the intention of expediting cases.

The change to the criminal procedure rules and the publishing of the Practice Note occurred after the applicants in the present case had lodged their notes of appeal, so their appeals were not subject to the new regime of case management which is now in place.

**The Government considers that all necessary measures have been taken. The Council of Europe has closed its supervision of the case.**

## **6. McNamara (22510/13) (closed)**

The applicant founded Arakin Ltd ('Arakin') which later became involved in a number of commercial disputes. Tods Murray Solicitors ('TMS') acted on their behalf in these disputes but their fees were not paid in full. TMS issued proceedings against Arakin to recover their fees, and Arakin counter-claimed alleging professional misconduct and negligence. The dispute gave rise to four sets of overlapping proceedings which were considered by the courts between 1996 and 2014 when the Outer House of the Court of Session gave a final decision on expenses in favour of TMS.

The applicant made multiple complaints to the ECtHR, including under Article 6(1) that the civil proceedings were not concluded within a reasonable time which was the only part of the application to be declared admissible.

The ECtHR noted that the litigation took on a scale and duration incommensurate with the simple nature of the underlying claim, lasting over 18 years.

Whilst the ECtHR noted that the applicant's own actions generated the vast majority of the delay, it also highlighted certain stages of the proceedings which were protracted, in particular, a period of just over 1 year and 5 months, between the conclusion of the November 2004 hearing on the notes of objections and delivery of the subsequent judgment, and a period of around 7 months after the conclusion of the 2011 hearing on the facts, and the delivery of the relevant judgments.

The ECtHR found that to this limited extent the overall length of proceedings was excessive and failed to meet the reasonable-time requirement, and accordingly there had been a violation of Article 6. The ECtHR held that this declaration alone constituted just satisfaction but did award the applicant 500 euros in costs.

As a direct consequence of the ECtHR judgment, the Lord President of the Court of Session has reminded his fellow judges of the importance of the timely issuing of judgments. The Lord President is the head of the Judiciary in Scotland and is responsible for the conduct of both civil and criminal business in the Scottish courts. The Lord President and his office also actively manage the judiciary to ensure that any delays are quickly identified and dealt with. The judgment has been widely disseminated within the Lord President's Private Office.

A number of significant reforms have been made to the Scottish Civil Court system. These reforms post-date the periods of delay giving rise to the violation and followed a review carried out by Lord Gill into Scotland's Civil Courts (published in 2009) which resulted in the Court Reform (Scotland) Act 2014. Under the Act, the Scottish Civil Justice system was overhauled and time has been freed up in the Court of Session. The exclusive competency of Scotland's Sheriff Courts has increased from £5,000 to £100,000. A dedicated Sheriff Personal Injury Court has been established, as well as a Sheriff Appeal Court to deal with matters that would formerly have taken up time in the Court of Session.

The Court of Session is therefore more efficient, with only cases that are appropriate for Scotland's supreme civil courts now having jurisdiction to be heard before Scotland's senior judges.

Additionally, the Scottish Courts and Tribunal Service (the function of which is to provide administrative support) has introduced a new electronic case management system. This system came into operation in November 2016 and assists in the monitoring of cases as they progress through the Scottish judicial system. This system helps to prevent undue delays occurring in cases. Reminders are now issued to parties if cases are inactive for prolonged periods of time. This helps to ensure that cases progress without undue delay.

The civil justice system in Scotland has been modernised and its efficiency has been increased. Cases are now more closely supervised and court business is more appropriately allocated across the various court levels of Scotland.

**The Government considers that all necessary measures have been taken. The Council of Europe has closed its supervision of the case.**

## **Judgments that became final before August 2016 and are still under the supervision of the Committee of Ministers**

These judgments, for which implementation is particularly complex, fall into four policy areas.

### **1. McKerr Group (28883/95)**

#### **Delays in the investigation of deaths in Northern Ireland**

The Stormont House Agreement, which was agreed in December 2014, includes measures to address a number of issues relating to Northern Ireland's troubled past. These include refining the legacy inquest process and provision for a new body, the Historical Investigations Unit (HIU), to take forward investigations into outstanding troubles-related deaths. As of 31 July 2016 there are in the region of 1,700 HET (Historical Enquiries Team) and OPONI (Office of the Police Ombudsman for Northern Ireland) cases outstanding. The HET was closed in December 2014 following restructuring within the PSNI in response to budget cuts. The Legacy Investigations Branch of the PSNI continues to review cases within its remit and investigate where there is credible evidence in those cases at present.

The HIU, once established, will be an independent body. Officers investigating criminal allegations will have the powers and privileges of a police constable. The HIU will also provide dedicated family support staff and the next of kin will be involved in the process from the beginning and will be provided with support. Oversight will be provided by the Northern Ireland Policing Board, and the HIU will be structurally and operationally independent from the police. This independence is intended to address the criticisms that had previously been made of the role of the HET. The UK Government will make full disclosure to the HIU. To enable full disclosure, legislation in the UK Parliament is required, which will also prevent any damaging onward disclosure of information by the HIU.

On 17 November 2015, the 'Fresh Start' Agreement was reached following ten weeks of talks between the UK and Irish Governments and the Northern Ireland political parties. Unfortunately, although a great deal of progress was made during the negotiations on addressing Northern Ireland's past, it was not possible to achieve final agreement on those matters at that time. However, over the course of the political negotiations, substantial areas of common ground were developed on the legacy institutions, including on a range of issues where progress has previously proved impossible. Contentious questions were worked through by all the parties in the spirit of moving things forward for families and victims.

The Secretary of State has met with key stakeholders to work towards a political agreement on these issues. As a consequence of that engagement the Secretary of State concluded that there was a desire for a public phase to enable discussion on the detailed proposals for addressing the past. On 9 September 2016, the Secretary of State announced an intention to move forward with a public phase. During the autumn of 2016 and the start of 2017, further meetings took place with political parties and victims groups, in advance of the planned public consultation phase.

Following the resignation of the former deputy First Minister of Northern Ireland, Martin McGuinness, on 9 January 2017, a Northern Ireland Assembly election was held on 2 March 2017. Consequently, no further progress was made with political parties during the election campaign period. Following that election, the Secretary of State for Northern Ireland engaged in intensive talks with the political parties and the Irish Government to re-establish an inclusive devolved administration at Stormont. Whilst progress was made on a number of issues including legacy, significant gaps remained between the parties, and unfortunately they were unable to form a devolved government by the deadline of 27 March 2017. Talks to restore the devolved institutions have continued between the political parties in Northern Ireland, the Irish Government and the UK Government.

The Government remains committed to consulting on the legacy proposals and the Secretary of State continues to reflect carefully on the next steps for taking forward the legacy consultation to enable all those with an interest to express their view. The consultation will provide everyone with an interest the opportunity to see the proposed way forward and contribute to the discussion on the issues. A public phase has the potential to build greater confidence in the new bodies, particularly among the wide constituency of victims of the Troubles.

The Government hopes that, post-consultation, it will be in a position to introduce legislation and have the new legacy institutions up and running as quickly as possible and in a way that can command support and confidence from across the community. The Government is committed to making progress on this issue and it has indicated £150m of additional funding will be available for the Stormont House Agreement measures for dealing with the past.

The *McKerr* case is subject to on-going preparation for inquest in relation to disclosure of documents and other materials that date back to 1976. The case has not been listed for inquest and disclosure is ongoing. *McKerr* is materially linked to a number of other cases and the disclosure exercise involves several thousands of pages held by the Police Service of Northern Ireland (PSNI) and other departments and agencies. PSNI initial disclosure was, some time ago, separated into 13 tranches because of the volume of material involved. Disclosure within Tranche 1–Tranche 12 remains to be perfected, though several tranches have been disseminated to families and other properly interested persons. Tranche 13 consists of a substantial volume of documents in respect of which the Coroner has issued directions and a small amount of this material has also been furnished to families and other properly interested persons. Directions and queries have also issued to PSNI in relation to the disclosure of further information deemed to be potentially relevant to the Coroner's investigation, some of which relates to the need to cross-reference identified information against additional cases in respect of ascertaining and analysing similar fact evidence.

The Coroner has also requested the disclosure of documents from across a number of government departments and agencies, including the Ministry of Defence, the Security Service, the Cabinet Office, the Northern Ireland Office, the Attorney General's Office, the Home Office, the Director of Public Prosecutions and the Office of the Police Ombudsman. As a result approximately 100 lever-arch folders of materials have been provided for consideration by the Coroner's legal team and the majority of materials from this body of documents have been considered and potential relevance indicated. The Coroner has been notified that further materials are to be provided shortly in the progression of this exercise. Additionally, in April 2016 a list of priority materials was drawn up and sent to all the agencies concerned to facilitate early disclosure of a small body of highly relevant material. The departments are considering the Coroner's requests

that they process material ready for disclosure to families and other properly interested persons. To capture all potentially relevant material, departments and agencies, including the PSNI, have been directed to provide further specified disclosure and answer a number of outstanding queries.

Until the Coroner is furnished with all material necessary and this is made available in appropriate form to families and other properly interested persons, it is not possible to advance a realistically achievable timeframe for hearing. Further dissemination of material to families is linked to an ongoing Public Interest Immunity (PII) process. Hearings on PII currently attend the outcome of this process. Work is ongoing on the collation and analysis of material provided to the Coroner to date, alongside internal cross-referencing and the preparation of chronologies and witness lists.

### **Measures to Address Delay**

The Lord Chief Justice (LCJ) of Northern Ireland became President of the Coroner's Court on 1 November 2015. The LCJ has appointed a High Court Judge as the Presiding Coroner to oversee the management of cases and consider issues relating to scope and disclosure. The Presiding Coroner in conjunction with the Lord Chief Justice will determine which cases will be listed for hearing and when.

When the LCJ assumed the Presidency of The Coroner's Court there were 55 legacy cases. Since then two further cases have been referred, four cases have concluded. A further three cases have been subject to inquest proceedings and only the findings are awaited to complete these cases. There are three cases currently at hearing, which it is hoped will conclude this financial year. There are two other inquests planned for December 2017 and March 2018. Work is also progressing on Ballymurphy, which involves 10 deaths, with a planned inquest hearing of September 2018. The cases progressed to date are the oldest in terms of the date of death, all dating back to the early 1970s.

A further referral has been received from the Attorney General on 21 November 2017 directing a new inquest into the death of Thomas Mills who was who was shot by the Army in Belfast on 18 July 1972. This current case load stands at 54 cases / 95 deaths.

Following a review of the state of readiness of the outstanding legacy cases, undertaken by Lord Justice Weir, and a series of meetings in Strasbourg, both in January 2016, the LCJ made his proposals. He proposed that with the support of a properly resourced Legacy Inquest Unit in the Northern Ireland Courts and Tribunals Service and co-operation from the relevant bodies including the PSNI and the MoD, operating in conjunction with the other reform measures that he has recommended, it should be possible to complete the existing legacy inquest caseload within a period of five years, subject to the required resources being made available.

Criminal Justice Inspection Northern Ireland (CJINI) carried out an inspection of the arrangements in place in the PSNI to manage and disclose information in support of the coronial process in Northern Ireland. The report was published on 8 December 2016 and made seven recommendations aimed at improving disclosure of information to the Coroner which will be key to completing the cases in line with Article 2. Greater use is also planned of electronic data management, both within the new Legacy Inquest Unit and between organisations. An IT project is underway to procure a new case and disclosure management system to support the progression of legacy inquests in the Northern Ireland

Courts and Tribunals Service. This will help to ensure that more effective use is made of resources within the organisations that contribute to the inquest process.

A new Coroner's Researcher took up post in May 2017, to assist in the discovery process of relevant material for inquests, and work is being progressed on Recommendation 7 of the CJINI Report in collaboration with the PSNI, to ensure early involvement of the Coroners Service in the discovery and disclosure process – providing more assurance and scrutiny and reducing delay in providing access to the material to Properly Interested Persons.

The projected time-frame remains five years for completion of the outstanding legacy inquest caseload with the required resources and co-operation in place as envisaged under the Lord Chief Justice's reform proposals.

In March 2016, the Northern Ireland Executive was asked by the Department of Justice to consider a proposed bid for funding for an initial phase of work which would aim to complete up to 16 legacy cases within a period of 19 months. Since then the Department of Justice has developed a revised funding bid for legacy inquests as part of the overall funding package for dealing with the Past to the parties to inform the ongoing political talks in Northern Ireland. Once agreed, this will be considered by the UK Government.

The UK Government continues to support reforms to the legacy inquest system in Northern Ireland to improve the way legacy inquests are conducted in accordance with the UK's international obligations. However, reform of legacy inquests is a devolved matter and a decision needs to be taken by the Northern Ireland Executive to implement the Lord Chief Justice's proposals. The UK Government is determined to see devolved government re-established and is doing everything it can to work with the parties to reach a successful conclusion.

### **Review and update of coronial law in Northern Ireland**

The requirement for the review and update of Coronial Law in Northern Ireland was reflected in the CSNI review report. A scoping study for a review of the Coroners legislation has been completed.

## 2. **Hirst (No.2), Greens & MT (74025/01, 60041/08)** **Prisoner Voting Rights**

**Hirst (No.2):** In March 2004, the UK's blanket ban on prisoner voting, under section 3 of the Representation of the People Act 1983, was found to be a violation of Article 3 of Protocol 1 by the ECtHR as a result of a successful challenge by Hirst, a prisoner. In October 2005, the Grand Chamber upheld the ruling that the UK's ban was in violation of Article 3 of Protocol 1. In its judgment, the Grand Chamber allowed the UK a 'wide margin of appreciation' in implementing *Hirst (No. 2)*. It also referred to the lack of a substantive debate in the UK Parliament on the continued justification for the ban in light of modern day penal policy and current human rights standards.

**Greens and MT:** This is a 'pilot case', so called because it was used to decide how similar 'clone cases' would be decided by the ECtHR. It concerned the blanket ban on voting imposed automatically on the applicants due to their status as convicted offenders detained in prison. The applicants, both prisoners in Scotland, were refused the right to enrol on the electoral register for domestic elections and elections to the European Parliament.

The ECtHR found the blanket ban under section 3 of the Representation of the People Act 1983 in violation of Article 3 of Protocol 1 and, pursuant to the judgment in *Hirst (No. 2)*, set a deadline of six months from 11 April 2011 for the UK to bring forward legislative proposals to end the blanket ban on prisoner voting. The Court declined to award compensation to the applicants and stayed around 2,400 'clone cases' brought by UK prisoners against the Government.

The Government sought deferral of the deadline specified in *Green & MT* in order to intervene in the case of *Scoppola (No.3)*.

**Scoppola v Italy (No.3):** The UK intervened in the Italian prisoner voting case of *Scoppola (No 3)* and was represented by the former Attorney General, Dominic Grieve QC at the Grand Chamber's hearing on the case on 2 November 2011. On 22 May 2012, the Grand Chamber gave its judgment which reaffirmed its ruling in *Hirst (No 2)*, that the UK's blanket ban was in violation of Article 3 of Protocol 1, while recognising that national parliaments enjoyed a wide margin of discretion when it came to regulating prisoner voting.

The UK was granted a deferral of the deadline imposed by *Greens & MT*, and was given six months from 22 May 2012 to introduce proposals to remove the blanket ban.

Following the judgment in *Scoppola (No 3)*, the Committee of Ministers resumed its supervision of the UK's implementation of the *Hirst (No 2)* and *Greens & MT* judgments.

**Clone cases:** On 12 August 2014, in the case of *Firth and Others v. the UK*<sup>18</sup> the ECtHR passed judgment on the first batch of ten 'clone cases' following on from *Greens & MT*. These cases related to prisoners unable to vote in the 2009 European Parliamentary elections. The ECtHR held that there was a violation of Article 3 of Protocol 1 in each of the ten cases, but did not award any damages or costs. The applicants sought referral of

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<sup>18</sup> Applications 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09.

the judgment to the Grand Chamber, but this was refused and the judgment became final on 15 December 2014.

More than half of the original *Greens & MT* 'clone cases' have been declared inadmissible or struck out by the ECtHR. On 22 September 2014, the remaining 1,015 'clone cases' were communicated to the UK.<sup>19</sup> These cases relate to prisoners unable to vote in one or more of the 2009 European Parliamentary elections, the 2010 Parliamentary elections and the 2011 elections to the Scottish Parliament, the Welsh Assembly or the Northern Irish Assembly.

In a statement to Parliament on 2 November 2017, the Secretary of State for Justice set out the Government's proposals to make administrative changes to address the *Hirst* judgment, while maintaining the bar on convicted prisoners in custody from voting. First, the Government will make it clear to criminals when they are sentenced that while they are in prison this means they will lose the right to vote. Second, the Government will amend Prison Service guidance to address an anomaly in the current system, where offenders who are released back in the community on licence using an electronic tag under the Home Detention Curfew scheme can vote, but those who are in the community on Temporary Licence cannot.

On 7 December 2017, the Committee of Ministers noted with satisfaction the Government's proposed measures, encouraged the UK to implement them as soon as possible and asked the UK to provide an update on implementation by 1 September 2018.

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<sup>19</sup> [http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{"respondent":\["GBR"\],"documentcollectionid2":\["COMMUNICATEDCASES"\],"itemid":\["001-147091"\]}](http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#{)

### **3. S and Marper (30562/04 and 30566/04) Retention of DNA profiles and cellular samples**

The applicants, both of whom had been arrested for but not convicted of criminal offences, sought to have their DNA samples, profiles and fingerprints removed from police records. The refusal of the police to delete this information was upheld by all domestic courts up to the House of Lords. However, the ECtHR ruled the blanket policy of retaining this information from all those arrested or charged but not convicted of an offence was disproportionate and therefore unjustifiable under Article 8.

The Government brought forward legislative proposals to address the issue in England and Wales, and across the UK in respect of material collected under counter-terrorism powers, in the Protection of Freedoms Act 2012 (PoFA) which received Royal Assent on 1 May 2012. The legislation adopted the protections of the Scottish model for the retention of DNA and fingerprints.

The Government has confirmed that in England and Wales, DNA profiles and fingerprints which can no longer be retained under the provisions of PoFA have been removed from the national databases. This was completed by 31 October 2013, the date on which PoFA was brought into force.

The Northern Ireland Department of Justice (DoJ) was unable to secure the necessary legislative consent motion to allow the extension of PoFA to Northern Ireland in respect of material collected under policing powers there. Instead, the DoJ brought forward broadly similar provision in the Criminal Justice Act (Northern Ireland) 2013 (CJA), which received Royal Assent on 25 April 2013.

At the time of writing, the biometric retention provisions of CJA have yet to be commenced. As PoFA requires the destruction of a large volume of existing DNA and fingerprints, there was a risk that the investigative role of the proposed HIU might be undermined should material potentially relevant to its work be destroyed. The UK Government has therefore made transitional provision to enable authorities in Northern Ireland to retain data collected under counter-terrorism powers in Northern Ireland before 30 October 2013 on a temporary basis. Once statutory provision for the HIU's use of such material has been made, the DoJ will work to bring the legislative proposals of CJA into force.

#### **4. MGN Ltd (39401/04)**

##### **Disproportionate interference with freedom of expression due to requirement to pay success fees**

The applicant, a publishing company, was a defendant in domestic privacy proceedings in 2005. Having lost the case, the applicant had to pay significant costs including 'success fees' of around £1,000,000. The ECtHR found a violation of Article 10, noting the chilling effect on freedom of expression if the fees were inflated by pressuring defendants to settle cases which could have been defended. It considered that the requirement that the applicant pay success fees was disproportionate having regard to the legitimate aims sought to be achieved and exceeded the broad margin of appreciation accorded in such matters.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) implements reforms to civil litigation funding and in particular to 'conditional fee agreements' (CFA) and success fees. This legislation was enacted on 1 May 2012 and is aimed at controlling the costs of litigation generally as well as, in particular, the costs that the other party may have to pay. It includes a variety of provisions to ensure the proportionality of costs; effective costs management and the encouragement of early settlements. However, following recommendations made in the context of a domestic inquiry (the Leveson Inquiry), entry into force of the relevant parts of the Act relating to defamation and privacy cases has been delayed until the introduction of a proposed costs protection regime which was the subject of a consultation process that closed on 8 November 2013. The Government is considering how to proceed in light of the results of the consultation.

In addition, changes already introduced by the Defamation Act 2013 will help to reduce costs in defamation cases. The judgment has also been widely published and disseminated.

On 11 April 2017 the Supreme Court handed down judgment in three cases which required it to consider the same legal issues as were raised in *MGN*, namely *Frost and others v MGN Limited*, *Miller v Associated Newspapers Limited* and *Times Newspapers Limited v Flood*. The Court considered the competing rights present, as identified in *MGN*, and in a detailed examination of the issues, the Court highlighted the need to consider in each case the balance between the rights of one party to freedom of expression under Article 10 on the one hand, and the rights of another party, such as those provided under Article 1 Protocol 1 and Articles 6 and 8, on the other. On this basis the Court identified different categories of case involving these issues, where different approaches to remedies might be appropriate. The Government is considering the implications of the Supreme Court judgment for the structure of the conditional fee agreement reforms for defamation and privacy cases, and will continue to update the Committee of Ministers on progress.

## **Domestic cases: declarations of incompatibility made in August 2016 – July 2017**

Two new declarations of incompatibility were made under section 4 of the Human Rights Act 1998:

- *R (Johnson) v Secretary of State for the Home Department*, [2016] UKSC 56 (19 October 2016)
- Consent Order in *R (Bangs) v Secretary of State for the Home Department* (High Court; 4 July 2017)

A further declaration of incompatibility was omitted from our previous report, and we are grateful to those who drew this omission to our attention:

- *Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya*, [2015] EWCA Civ 33 (5 February 2015)

Details of all declarations of incompatibility made since the Human Rights Act 1998 came into force are given in Annex A.

## **Annex A: Declarations of incompatibility**

Since the Human Rights Act 1998 (HRA) came into force on 2 October 2000 until the end of July 2017, 37 declarations of incompatibility have been made. Of these:

- 25 have become final (in whole or in part) and are not subject to further appeal;
- 3 are subject to appeal; and
- 9 have been overturned on appeal.

Of the 25 declarations of incompatibility that have become final:

- 11 have been remedied by later primary or secondary legislation;
- 5 related to provisions that had already been remedied by primary legislation at the time of the declaration;
- 3 have been remedied by a remedial order under section 10 of the HRA;
- 1 the Government has notified Parliament that it is proposing to remedy by a remedial order; and
- 5 are under consideration as to how to remedy the incompatibility.

Details of all the declarations of incompatibility are set out below in chronological order. References to Articles are to the Convention rights, as defined in the HRA, unless stated otherwise.

## Contents

1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions  
*(Administrative Court; [2001] HRLR 2; 13 December 2000)*
2. R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health  
*(Court of Appeal; [2001] EWCA Civ 415; 28 March 2001)*
3. Wilson v First County Trust Ltd (No.2)  
*(Court of Appeal; [2001] EWCA Civ 633; 2 May 2001)*
4. McR's Application for Judicial Review  
*(Queen's Bench Division (NI); [2002] NIQB 58; 15 January 2002)*
5. International Transport Roth GmbH v Secretary of State for the Home Department  
*(Court of Appeal; [2002] EWCA Civ 158; 22 February 2002)*
6. Matthews v Ministry of Defence  
*(Queen's Bench Division; [2002] EWHC 13 (QB); 22 January 2002)*
7. R (on the application of Anderson) v Secretary of State for the Home Department  
*(House of Lords; [2002] UKHL 46; 25 November 2002)*
8. R (on the application of D) v Secretary of State for the Home Department  
*(Administrative Court; [2002] EWHC 2805 (Admin); 19 December 2002)*
9. Blood and Tarbuck v Secretary of State for Health  
*(unreported; 28 February 2003)*
10. R (on the application of Uttley) v Secretary of State for the Home Department  
*(Administrative Court; [2003] EWHC 950 (Admin); 8 April 2003)*
11. Bellinger v Bellinger  
*(House of Lords; [2003] UKHL 21; 10 April 2003)*
12. R (on the application of M) v Secretary of State for Health  
*(Administrative Court; [2003] EWHC 1094 (Admin); 16 April 2003)*
13. R (on the application of Wilkinson) v Inland Revenue Commissioners  
*(Court of Appeal; [2003] EWCA Civ 814; 18 June 2003)*
14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions  
*(Court of Appeal; [2003] EWCA Civ 875; 18 June 2003)*
15. R (on the application of MH) v Secretary of State for Health  
*(Court of Appeal; [2004] EWCA Civ 1609; 3 December 2004)*
16. A and others v Secretary of State for the Home Department  
*(House of Lords; [2004] UKHL 56; 16 December 2004)*
17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)  
*(Court of Appeal; [2005] EWCA Civ 1184; 14 October 2005)*
18. R (on the application of Gabaj) v First Secretary of State  
*(Administrative Court; unreported; 28 March 2006)*

19. R (on the application of Baiai and others) v Secretary of State for the Home Department and another  
*(Administrative Court; [2006] EWHC 823 (Admin); 10 April 2006)*
20. Re MB  
*(Administrative Court; [2006] EWHC 1000 (Admin); 12 April 2006)*
21. R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills  
*(Administrative Court; [2006] EWHC 2886 (Admin); 16 November 2006)*
22. R (on the application of Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another  
*(House of Lords; [2006] UKHL 54; 13 December 2006)*
23. Smith v Scott  
*(Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007)*
24. Nasser v Secretary of State for the Home Department  
*(Administrative Court; [2007] EWHC 1548 (Admin); 2 July 2007)*
25. R (on the application of Wayne Thomas Black) v Secretary of State for Justice  
*(Court of Appeal; [2008] EWCA Civ 359; 15 April 2008)*
26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department  
*(Administrative Court; [2008] EWHC 3170 (Admin); 19 December 2008)*
27. R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department  
*(Administrative Court; [2010] EWHC 2761; 10 November 2010)*
28. R (on the application of T, JB and AW) v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice  
*(Court of Appeal; [2013] EWCA Civ 25; 29 January 2013)*
29. R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions  
*(Administrative Court; [2014] EWHC 2182; 4 July 2014)*
30. Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya  
*(Court of Appeal; [2015] EWCA Civ 33; 5 February 2015)*
31. Northern Ireland Human Rights Commission, Re Judicial Review  
*(High Court of Northern Ireland; [2015] NIQB 102; 16 December 2015)*
32. David Miranda v Secretary of State for the Home Department  
*(Court of Appeal; [2016] EWCA Civ 6; 19 January 2016)*
33. R (on the application of P and A) v Secretary of State for the Home Department and Others  
*(Administrative Court; [2016] EWHC 89 (Admin); 22 January 2016)*
34. R (on the application of G) v Constable of Surrey Police & Others  
*(Administrative Court; [2016] EWHC 295 (Admin); 19 February 2016)*

35. Z (A Child) (No 2)  
*(Family Court; [2016] EWHC 1191 (Fam); 20 May 2016)*
36. R (on the application of Johnson) v Secretary of State for the Home Department  
*(Supreme Court; [2016] UKSC 56; 19 October 2016)*
37. Consent Order in R (on the application of David Fenton Bangs) v Secretary of State for the Home Department  
*(High Court; 4 July 2017)*

**1. R (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions**

*Administrative Court; [2001] HRLR 2; 13 December 2000*

The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.

The Divisional Court declared that the powers were incompatible with Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker. A number of provisions were found to be incompatible, including the Town and Country Planning Act 1990, sections 77, 78 and 79.

**The House of Lords overturned the declaration on 9 May 2001: [2001] UKHL 23**

**2. R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & the Secretary of State for Health**

*Court of Appeal; [2001] EWCA Civ 415; 28 March 2001*

The case concerned a man who was admitted under section 3 of the Mental Health Act 1983 and sought discharge from hospital.

Sections 72 and 73 of the Mental Health Act 1983 were declared incompatible with Articles 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.

**The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712), which came into force on 26 November 2001.**

**3. Wilson v First County Trust Ltd (No.2)**

*Court of Appeal; [2001] EWCA Civ 633; 2 May 2001*

The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement with the result that it could not be enforced.

Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with Article 6 and Article 1 of Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditor's enjoyment of contractual rights.

**The House of Lords overturned the declaration on 10 July 2003: [2003] UKHL 40**

#### 4. McR's Application for Judicial Review

*Queen's Bench Division (NI); [2002] NIQB 58; 15 January 2002*

The case concerned a man who was charged with the attempted buggery of a woman. He argued that the existence of the offence of attempted buggery was in violation of Article 8.

It was declared that Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.

**Section 62 was repealed in Northern Ireland by the Sexual Offences Act 2003, section 139, section 140, Schedule 6 paragraph 4, and Schedule 7. These provisions came into force on 1 May 2004.**

#### 5. International Transport Roth GmbH v Secretary of State for the Home Department

*Court of Appeal; [2002] EWCA Civ 158; 22 February 2002*

The case involved a challenge to a penalty regime applied to carriers who unknowingly transported clandestine entrants to the UK.

The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was declared incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of Protocol 1 as it imposed an excessive burden on the carriers.

**The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8, which came into force on 8 December 2002.**

#### 6. Matthews v Ministry of Defence

*Queen's Bench Division; [2002] EWHC 13 (QB); 22 January 2002*

The case concerned a Navy engineer who came into contact with asbestos lagging on boilers and pipes. As a result he developed pleural plaques and fibrosis. The Secretary of State issued a certificate that stated that the claimant's injury had been attributable to service and made an award of no fault compensation. The effect of the certificate, made under section 10 of the Crown Proceedings Act 1947, was to preclude the engineer from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The engineer claimed this was a violation of Article 6.

Section 10 of the Crown Proceedings Act 1947 was declared incompatible with Article 6 in that it was disproportionate to any aim that it had been intended to meet.

**The Court of Appeal overturned the declaration, a decision which was upheld by the House of Lords on 13 February 2003: [2003] UKHL 4**

## **7. R (on the application of Anderson) v Secretary of State for the Home Department**

*House of Lords; [2002] UKHL 46; 25 November 2002*

The case involved a challenge to the Secretary of State for the Home Department's power to set the minimum period that must be served by a mandatory life sentence prisoner.

Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence.

**The law was repealed by the Criminal Justice Act 2003, sections 303(b)(i) and 332 and Schedule 37, Part 8, with effect from 18 December 2003. Transitional and new sentencing provisions were contained in Chapter 7 and Schedules 21 and 22 of that Act.**

## **8. R (on the application of D) v Secretary of State for the Home Department**

*Administrative Court; [2002] EWHC 2805 (Admin); 19 December 2002*

The case involved a challenge to the Secretary of State for the Home Department's discretion to allow a discretionary life prisoner to obtain access to a court to challenge their continued detention.

Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court.

**The law was amended by the Criminal Justice Act 2003 section 295, which came into force on 20 January 2004.**

## **9. Blood and Tarbuck v Secretary of State for Health**

*Unreported; 28 February 2003*

The case concerned the rules preventing a deceased father's name from being entered on the birth certificate of his child.

Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was declared incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father's name to be given on the birth certificate of his child.

**The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, which came into force on 1 December 2003.**

## **10. R (on the application of Uttley) v Secretary of State for the Home Department**

*Administrative Court; [2003] EWHC 950 (Admin); 8 April 2003*

The case concerned a prisoner who argued that his release on licence was an additional penalty to which he would not have been subject at the time he was sentenced.

Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were declared incompatible with the claimant's rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison.

**The House of Lords overturned the declaration on 30 July 2004: [2004] UKHL 38.**

## **11. Bellinger v Bellinger**

*House of Lords; [2003] UKHL 21; 10 April 2003*

A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.

Section 11(c) of the Matrimonial Causes Act 1973 was declared incompatible with Articles 8 and 12 in so far as it made no provision for the recognition of gender reassignment.

**In *Goodwin v UK* (Application 28957/95; 11 July 2002) the ECtHR had already identified the absence of any system for legal recognition of gender change as a violation of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004, which came into force on 4 April 2005.**

## **12. R (on the application of M) v Secretary of State for Health**

*Administrative Court; [2003] EWHC 1094 (Admin); 16 April 2003*

The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of the Act designated her adoptive father as her 'nearest relative' even though he had abused her as a child.

Sections 26 and 29 of the Mental Health Act 1983 were declared incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative.

**The Government published in 2004 a Bill proposing reform of the mental health system, which would have replaced these provisions. Following substantial opposition in Parliament, the Government withdrew the Bill in March 2006, and introduced a new Bill to amend the Mental Health Act 1983 which received Royal Assent on 19 July 2007 as the Mental Health Act 2007. Sections 23 to 26 of this Act amend the relevant provisions to remove the parts declared incompatible. These provisions came into force on 3 November 2008.**

### **13. R (on the application of Wilkinson) v Inland Revenue Commissioners**

*Court of Appeal; [2003] EWCA Civ 814; 18 June 2003*

The case concerned the payment of Widow's Bereavement Allowance to widows but not widowers.

Section 262 of the Income and Corporation Taxes Act 1988 was declared incompatible with Article 14 when read with Article 1 of Protocol 1 in that it discriminated against widowers in the provision of Widow's Bereavement Allowance.

**The section declared incompatible was no longer in force at the date of the judgment, having already been repealed by the Finance Act 1999 sections 34(1), 139, and Schedule 20. This came into force in relation to deaths occurring on or after 6 April 2000.**

### **14. R (on the application of Hooper and others) v Secretary of State for Work and Pensions**

*Court of Appeal; [2003] EWCA Civ 875; 18 June 2003*

The case concerned Widowed Mother's Allowance which was payable to women only and not to men.

Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were found to be in violation of Article 14 in combination with Article 8 and Article 1 of Protocol 1 in that benefits were provided to widows but not widowers.

**The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1), which came into force on 9 April 2001.**

### **15. R (on the Application of MH) v Secretary of State for Health**

*Court of Appeal; [2004] EWCA Civ 1609; 3 December 2004*

The case concerned a patient who was detained under section 2 of the Mental Health Act 1983 and was incompetent to apply for discharge from detention. Her detention was extended by operation of provisions in the Mental Health Act 1983.

Section 2 of the Mental Health Act 1983 was declared incompatible with Article 5(4) in so far as:

- (i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the Mental Health Review Tribunal but the incompetent patient is incapable of exercising that right; and
- (ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).

**The House of Lords overturned the declaration on 20 October 2005: [2005] UKHL 60**

## **16. A and others v Secretary of State for the Home Department**

*House of Lords; [2004] UKHL 56; 16 December 2004*

The case concerned the detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without violating Article 3. They were detained without charge or trial in accordance with a derogation from Article 5(1) provided by the Human Rights Act 1998 (Designated Derogation) Order 2001.

The Human Rights Act 1998 (Designated Derogation) Order 2001 was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was declared incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.

**The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders; it came into force on 11 March 2005.**

## **17. R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (No. 3)**

*Court of Appeal; [2005] EWCA Civ 1184; 14 October 2005*

&

## **18. R (on the application of Gabaj) v First Secretary of State**

*Administrative Court; unreported; 28 March 2006*

These two cases concerned applications for local authority accommodation. In *Morris*, the application was by a single mother (a British citizen) whose child was subject to immigration control. Section 185(4) of the Housing Act 1996 was declared incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation.

In *Gabaj*, it was the claimant's pregnant wife, rather than the claimant's child, who was a person from abroad. As this case was a logical extension of the declaration granted in *Morris*, the Government agreed to the making of a further similar declaration that section 185(4) of the Housing Act 1996 is incompatible with Article 14 to the extent that it requires a pregnant member of the household of a British citizen, if both are habitually resident in the UK, to be disregarded when determining whether the British citizen has a priority need for accommodation or is homeless, when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.

**The law was amended by Schedule 15 to the Housing and Regeneration Act 2008. The Act received Royal Assent on 22 July 2008 and Schedule 15 was brought into force on 2 March 2009.**

### **19. R (on the application of Baiai and others) v Secretary of State for the Home Department and another**

*Administrative Court; [2006] EWHC 823 (Admin); 10 April 2006*

The case concerned the procedures put in place to deal with sham marriages, specifically which persons subject to immigration control are required to go through before they can marry in the UK.

Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was declared incompatible with Articles 12 and 14 in that the effect of this provision is unjustifiably to discriminate on the grounds of nationality and religion, and in that this provision is not proportionate. An equivalent declaration was made in relation to Regulations 7 and 8 of the Immigration (Procedure for Marriage) Regulations 2005 (which imposed a fee for applications). Home Office Immigration Guidance was also held to be unlawful on the grounds it was incompatible with Articles 12 and 14, but this did not involve section 4 HRA.

**The House of Lords held that the declaration of incompatibility should be limited to a declaration that section 19(1) of the Act was incompatible with Article 14 taken together with Article 12, insofar as it discriminated between civil marriages and Church of England marriages. In other respects it was possible to read and give effect to section 19 in a way which was compatible with Article 12: [2008] UKHL 53.**

**The Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Remedial) Order 2011 was made on 25 April 2011 and came into force on 9 May 2011. This abolished the Certificate of Approval scheme so that those subject to immigration control who wish to marry in the UK and the Isle of Man will have the freedom to give notice of marriage without having first to seek permission of the Secretary of State.**

### **20. Re MB**

*Administrative Court; [2006] EWHC 1000 (Admin); 12 April 2006*

The case concerned the Secretary of State's decision to make a non-derogating control order under section 2 of the Prevention of Terrorism Act 2005 against MB, who he believed intended to travel to Iraq to fight against coalition forces.

The procedure provided by the 2005 Act for supervision by the court of non-derogating control orders was held incompatible with MB's right to a fair hearing under Article 6.

**The Court of Appeal overturned the declaration, a decision which was upheld by the House of Lords on 31 October 2007: [2007] UKHL 46.**

**21. R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills**

*Administrative Court; [2006] EWHC 2886 (Admin); 16 November 2006*

This case concerned the Care Standards Act 2000 Part VII procedures in relation to provisional listing of care workers as unsuitable to work with vulnerable adults.

Section 82(4)(b) of the Care Standards Act 2000 was declared incompatible with Articles 6 and 8. The Court of Appeal overturned the declaration of incompatibility on 24 October 2007.

**The House of Lords reinstated the declaration of incompatibility on 21 January 2009: [2009] UKHL 3. By the date of the House of Lords' judgment, the transition to a new scheme under the Safeguarding Vulnerable Groups Act 2006 was already underway. The new SVGA scheme does not include the feature of provisional listing which was the focus of challenge in the Wright case. However, the new Act was subject to a subsequent challenge in the Royal College of Nursing case set out below.**

**22. R (on the application of Cliff) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and another**

*House of Lords; [2006] UKHL 54; 13 December 2006*

This was a conjoined appeal in which the appellants were all former or serving prisoners. The issue on appeal was whether the early release provisions, to which each of the appellants was subject, were discriminatory.

Sections 46(1) and 50(2) of the Criminal Justice Act 1991 were declared incompatible with Article 14 taken together with Article 5 on the grounds that they discriminated on grounds of national origin.

**The provisions in question had already been repealed and replaced by the Criminal Justice Act 2003, save that they continued to apply on a transitional basis to offences committed before 4 April 2005. Section 27 of the Criminal Justice and Immigration Act 2008 therefore amended the Criminal Justice Act 1991 to remove the incompatibility in the transitional cases. The amendment came into force on 14 July 2008, but reflected administrative arrangements addressing the incompatibility that had been put in place shortly after the declaration was made.**

### 23. Smith v Scott

*Registration Appeal Court (Scotland); [2007] CSIH 9; 24 January 2007*

This case concerned the incapacity of a convicted prisoner who was unable to register to vote at the Scottish Parliament elections in May 2003 under section 3 of the Representation of the People Act 1983.

The Court ruled that as part of the Court of Session for the purposes of section 4 of the HRA it had the power to make a declaration of incompatibility under that section. It held that the Scottish Parliament was a legislature for the purposes of section 3 of the Representation of the People Act 1983 and, therefore, declared that section 3 was incompatible with Article 3 of Protocol 1 on the grounds that it imposed a blanket ban on convicted prisoners voting in the Scottish Parliament elections. This declaration was substantially similar to the judgment of the ECtHR in the earlier case of *Hirst v the UK (No.2)* (Application 24035/01; 6 August 2005).

**The Government is considering this declaration alongside the ECtHR's decision in *Hirst v UK (No.2)* and its pilot judgment in *Greens & MT v UK* which are covered in the section on ECtHR judgments.**

On 16 October 2013, the UK Supreme Court handed down its judgment on a further legal challenge relating to prisoner voting rights in *Chester & McGeoch*.<sup>20</sup> The Court applied the principles in *Hirst (No.2)* and *Scoppola (No.3)* regarding the blanket ban on voting, but declined to make any further declaration of incompatibility. The Supreme Court took the view that the incompatibility of the blanket ban on prisoner voting in the UK with the ECHR was already the subject of a declaration of incompatibility made by the Registration Appeal Court in *Smith v Scott* and was under review by Parliament and that, in those circumstances, there was no point in making a further declaration of incompatibility.

**In a statement to Parliament on 2 November 2017, the Secretary of State for Justice set out the Government's proposals to make administrative changes to address the *Hirst* judgment, while maintaining the bar on convicted prisoners in custody from voting. First, the Government will make it clear to criminals when they are sentenced that while they are in prison this means they will lose the right to vote. Second, the Government will amend Prison Service guidance to address an anomaly in the current system, where offenders who are released back in the community on licence using an electronic tag under the Home Detention Curfew scheme can vote, but those who are in the community on Temporary Licence cannot.**

**On 7 December 2017, the Committee of Ministers noted with satisfaction the Government's proposed measures, encouraged the UK to implement them as soon as possible and asked the UK to provide an update on implementation by 1 September 2018.**

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<sup>20</sup> R. (on the application of Chester) v Secretary of State for Justice; Supreme Court [2014] UKSC 25

## 24. *Nasseri v Secretary of State for the Home Department*

*Administrative Court; [2007] EWHC 1548 (Admin); 2 July 2007*

The case concerned a challenge, by a national of Afghanistan, to a decision to remove him to Greece under the terms of the Dublin Regulation. The issue was whether paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 – which requires the listed countries (including Greece) to be treated as countries from which a person will not be sent to another State in contravention of his Convention rights – is compatible with Article 3.

Paragraph 3 of Schedule 3 to the 2004 Act, applied by section 33 of the Act, was declared incompatible with Article 3 on the grounds that it precludes the Secretary of State and the courts from considering any question as to the law and practice on *refoulement* in any of the listed countries.

The Court of Appeal overturned the declaration of incompatibility on 14 May 2008: [2008] EWCA Civ 464.

**The claimant appealed to the House of Lords and was unsuccessful. Lord Hoffmann said that the presumption in paragraph 3 of Schedule 3 to the 2004 Act did not preclude an inquiry into whether the claimant's Article 3 rights would be infringed for the purpose of deciding whether paragraph 3, would be incompatible with his Convention rights. In addition, the House of Lords found there to be no evidence of a real risk of *refoulement* from Greece therefore no violation had occurred in this case.**

**On declarations of incompatibility more generally, Lord Hoffmann said that they would *normally* concern a real Convention right in issue in the proceedings, not a hypothetical Convention right (i.e. a violation should generally be demonstrated on the facts for a declaration to be issued) and that the structure of the HRA suggests that 'a declaration of incompatibility should be the last resort.'**

## 25. *R (on the application of Wayne Thomas Black) v Secretary of State for Justice*

*Court of Appeal; [2008] EWCA Civ 359; 15 April 2008*

This case concerned the application of Article 5(4) to the early release of determinate sentence prisoners subject to the release arrangements in the Criminal Justice Act 1991. Under section 35(1) of the Act, the decision whether to release long-term prisoners serving 15 years or more who have reached the halfway point of their sentence, when they become eligible for parole, lies with the Secretary of State rather than the Parole Board. Section 35(1) was repealed and replaced by the Criminal Justice Act 2003. However, it continues to apply on a transitional basis to offences committed before 4 April 2005.

The Court of Appeal found that Article 5(4) requires the review of continuing detention to be undertaken by the Parole Board following the halfway point of such sentences. As a result the Court declared that section 35(1) was incompatible with Article 5(4).

**The House of Lords overturned the declaration of incompatibility on 21 January 2009: [2009] UKHL 1.**

**26. R (on the application of (1) F (2) Angus Aubrey Thompson) v Secretary of State for the Home Department**

*Court of Appeal; [2009] EWCA Civ 792; 23 July 2009*

This case concerned a juvenile and an adult who have been convicted of sexual offences. Under section 82 of the Sexual Offences Act 2003, the nature of the offences they committed and the length of their sentences mean that they are subject to the notification requirements set out in Part 2 of that Act for an indefinite period. At the time, there was no statutory mechanism for reviewing indefinite notification requirements.

Section 82 of the Sexual Offences Act 2003 was declared incompatible with Article 8 by the Court of Appeal on 23 July 2009 and this decision was upheld by the Supreme Court on 21 April 2010: [2010] UKSC17. In doing so, the court concluded that, in so far as the relevant provisions allow for indefinite notification without review, they present a disproportionate interference with the right to respect for private life and are incompatible with Article 8(1).

**To remedy the incompatibility, the draft Sexual Offences Act 2003 (Remedial) Order 2012 was laid before Parliament on 5 March 2012 in accordance with paragraph 2(a) of Schedule 2 HRA. The remedial order was subsequently approved by Parliament and came into force on 30 July 2012, amending the Sexual Offences Act 2003 to introduce a mechanism which will enable registered sex offenders who are subject to indefinite notification requirements to apply for those requirements to be reviewed.**

**27. R (on the application of Royal College of Nursing and others) v Secretary of State for Home Department**

*Administrative Court; [2010] EWHC 2761; 10 November 2010*

The case concerned the procedures established by Part 1 of the Safeguarding Vulnerable Groups Act 2006 ('SVGA 2006'), specifically those in Schedule 3 to that Act, which provide for the inclusion of individuals who had committed a specified criminal offence on a list to bar them from working with children or vulnerable adults. It was found that procedures which denied the right of a person to make representations as to why they should not be included on a barred list violated Article 6 and had the potential to give rise to violations of Article 8.

The legislation which preceded the SVGA 2006 was also declared incompatible, see: at 21 above, R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills (*House of Lords; [2009] UKHL 3; 21 January 2009*).

**Section 67(2) and (6) of the Protection of Freedoms Act 2012 amends Schedule 3 to the SVGA 2006 and gives the person the opportunity to make representations as to why they should not be included in the children's or adults' barred list before a barring decision is made. These provisions commenced on 10 September 2012.**

**28. R (on the application of T, JB and AW) v Chief Constable of Greater Manchester, Secretary of State for the Home Department and Secretary of State for Justice**

*Court of Appeal; [2013] EWCA Civ 25; 29 January 2013*

The Court of Appeal found the Police Act 1997 and the Exceptions Order to the Rehabilitation of Offenders Act 1974 (ROA) incompatible with Article 8 on the grounds that blanket disclosure of all cautions and convictions is disproportionate.

The Court did not prescribe any solution, instead stating that it would be 'for Parliament to devise a proportionate scheme' and directed that its decision should not take effect until the Supreme Court determined the Government's application to appeal.

**While the Government's application to appeal to the Supreme Court was outstanding, changes were made to the Exceptions Order and to the Police Act by secondary legislation in response to the Court of Appeal judgment, and came in to force on 29 May 2013.**

**The Supreme Court heard the case on 13/14 December 2013 and issued its judgment on 18 June 2014. Overall it upheld the declaration of incompatibility with Article 8 in respect of the Police Act 1997. It also held that, in its application to the case of T, the Exceptions Order to the Rehabilitation of Offenders Act was incompatible with Article 8 but significantly decided that no judicial remedy was required in respect of the Order. Therefore, the Secretary of State for Justice's appeal against the Court of Appeal's declaration that the Exceptions Order was *ultra vires* was successful.**

**While the Supreme Court noted that the Exceptions Order had been amended following the Court of Appeal judgment to provide that some spent convictions and cautions would not need to be disclosed, it did not carry out any in-depth analysis of the new regime or comment on its compatibility with Article 8.**

**29. R (on the application of Reilly (no.2) and Hewstone) v Secretary of State for Work and Pensions**

*Administrative Court; [2014] EWHC 2182; 4 July 2014*

In this case, the claimants sought a declaration of incompatibility on the ground that the Jobseekers (Back to Work Schemes) Act 2013 ('the 2013 Act') was incompatible with their rights under Article 6 and Article 1 of Protocol 1.

The case followed that of R (Reilly & Wilson) v Secretary of State for Work and Pensions [2013] UKSC 68; [2013] 3 WLR 1276 where the Court of Appeal, and later the Supreme Court, held the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ('the 2011 Regulations') to be *ultra vires* and certain notification letters to be deficient.

The 2013 Act came into force after the Court of Appeal judgment and had the effect of retrospectively validating the 2011 Regulations, which the Court of Appeal had held to be *ultra vires* and the notification letters that had failed to comply with the requirements of reg. 4 of the 2011 Regulations.

The judgment found the 2013 Act was incompatible with the claimants' rights under Article 6(1) and a declaration of incompatibility was granted. However, it was decided that Article 1 of Protocol 1 was not engaged.

**The Government appealed the judgment to the Court of Appeal and the claimants filed a counter-appeal. The Court joined this case with Jeffrey and Bevan v Secretary of State for Work and Pensions and upheld the declaration of incompatibility on 29 April 2016: [2016] EWCA Civ 413.**

**The Government is considering the options for addressing the incompatibility.**

### **30. Benkharbouche and Janah v Embassy of the Republic of Sudan, and Libya**

*Court of Appeal; [2015] EWCA Civ 33; 5 February 2015*

The Court of Appeal held that sections 4(2)(b) and 16(1)(a) of the State Immunity Act 1978 are incompatible with Article 6 ECHR in so far as they barred two members of the service staff of foreign missions (Libya and Sudan) bringing employment claims in the UK courts. In so far as those claims fell within the scope of EU law (e.g. Working Time Directive claims), there was also a violation of Article 47 of the Charter of Fundamental Rights.

In terms of remedy, the Court of Appeal made a declaration of incompatibility in respect of sections 4(2)(b) and 16(1)(a) of the 1978 Act. For the same reasons, the Court found that those provisions of the 1978 Act were incompatible with EU law. In respect of those employment claims which were within the scope of EU law, the Court disapplied the provisions in so far as they barred the claims, which meant the claims could be brought by the claimants.

**The Foreign Secretary appealed to the Supreme Court which dismissed the appeal and upheld the declaration of incompatibility: [2017] UKSC 62.**

**The Government is considering its response.**

### **31. Northern Ireland Human Rights Commission, Re Judicial Review**

*High Court of Northern Ireland; [2015] NIQB 102; 16 December 2015*

The Northern Ireland Human Rights Commission brought a legal challenge to the courts in Northern Ireland seeking a declaration that legislation criminalising abortion at Section 25 of the Criminal Justice Act (NI) 1945 is incompatible with Articles 3, 8 and 14.

The High Court held that the failure to provide exceptions to the prohibition of abortion in cases where there is a fatal foetal abnormality or where the pregnancy is a result of sexual crime, up to the date when the foetus becomes capable of existing independently of the mother, violated Article 8.

The Department of Justice and the Attorney General for Northern Ireland appealed to the Court of Appeal. Judgment was handed down on 29 June 2017 ([2017] NICA 42).

The Court did not consider that Article 2 or 3 were engaged in this case. In relation to Article 8, the Court considered that given the majority vote in the Northern Ireland Assembly in February 2017 on the question of whether abortion should be lawful when a foetal abnormality is diagnosed, the fact that it remains under consideration in the Assembly, and the wide margin of appreciation afforded by the ECtHR to states in this area, it could not grant a declaration of incompatibility on this issue and consequently allowed the appeal by the Department of Justice and Attorney General for Northern Ireland. The Court considered that making the declaration sought by the Northern Ireland Human Rights Commission would effectively amount to judicial legislation. It was proposed that it was not 'institutionally appropriate' for the Court to intervene at this stage, although the Lord Chief Justice concluded in his remarks that although his preference was for a determination by elected representatives, if there is no provision for a practical and effective resolution the court may still have a role.

**The Northern Ireland Human Rights Commission appealed to the UK Supreme Court and the case was heard in October 2017. A date for the Supreme Court's ruling has not been fixed, but is expected early next year.**

### **32. David Miranda v Secretary of State for the Home Department**

*Court of Appeal; [2016] EWCA Civ 6; 19 January 2016*

Mr Miranda was examined under Schedule 7 to the Terrorism Act 2000 by the Metropolitan Police at Heathrow Airport on 18 August 2013. Schedule 7 allows an examining officer to stop and question and, when necessary, detain and search individuals travelling through border control areas to determine whether they appears to be someone who is or has been involved in the commission, preparation or instigation of acts of terrorism.

During his period of examination, Mr Miranda was questioned and items in his possession were taken from him. Mr Miranda is the spouse of Glenn Greenwald, a journalist who at the time was working for *The Guardian*. The information taken included encrypted material derived from data from the National Security Agency of the United States that had been obtained by Edward Snowden. This included US intelligence material, some of which formed the basis of articles that appeared in *The Guardian* on 6 and 7 June 2013. Mr Miranda was accepted to be carrying the material in order to assist Mr Greenwald in his journalistic activity.

The Court held that Schedule 7 was incompatible with Article 10, in relation to journalistic material, as it was not subject to adequate safeguards against arbitrary use.

**The Court's judgment concerned Schedule 7 as it was at the time of the Miranda examination, which took place in August 2013. Since that time, Schedule 7 has been amended, as has the Schedule 7 Code of Practice for Examining and Review Officers.**

**Paragraph 40 of the Code now states:**

***'examining officers should cease reviewing, and not copy, information which they have reasonable grounds for believing is subject to legal privilege, is excluded material or special procedure material, as defined in sections 10, 11 and 14 of the Police and Criminal Evidence Act 1984 (PACE).'***

**Section 11(1)(c) of the Police and Criminal Evidence Act 1984 includes journalistic material within the meaning of 'excluded material'.**

**33. R (on the application of P and A) v Secretary of State for the Home Department and Others**

*Administrative Court; [2016] EWHC 89 (Admin); 22 January 2016*

&

**34. R (on the application of G) v Constable of Surrey Police and Others**

*Administrative Court; [2016] EWHC 295 (Admin); 19 February 2016*

Under the Rehabilitation of Offenders Act 1974, after a certain period of time most convictions and all cautions become 'spent' and are protected from disclosure. However, the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 provides that, in certain circumstances and for certain sensitive professions, spent convictions and cautions are not protected from disclosure and can be taken into account.

Following the decision of the Supreme Court in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35, amendments were made to the Police Act 1997, which sets out the information to be included on a criminal record certificate issued by the Disclosure and Barring Service, and the Exceptions Order to reduce the number of convictions and cautions which are disclosed.

P & A challenged the revised approach to disclosure where an individual has more than one conviction. G challenged the refusal of the Chief Constable to exercise her discretion to expunge records of his reprimand received for a specified offence from the police national computer and the subsequent disclosure of the record.

In both cases the High Court held that there are insufficient safeguards included in the disclosure scheme such that it is still not 'in accordance with the law' for the purposes of Article 8 in the claimants' case. They made a declaration of incompatibility to this effect.

**The Government appealed the decisions to the Court of Appeal and the cases were joined with the related cases of *W* and *Krol*. The effect of both declarations was stayed pending the outcome of the appeal.**

**The Court of Appeal found that the rules providing for indefinite disclosure of (i) multiple convictions, and (ii) a conviction or caution for a specified offence, do not take sufficient account of relevant factors to ensure that the proportionality of the interference with Article 8 is adequately examined: [2017] EWCA Civ 321.**

**The Government has been granted permission to appeal the decision to the Supreme Court. The case is listed for 2018. The effect of the declarations has been stayed pending the outcome of the appeal.**

**35. Z (A Child) (No 2)**

*Family Court; [2016] EWHC 1191 (Fam); 20 May 2016*

A declaration of incompatibility was sought in this matter on the basis that section 54 of the Human Fertilisation and Embryology Act 2008 was a discriminatory interference with a single person's rights to private and family life, and therefore incompatible with Articles 8 and 14. Under section 54 of the 2008 Act only couples (and not single people) can obtain a parental order following a surrogacy arrangement. This contrasts with adoption where single people are able to adopt. The case came following an application to read section 54 compatibly with the Convention under section 3 of the HRA – which was rejected.

Shortly prior to the hearing the Secretary of State for Health conceded that the unavailability of parental orders to single people following a surrogacy arrangement was in violation of Article 14 (taken with Article 8). The Secretary of State made it clear that in their view the policy did not violate Article 8 taken on its own, as there was no right to be conferred parenthood using this particular legal mechanism. The result was a declaration by the court that section 54(1) and (2) of the 2008 Act are incompatible with the rights of the applicant and his child under Article 14 (taken with Article 8) insofar as they prevent the applicant from obtaining a parental order.

**A draft remedial order to address the incompatibility was laid before Parliament on 29 November 2017.**

**36. R (on the application of Johnson) v Secretary of State for the Home Department**

*Supreme Court; [2016] UKSC 56; 19 October 2016*

Mr Johnson was born in Jamaica in 1985 to a Jamaican mother and British father who were not married to one another. As a result of the legislation in place at the time, he did not acquire British nationality at birth, although he would have obtained citizenship if his parents had been married. His father moved to the UK with him when he was four. Under the policy in place at the relevant time, Mr Johnson would have been granted British citizenship had an application for registration as a British citizen been made while he was still a child, provided that, if over 16, he was of good character. But no application was made.

He was subsequently convicted of manslaughter for which he was sentenced to nine years' imprisonment. In 2011, he was issued with a deportation order on the ground that he was liable to automatic deportation as a 'foreign criminal' under section 32(5) UK Borders Act 2007. Mr Johnson argued that deportation would violate Article 14 (taken with Article 8), given that he would not have been liable to deportation had his parents been married to one another. The Secretary of State reconfirmed her decision and also certified that Mr Johnson's claim was clearly unfounded, thereby removing his right of in-country appeal against her decision.

The High Court held that discrimination against a child of unmarried parents at birth and thereafter violated Mr Johnson's Convention rights, and quashed the certificate. The Court of Appeal allowed the Secretary of State's appeal, holding that there had been no violation of Mr Johnson's rights at the relevant time, namely his birth, which was long before the HRA came into force.

The Supreme Court unanimously allowed the appeal, finding that Mr Johnson's liability to deportation by reason of the accident of his birth outside wedlock is unlawfully discriminatory, in violation of Article 14 (taken with Article 8). The court also made a declaration that the statutory requirement that a person in Mr Johnson's position must also be of good character in order to be granted British citizenship is incompatible with Article 14 (taken with Article 8). The incompatible provision is paragraph 70 of Schedule 9 to the Immigration Act 2014, which inserts into section 41A of the 1981 Act (the requirement to be of good character) a reference to sections 4F, 4G, 4H and 4I, which relate to various categories of people who would automatically have become UK citizens had their parents been married to one another at their birth.

**The Government is considering the options for addressing the incompatibility.**

### **37. Consent Order in R (on the application of David Fenton Bangs) v Secretary of State for the Home Department**

Mr Bangs is a US citizen who claimed to have arrived in the UK in 1979, aged 11 years old. He was granted indefinite leave to remain on arrival to the UK. Mr Bangs' mother was British and his father was American. Between 1983 and 1990 he was convicted of a series of offences culminating in two convictions for murder. He was sentenced to a life sentence with a minimum term of imprisonment of 12 years and 1 day. In May 2004 he was released from prison on life sentence.

In May 2013, as a result of his arrest for a suspected public order offence, Mr Bangs' life licence was revoked and he was recalled to prison. In August 2013 the Secretary of State invited Mr Bangs to make representations as to why he should not be deported from the UK. He stated he had a claim to private and family life under Article 8.

Mr Bangs was convicted for the public order offence and later released from custody in March 2014. In April 2015 he was detained under immigration powers and served with a notice of a decision to make a deportation order. He was invited to make submissions and again raised his Article 8 claim.

The Secretary of State refused Mr Bangs' human rights claim and made a deportation order and certified his claim under section 94B of the Nationality, Immigration and Asylum Act 2002. The effect was Mr Bangs would be removed pending the outcome of his appeal.

Mr Bangs issued his human rights claim in the Upper Tribunal of the Immigration and Asylum Chamber. Permission was initially refused but in May 2016 he was granted permission to appeal. In March 2017 Mr Bangs submitted amended grounds of claim in accordance with a consent order agreed by both parties. They raised an argument in reliance on *Johnson* (above).

The Secretary of State accepted Mr Bangs' evidence that his mother was British and as such that his deportation would be contrary to Article 14 (taken with Article 8). On that basis the Secretary of State agreed to the making of a declaration of incompatibility in the terms of the consent order: 'Section 47(1) of the Borders, Citizenship and Immigration Act 2009 is incompatible with Article 14, read with Article 8, of the European Convention on Human Rights, in so far as it introduces into the British Nationality Act 1981 a new section 41A applying a "good character" requirement for applications for registration under section 4C of the British Nationality Act 1981.'

This mirrored the approach in *Johnson*, where the Supreme Court declared as incompatible the provision of primary legislation which introduced the good character requirement in question.

**The Government is considering the options for addressing the incompatibility.**

## Annex B: Statistical information on implementation of ECtHR judgments

Data in tables 1 and 2 are taken from the Annual Report of the Committee of Ministers, 'Supervision of the execution of judgments and decisions of the European Court of Human Rights' (<http://www.coe.int/en/web/execution/annual-reports>). Data for 2014 are from the 9th Annual Report and show the position at 31 December 2015, data for 2015 and 2016 are from the 10th Annual Report and show the position at 31 December 2016.

**Table 1: UK Performance**

Statistic	UK performance		
	2014	2015	2016
<b>New cases</b>			
i) Total number of UK cases	15	5	7
ii) of which leading cases	3	2	6
<b>Cases closed by final resolution</b>			
i) Total number of UK cases	16	12	5
ii) of which leading cases	10	4	4
<b>Pending cases</b>			
i) Total number of UK cases	26	19	21
ii) of which leading cases	11	8	11 <sup>21</sup>
<b>Leading cases pending by length of time</b>			
Leading UK cases pending <2yrs	6	2	4
Leading UK cases pending 2–5yrs	3	3	1
Leading UK cases pending >5yrs	2	3	5
<b>Payment of just satisfaction</b>			
i) Within deadline	17	2	4
ii) Late	0	0	0
iii) Pending waiting confirmation of payment	0	1	1
<b>Amount of just satisfaction (€)</b>			
Total amount paid by the UK	50,050	23,450	74,900

<sup>21</sup> This is greater than the sum of the three figures below as it includes one case not yet classified.

**Table 2: Judgments under supervision of the Committee of Ministers at the end of years 2014–2016 by State Party to the Convention**

Ranking by 2016 pending cases	State	All pending cases			of which leading cases		
		2014	2015	2016	2014	2015	2016
1	Italy	2622	2421	<b>2350</b>	78	81	70
2	Russian Federation	1474	1549	<b>1573</b>	187	197	204
3	Turkey	1500	1591	<b>1430</b>	168	178	182
4	Ukraine	1009	1052	<b>1147</b>	135	144	146
5	Romania	639	652	<b>588</b>	83	76	72
6	Hungary	331	388	<b>440</b>	37	43	54
7	Greece	558	302	<b>311</b>	56	52	50
8	Bulgaria	325	272	<b>290</b>	95	89	94
9	Republic of Moldova	256	270	<b>286</b>	76	79	80
10	Poland	503	346	<b>225</b>	40	35	34
11	Croatia	172	162	<b>180</b>	67	70	74
12	Azerbaijan	114	147	<b>168</b>	42	45	53
13	Serbia	194	248	<b>162</b>	33	29	26
14	'The Former Yugoslav Republic of Macedonia'	113	123	<b>66</b>	26	29	28
15	Slovak Republic	49	71	<b>59</b>	20	27	10
16	France	54	69	<b>58</b>	35	41	28
17	Latvia	58	63	<b>53</b>	44	50	41
18	Belgium	59	50	<b>51</b>	13	13	14
19	Albania	38	49	<b>50</b>	18	18	10
20	Slovenia	302	309	<b>49</b>	21	20	21
21=	Finland	41	42	<b>41</b>	13	13	12
	Portugal	122	129	<b>41</b>	10	12	13
	Spain	29	34	<b>41</b>	15	18	17
24	Georgia	29	38	<b>39</b>	19	22	15
25=	Austria	72	42	<b>31</b>	23	22	14
	Bosnia and Herzegovina	24	26	<b>31</b>	10	11	11
27=	Germany	19	20	<b>27</b>	15	17	21
	Lithuania	26	31	<b>27</b>	23	24	20
29	United Kingdom	26	19	<b>21</b>	11	8	11
30	Armenia	34	25	<b>19</b>	16	12	12
31	Montenegro	17	17	<b>16</b>	13	13	6
32	Malta	17	23	<b>12</b>	10	11	7
33=	Czech Republic	14	9	<b>10</b>	10	7	6
	Netherlands	11	9	<b>10</b>	9	9	8
35	Cyprus	5	7	<b>9</b>	5	4	5

## Responding to human rights judgments

Ranking by 2016 pending cases	State	All pending cases			of which leading cases		
		2014	2015	2016	2014	2015	2016
36	Switzerland	18	14	7	16	13	7
37	Ireland	6	6	6	2	2	2
38	Estonia	9	11	5	7	8	4
39=	Andorra	1	1	2	1	1	2
	Liechtenstein	0	1	2	0	1	1
	San Marino	1	2	2	1	2	2
	Sweden	3	3	2	2	3	2
43=	Denmark	0	0	1	0	0	1
	Iceland	6	5	1	5	2	1
	Luxembourg	0	1	1	0	1	1
	Norway	4	3	1	3	3	1
47	Monaco	0	0	0	0	0	0
	<b>Total</b>	<b>10904</b>	<b>10652</b>	<b>9941</b>	<b>1513</b>	<b>1555</b>	<b>1493</b>

**Table 3: Judgments finding a violation against the UK under supervision of Committee of Ministers at the end of July 2017**

	Case name	Application	Judgment final on
<b>Enhanced Procedure</b>			
<b>1</b>	<b><i>McKERR GROUP:</i></b> McKerr Jordan Kelly and Others Shanaghan McShane Finucane Collette and Michael Hemsworth McCaughey and Others	28883/95 24746/94 30054/96 37715/97 43290/98 29178/95 58559/09 43098/09	04/08/2001 04/08/2001 04/08/2001 04/08/2001 28/08/2002 01/10/2003 16/10/2013 16/10/2013
<b>2</b>	<b><i>HIRST/GREENS AND MT GROUP:</i></b> Hirst No.2 Greens and MT Firth and Others McHugh and Others Millbank and Others	74025/01 60041/08 47784/09 51987/08 44473/14	06/10/2005 11/04/2011 15/12/2014 10/02/2015 30/06/2016
<b>Standard Procedure</b>			
<b>3</b>	<b>S and Marper</b>	30562/04 and 30566/04	04/12/2008
<b>4</b>	<b>MGN Ltd</b>	39401/04	18/04/2011
<b>5</b>	<b>JN (closed 06/09/2017)</b>	37289/12	19/08/2016
<b>6</b>	<b>Hammerton</b>	6287/10	12/09/2016
<b>7</b>	<b>McNamara (closed 21/09/2017)</b>	22510/13	12/01/2017
<b>8</b>	<b>VM (closed 06/09/2017)</b>	49734/12	30/01/2017

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