

Equality and Human Rights Commission

Human Rights Review 2012

How fair is Britain?
An assessment of how well
public authorities protect
human rights



**Equality and
Human Rights**
Commission

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We would also like to thank all those who contributed to the Human Rights Review through the various roundtable events and expert contributions. A full list of contributors can be found in the Annex of this report.

Foreword

We are fortunate to live in a country that believes that everyone's fundamental rights and freedoms should be protected. Human rights affect every aspect of our lives. They are about the right to be treated with dignity and respect when we use public services, and about the freedom to voice ideas openly and protest if we disagree with the government of the day. Human rights can ensure that people live their lives free from fear, knowing that their private lives are safeguarded from intrusion, and that they will not suffer degrading treatment, or worse, loss of life at the hands of public authorities. We have a strong tradition in this country of standing up for human rights at home and arguing for and sometimes fighting for them abroad.

This landmark review assesses how well these rights are protected in Britain. It is the first review of its kind since the introduction of the Human Rights Act, and takes the opportunity to look at the many ways in which the protection of human rights in Britain has been strengthened by law, policy and practice. There is much here that should make us proud. The evidence shows that the government and public authorities largely respect human rights standards. The Human Rights Act has gone a long way in enabling us to challenge cases of injustice and move us towards a society where human rights are respected and enjoyed by all. But there is also more still to be done.

The review sets out areas where public authorities are falling short of meeting their obligations and could improve the way they protect fundamental rights and freedoms. Through the objective analysis of evidence, this review identifies ten key areas for improvement. It also provides a benchmark from which we can work with government to track our progress in the future.

I am confident that this review will prove invaluable in helping us all to achieve a society built on fairness, where there is respect for, and protection of, the rights and freedoms of everyone.

This review is the work of many people. Aside from those outside the Commission who are acknowledged elsewhere, I would like to thank our own intelligence and legal policy teams, ably led by Karen Jochelson, for their dedicated work in

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A handwritten signature in dark ink that reads "Mark Hammond".

Mark Hammond

Chief Executive

Equality and Human Rights Commission

Introduction

Human rights protect everyone in Britain and affect every aspect of our lives. They are about our right to be treated with dignity, respect and fairness by the government and our public authorities, such as hospitals, care homes, the police or prisons. They are about the freedom to voice ideas openly and to protest if you disagree with government policy. They are about protecting individuals from arbitrary and excessive action by government or public officials that may result in loss of life, liberty, degrading treatment or intrusion into people's personal lives. We take many of these rights for granted, and often do not realise how successfully our legal and institutional systems work to protect and uphold them.

In this landmark review the Equality and Human Rights Commission assesses how well Britain is meeting its human rights obligations under the European Convention of Human Rights and our own Human Rights Act 1998 (HRA) which gives effect to the Convention in UK law. We set out one by one the rights and freedoms protected in the Convention, and explore to what extent each is enjoyed by people living in Britain today. We look at how our laws, institutions and institutional processes support and protect each right.

The Equality and Human Rights Commission is Britain's statutory and independent body promoting equality and human rights in society.¹ It was set up to challenge discrimination, to protect and promote equality and respect for human rights, and to encourage respect between people of different backgrounds.² It has duties to promote awareness, understanding and protection of human rights; and to encourage public authorities to comply with the HRA.³ It is also

1 The Equality and Human Rights Commission has jurisdiction over England, Wales and Scotland in relation to equality and human rights. In relation to Scotland the human rights jurisdiction is shared with the Scottish Human Rights Commission. The Commission has jurisdiction over matters reserved to the Westminster parliament and the Scottish Human Rights Commission has jurisdiction over matters devolved to the Scottish Parliament.

2 Part 1, Section 3 of the Equality Act 2006.

3 Part 1, Section 9 of the Equality Act 2006.

required to review progress in society on equality and human rights, produce indicators to measure that progress and report on progress every three years.⁴

The Commission is also a National Human Rights Institution (NHRI) accredited by the United Nations (UN) under the Paris Principles. These require it to monitor, advise and report to the government and parliament on the human rights situation in Britain, including any human rights violations.⁵ The Human Rights Review meets the Commission's statutory duties under the Equality Act 2006, and its requirements as an NHRI. It assesses human rights in England, Wales and Scotland.⁶

Britain has a good track record on human rights. The government largely respects the human rights of people in Britain. Direct abuses by the state against individuals are thankfully rare. We have domestic legislation protecting human

4 Section 12 of the Equality Act 2006. The Commission's Equality Measurement Framework sets out indicators to measure progress on equality issues and the Human Rights Measurement Framework sets out indicators to measure progress on human rights.

Alkire, S., Bastagli, F., Burchardt, T., Clark, D., Holder, H., Ibrahim, S., Munoz, M., Terrazas, P., Tsang, T., Vizard, P., 2009. *Developing the Equality Measurement Framework: selecting the indicators*. Manchester: Equality and Human Rights Commission. Available at: www.equalityhumanrights.com/key-projects/equality-measurement-framework/. Accessed 20/11/2011.

Candler, J., Holder, H., Hosali, S., Payne, A.M., Tsang, T. and Vizard, P., 2011. *Human Rights Measurement Framework: Prototype panels, indicator set and evidence base*. Manchester: Equality and Human Rights Commission. Available at: http://www.equalityhumanrights.com/uploaded_files/humanrights/HRMF/hrmf.pdf. Accessed 29/02/2011.

In 2010 the Commission published its first Triennial Review on the equality aspects of its mandate. The review considered the experience of groups of people who share common characteristics in terms of: age; gender; disability; ethnicity; religion or belief; sexual orientation; and transgender status, and, where appropriate, the impact of socio-economic background. The data in the Triennial Review related capabilities and freedoms required to be happy, productive and fulfilled: life; security; health; education; employment; standard of living; care and support; power and voice.

Equality and Human Rights Commission, 2010. *How Fair is Britain. Equality, Human Rights and Good Relations in Britain in 2010*. Available at: www.equalityhumanrights.com/key-projects/how-fair-is-britain/full-report-and-evidence-downloads/. Accessed 20/11/2011.

5 The UN accredited the Commission with 'A' status in recognition of its compliance with the Paris Principles which set out the requirements for effective and independent NHRIs. Office of the United Nations High Commissioner for Human Rights, Paris Principles, Adopted by General Assembly resolution 48/134 of 20 December 1993. Available at: <http://www2.ohchr.org/english/law/parisprinciples.htm>. Accessed 29/02/2012.

6 The Commission has a human rights mandate that covers England, Wales and reserved matters in Scotland. As a result, the review covers all of Britain but in relation to Scotland has only focused on certain reserved aspects or where it has been agreed with the Scottish Human Rights Commission that the Commission will conduct work. An example of this is the Commission's Trafficking Inquiry.

rights in the form of the HRA, which gives effect to most of the European Convention on Human Rights. As the HRA enables people to bring human rights claims in British courts, people no longer need to endure the delay and expense of bringing a claim in the European Court of Human Rights to protect their human rights. But people still have recourse to the European Court as a safety net when our government fails to meet its obligations under the Convention, or domestic judges fail to understand its jurisprudence.

Nevertheless, the place of human rights in Britain is at a critical juncture. Despite the many achievements of the HRA, it has not won hearts and minds across the nation. This led the Coalition Government to consider whether it should be replaced with a Bill of Rights. The government's Commission on a Bill of Rights is currently considering the future of the HRA and will report by December 2012.

Now more than ever, therefore, it is essential to step back and look, with a dispassionate and critical eye, at how well our government and public authorities meet their human rights obligations, and the extent to which human rights are enjoyed by everyone. How can government and public authorities protect human rights more fully? What more can we do to become a society in which human rights are respected and promoted for all?

This review makes a start on answering these crucial questions. It highlights the many ways in which the protection of human rights in Britain has been strengthened by law, policy and practice. It also, however, identifies the key areas in which we believe legislation, institutions, policy or services could protect human rights more fully.

The evolution of the UK's human rights framework

Human rights principles have evolved in our domestic legal system and philosophy over centuries. For example, the Magna Carta introduced the concepts of habeas corpus and trial by jury in 1215,⁷ which are similar to our modern rights to liberty and to a fair trial; and the English Bill of Rights of 1689 prohibited 'cruel and unusual punishments', which is similar to our modern prohibition on torture and inhumane and degrading treatment. Our ideas about liberty, freedom of the press and equality between women and men were developed in the 18th and early 19th centuries by English thinkers such as Thomas Paine, John Locke, Mary Wollstonecraft and John Stuart Mill, and are now key elements of human rights principles.

⁷ Habeas corpus links to the Article 5 right to liberty as it is a legal action which enables a prisoner to be released where they have been unlawfully detained.

The atrocities of World War Two had a significant impact on the development of our modern understanding of human rights across the world. The newly established UN and Council of Europe made the protection of human rights fundamental to their work. The UN set up a Human Rights Commission which drafted and adopted a Universal Declaration of Human Rights in 1948, the foundation of UN human rights treaties and conventions. Meanwhile, European leaders were debating the future for Europe, and Winston Churchill, then a former Prime Minister of the UK, proposed a 'kind of United States of Europe' and a European Charter of Human Rights.⁸ The proposals led to the Council of Europe being founded in 1949 and the drafting of the European Convention on Human Rights in 1950. David Maxwell Fyfe, a British Conservative politician, lawyer and judge was instrumental in drafting the Convention.⁹ The UK signed the Convention in 1950 and was the first country to ratify it in March 1951. These organisations and instruments intended to protect human rights and ensure member states comply with common standards of human rights protection. Today the Convention protects the human rights of about 800 million people in the 47 countries that are members of the Council of Europe.

The rights or 'articles' protected by the Convention are:

- the right to life (Article 2)
- freedom from torture or inhuman or degrading treatment or punishment (Article 3)
- freedom from slavery or servitude, or forced or compulsory labour (Article 4)
- the right to liberty and security (Article 5)
- the right to a fair trial (Article 6)
- freedom from punishment without law (Article 7)
- the right to respect for private and family life, home and correspondence (Article 8)
- freedom of thought, conscience and religion (Article 9)
- freedom of expression (Article 10)
- freedom of assembly and association (Article 11)
- the right to marry (Article 12)
- the right to an effective remedy (Article 13)
- freedom from discrimination in the enjoyment of rights (Article 14).

The right to life; freedom from torture or inhuman or degrading treatment or punishment; and freedom from slavery or servitude, or forced or compulsory labour are absolute rights, meaning they cannot be limited or restricted in any circumstances. The right to liberty and security and the right to a fair trial are

8 Zurich 19 September 1946, see: http://assembly.coe.int/Main.asp?link=/AboutUs/zurich_e.htm. Accessed 29/02/2012.

9 Churchill's Legacy: The Conservative Case for a Human Rights Act, Jesse Norman and Peter Osborne, Published by Liberty, October 2009.

limited rights, meaning that the article sets out specific circumstances in which it is lawful for government to restrict the right. The right to respect for private and family life, home and correspondence; freedom of thought, conscience and religion; freedom of expression; freedom of peaceful assembly and association; and freedom from discrimination in the enjoyment of rights are qualified rights. The government may justifiably limit these but only if the restriction is lawful, supports the legitimate aims outlined in the article (such as the interests of national security, public safety, to protect health or morals or to protect the rights and freedoms of others), and is ‘necessary in a democratic society’.

The Convention has been amended or supplemented by several Protocols. Protocol 1 added rights to the protection of property, education and free elections.¹⁰ Protocols 6 and 13 abolished the death penalty. Protocols 11¹¹ and 14¹² amended the Convention enforcement mechanisms. The UK has ratified all the protocols, except for Protocols 4 and 7 which provide better protection of civil and political rights not covered in the Convention’s main provisions,¹³ and Protocol 12 which expands the prohibition against discrimination to provide a free-standing right to equality.¹⁴ The Commission believes that ratification of Protocol 12 would ensure that the right to equality has the same status as other human rights, and would ensure that the right to equality informed the drafting of legislation by government and its interpretation by the courts.¹⁵

State parties to the Convention also have positive obligations in Article 1 to ensure their legislative, executive and judicial arms respect the rights and freedoms outlined in the Convention and secure them through their domestic legal systems. Article 13 obliges states and their public authorities to provide effective remedies for violations of the Convention rights.

¹⁰ Protocol 1 was ratified by the UK government in 1952 and entered into force in 1954.

¹¹ Protocol 11 was ratified by the UK government in 1994 and entered into force in 1998.

¹² Protocol 14 was ratified by the UK government in 2005 and entered into force in 2010.

¹³ Protocol 4 prohibits imprisonment for debt, protects the right to freedom of movement, prohibits expulsion of nationals, and prohibits collective expulsion of aliens. Protocol 4 entered into force in 1968. Protocol 7 provides procedural safeguards relating to a right to appeal in criminal matters, a right to compensation for wrongful conviction, a right not to be tried or punished twice, the right not to be expelled from a country where they are lawfully resident, and the right to equality between spouses. Protocol 7 came into force in 1988.

¹⁴ Protocol 12 provides a freestanding right to non-discrimination, unlike Article 14 which only provides a right to non-discrimination in the enjoyment of other rights in the Convention.

¹⁵ See the *EHRC shadow report to the UK government’s sixth periodic report on the ICCPR*, June 2008: <http://www.equalityhumanrights.com/legislative-framework/human-rights-submissions/civil-and-political-rights/>. Accessed 21/11/2011; *EHRC shadow report to the UK government’s fifth periodic report on the ICESCR*, May 2009: <http://www.equalityhumanrights.com/legislative-framework/human-rights-submissions/economic-social-and-cultural-rights/>. Accessed 21/11/2011; Submission to the Government Equalities Office regarding an Equality Guarantee for the Equality Bill, March 2009; Response to the Bill of Rights consultation, March 2010. Available at: http://www.equalityhumanrights.com/uploaded_files/pdfs/hra_plus_main_report.pdf. Accessed 21/11/2011.

The European Court of Human Rights is an international court established by the Convention to ensure that the obligations set out in the Convention are observed. It rules on applications by individuals or states alleging violations of the Convention in any of the Council's member states. It was established in 1959 and is primarily a supervisory court of last resort as member states have responsibility for enforcing human rights in their own jurisdictions. The European Court can only consider complaints after individuals have exhausted all their domestic remedies. Contracting states have a duty outlined in Article 46 of the Convention to abide by final judgments of the European Court. The Committee of Ministers of the Council of Europe decides whether a state has adopted sufficient measures to meet the judgment ruling and enable a case to be closed. The Council of Europe has, over a long period, been working on how to improve the effectiveness of the European Court, as it has a very large backlog of cases.¹⁶ The UK government currently has the Chairmanship of the Council of Europe and has made proposals on the reform of the European Court.¹⁷

As a member of the UN the UK government has signed and ratified all the core UN human rights conventions.¹⁸ There is some overlap between the European Convention on Human Rights and the UN conventions. For example the UN Covenant on Civil and Political Rights deals with civil and political rights, including Articles 10 and 11 in the Convention; and the UN Convention Against Torture covers many of the issues associated with Article 3 of the European Convention. The UK government is bound by the UN conventions in international law and reports periodically to the relevant monitoring bodies on its compliance. The reporting mechanisms and comments influence UK policy and practice and are taken into account by UK courts. However, the UN conventions have not been implemented into our domestic law and therefore the enforcement or compliance mechanisms are not as effective as those for the European Convention on Human

¹⁶ As of 30 November 2011 the European Court of Human Rights had 152,800 pending cases, see: http://www.echr.coe.int/NR/rdonlyres/92D2D024-6F05-495E-A714-4729DEE6462C/o/Chart_EN_30112011.pdf. Accessed 30/11/2011.

¹⁷ 'Foreign Secretary announces UK priorities for UK Chairmanship of Council of Europe', 7 November 2011. Available at: <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=688143982>. Accessed 26/01/2012.

Foreign and Commonwealth Office. 'United Kingdom Chairmanship of the Council of Europe Priorities and objectives', 26 October 2011. Available at: www.ukcoe.fco.gov.uk/resources/en/22792210/priorities-281011. Accessed 26.01.2012.

¹⁸ The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), The Convention Against Torture (CAT), the Convention on the Elimination of all forms of Racial Discrimination 1966 (CERD), the Convention on the Elimination of all forms of Discrimination against Women 1979 (CEDAW), the Convention on the Rights of the Child 1989 (CRC), the Convention on the Rights of Persons with Disabilities 2006 (CRPD).

Rights. The UN treaties offer a right to petition. This is codified either through an article of a treaty requiring that states make a declaration that they recognise the competence of a committee to receive complaints, or through an optional protocol requiring state ratification. The Commission believes that the government should sign up to all the optional protocols.¹⁹

The European Union (EU) has also made the protection of human rights more central to its work. As a member of the EU, the UK has agreed to the EU Charter of Fundamental Rights which strengthens the prominence and status of human rights in the EU. The Charter was proclaimed in 2007 and contains a wide range of civil and political rights, socio-economic rights and other human rights. It applies to all EU institutions and member states when implementing EU law domestically.²⁰ When the Lisbon Treaty (Treaty of the European Union) came into force in 2010, the Charter became binding on all member states as it has the same legal force as the two treaties governing the EU.²¹ The Lisbon Treaty also reaffirmed that the EU is founded on the principles of respect for human rights and fundamental freedoms.²² The Charter is relevant whenever the UK government is implementing EU law.

Implementing and monitoring human rights in the UK

Although the UK had ratified the Convention in 1951, until the Human Rights Act there was no domestic law that gave effect to the Convention, and people living in the UK had to go to the European Court of Human Rights in Strasbourg to seek redress for violations of their rights under the Convention. The Human Rights Act 1998 came into force in 2000 and incorporated most of the Convention rights into our domestic law and constitutional structures for the first time. Its intention was

¹⁹ Letter from Geraldine van Bueren, Commission lead commissioner on human rights to Lord McNally, 9 August 2011; Equality and Human Rights Commission, 'Rights to bring complaints under UN human rights treaties: accountability of the UK government for international obligations', 9 August 2011. The UK has not signed the optional protocol for the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has not yet indicated whether it will do so for the Convention on the Rights of the Child (CRC). It has not made a declaration for the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The UK has acceded to the optional protocol for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD).

²⁰ Article 51.1, EU Charter of Fundamental Rights.

²¹ Treaty of the European Union, Article 6(1), 2010/C 83/01 and the Treaty of the Functioning of the EU.

²² Declaration concerning the Charter of Fundamental Rights of the European Union, 2007, Note 1, Official Journal of the European Union. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML>. Accessed 29/02/2012.

to 'bring rights home' by integrating human rights into the work of the government, parliament and the judiciary.²³ The HRA gave people the opportunity to seek justice for human rights claims in UK courts. The HRA was also part of constitutional reform and devolution settlements in Scotland, Wales and Northern Ireland.²⁴

The HRA provides a 'parliamentary model' of human rights protection based on the concept of parliamentary sovereignty: this means that only parliament can alter any law and no judicial authority has the right to overrule its legislation.²⁵ Parliament has a central role in enforcing the HRA, and Ministers must make a statement on whether bills passing through parliament are compatible with Convention rights.²⁶ This allows parliament an opportunity to scrutinise proposed legislation for compliance. Only parliament can change legislation that is incompatible with Convention rights. The courts have no power to strike down such legislation. Courts are required to interpret acts and regulations compatibly with Convention rights²⁷ and to make declarations of incompatibility where acts and legislation cannot be read compatibly.²⁸ This model creates a 'dialogue' between the judiciary and parliament. A declaration of incompatibility does not affect the continued operation of a law, and it is left to parliament to decide what action to take about a declaration of incompatibility. The HRA allows ministers to make remedial orders to amend an act so that it is compatible with Convention rights.²⁹ The HRA also imposes a duty on all public authorities and private bodies carrying out public functions to comply with the Convention rights.³⁰

23 House of Commons. Human Rights Act, Second reading. Official report, 16 February 1998, vol. 307, col. 769.

24 In Scotland, Wales and Northern Ireland the devolution settlements give effect to the Convention. The Scotland Act 1998 requires actions by members of the Scottish Government and legislation enacted by the Scottish Parliament to be compatible with the Convention. If the courts were to find these incompatible, they would be declared invalid and beyond the powers conferred by devolution. The Government of Wales Act 2006 places a requirement on the Welsh Assembly and the Welsh Ministers to act compatibly with the Convention. The Northern Ireland Act 1998 does not permit Ministers and Northern Ireland departments to act in a way which is incompatible with the Convention and the Northern Ireland Assembly cannot legislate in a way that is incompatible with the Convention.

25 A. V. Dicey, 1885. *Introduction to the study of the law of the constitution*. Dicey describes the doctrine of parliamentary sovereignty as follows: parliament may alter any law; no legal distinction between constitutional and other laws; no judicial authority has a right to nullify an Act of Parliament or to treat it as void or unconstitutional.

26 Section 19 HRA.

27 Section 3 HR

28 Section 4 HRA.

29 Section 10 and Schedule 2 HRA.

30 Section 6 HRA.

The Joint Committee on Human Rights (JCHR) is a cross-party Committee set up in 2001 with the remit to consider human rights issues in the UK. It does this through thematic inquiries, by scrutinising bills, and by reviewing the government's implementation of judgments of the European Court and declarations of incompatibility by UK courts.

The government set up the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission to promote understanding of the HRA, compliance with the HRA by public authorities, and monitor and advise the government on any issues relating to human rights in their respective jurisdictions. The three bodies are statutory, independent National Human Rights Institutions (NHRIs) and all have 'A' status under the UN Paris Principles. This means that the UN has recognised the commissions as fully complying with the Paris Principles in terms of their independence from government and their required functions, including monitoring and advising government on human rights violations.

The debate about human rights in Britain today

Debates about the HRA focus on whether it is working effectively or should be replaced with a Bill of Rights. Some critics believe the Act permits the domestic courts to make decisions that override parliament.³¹ In fact, as explained above, the HRA upholds the supremacy of parliament as the only law-making authority. If a court finds that our legislation does not comply with the HRA, it is only the government and parliament that can decide the best way to respond by changing the law or policies. A review by the Department for Constitutional Affairs in 2006³² found that the HRA had not altered the constitutional balance between parliament, government and the judiciary, or between the UK and Europe. It found that the HRA had had a significant and beneficial impact on the development of policy by central government and had improved transparency and parliamentary accountability.

Other critics believe that the HRA is being used inappropriately to protect the rights of people convicted or accused of criminal activity. These claims do not often stand up to scrutiny. For example, Dennis Nilson, a convicted serial killer, brought a case to court in 2001 arguing he should have access to pornography as part of his freedom of expression. The court denied him permission even to bring

³¹ For example, M. Pinto-Duschinsky, 2011. *Bringing Rights Back Home: making human rights compatible with parliamentary democracy in the UK*. London: Policy Exchange.

³² Joint Committee on Human Rights, 2006. *The Human Rights Act: The DCA and Home Office Reviews*. Thirty-second Report of Session 2005-06. London: The Stationery Office.

the claim, on the basis there was no arguable case that his human rights had been breached.³³ However critics of the HRA still claim incorrectly that he was allowed access to pornography as part of his human rights.³⁴ There have been numerous similar examples in the past few years where declarations by politicians or the press that the HRA protects the rights of criminals or illegal immigrants later prove to be untrue.³⁵ The JCHR examined several cases that appeared to demonstrate that public safety was ignored in favour of the human rights of criminals and foreign offenders. It concluded that in each case ‘the Human Rights Act has been used as a convenient scapegoat for unrelated administrative failings within Government’.³⁶

Although many of these claims were factually incorrect, at their heart is an understandable uneasiness with protecting the rights of individuals who have broken the law or ignored the rights of others. However, the fundamental basis of the Convention is that everyone has human rights, and that a government cannot selectively award rights to some people and not to others without creating a system that discriminates against certain groups of people.

Studies of public perceptions of human rights show that people overwhelmingly agree that values such as fairness, freedom of expression, and being treated with dignity and respect are important. An Ipsos-Mori opinion poll for the Equality and Human Rights Commission found that 81 per cent of people interviewed agreed that ‘human rights are important for creating a fairer society’, 82 per cent agreed that ‘there should be a set of human rights standards for how public services treat people’, and 84 per cent agreed that it was ‘important to have a law that protects human rights’.³⁷ These findings are supported by other studies.³⁸ At

33 Clarke, M. and Williams, G. Nd. *Daily Mail*. www.dailymail.co.uk/news/article-80619/Serial-killers-legal-aid-porn-bid.html. Accessed 27/01/12; Liberty, ‘Human Right Myths’. Available at: <http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/human-rights-act-myths/index.php>. Accessed 27/01/2012.

34 ‘Fifteen reasons to scrap it’, *The Sun*, 9 February 2011. Available at: www.thesun.co.uk/sol/homepage/features/3400520/Crazy-Human-Rights-killed-my-only-child.html Accessed 27/01/2012.

35 Khan, S. ‘A fair trial for the Human Rights Act’. Lecture to the LSE Law Department from Rt Hon Sadiq Khan MP, 9 June 2011. Available at: www2.lse.ac.uk/publicEvents/pdf/20110609%20Sadiq%20Khan%20transcript.pdf. Accessed 11/01/2012; LSE, ‘Human rights reporting in the media: corrections and clarifications’. Available at: www2.lse.ac.uk/humanRights/articlesAndTranscripts/2011/KlugHRAMedia.pdf. Accessed 27/01/2012.

36 Joint Committee on Human Rights, 2006. *The Human Rights Act: The DCA and Home Office Reviews*. Thirty-second Report of Session 2005-06. London: The Stationery Office.

37 Kaur-Ballagan, K., Castell, S., Brough, K. and HFriemert, H., 2009. *Public perceptions of human rights*. Equality and Human Rights Commission. Pp. 20 and 23. The poll findings are based on interviews with a representative sample of 1,994 adults. Available at: www.equalityhumanrights.com/uploaded_files/public_perceptions_of_human_rights_ipos_mori.pdf. Accessed 11/01/2012.

38 Ministry of Justice, 2008. *Human Rights Insight Project*. London: Ministry of Justice.

the same time, the term ‘human rights’ also has negative associations and many people believe that asylum seekers and refugees, immigrants, lawyers and criminals take unfair advantage of the HRA.³⁹ Many people also do not know much about our human rights legislation.⁴⁰

So despite widespread support for the general principles of human rights – and even for the idea of a law protecting rights – many people are unconvinced about the value of the HRA. There are several explanations for this. The previous government pointed to the ‘accumulative and corrosive’ impact on public confidence caused by negative or misconceived media reporting on the HRA and the Convention.⁴¹ The JCHR also criticised ministers for failing systematically to dispel myths about the HRA.⁴²

Evidence also shows that public officials do not always understand the relevance of human rights to delivering public services. In 2009 the Commission’s Human Rights Inquiry reported on how the HRA was understood and implemented by public authorities in England and Wales.⁴³ The Inquiry showed that service users and service providers were uninformed about their rights and responsibilities,⁴⁴ there was a lack of positive leadership by public leaders,⁴⁵ and the duty on public authorities to act compatibly with the HRA sometimes produced a ‘compliance only’ culture.⁴⁶ However, the Inquiry also found that by focusing on the needs of individuals, a human rights approach could contribute to better service planning and delivery,⁴⁷ and influence how public authorities dealt with service users and assured the quality and effectiveness of their services. Since then government has also produced information and guidance to improve understanding about human rights in different sectors.

39 Donald, A., Watson, J., McClean, N., 2009. *Human Rights in Britain Since the Human Rights Act 1998: A critical review*. Manchester: Equality and Human Rights Commission. Ministry of Justice, 2008. *Human Rights Insight Project*. London: Ministry of Justice.

40 Kaur-Ballagan *et al.*, 2009: 22; Equality and Human Rights Commission, 2009. *Human Rights Inquiry*. Equality and Human Rights Commission. Page 90. Available at: www.equalityhumanrights.com/uploaded_files/hri_report.pdf. Accessed 11/01/2012.

41 Department for Constitutional Affairs, 2006. *Review of the Implementation of the Human Rights Act*. London.

42 Joint Committee on Human Rights, 2006. *The Human Rights Act: The DCA and Home Office Reviews*. Thirty-second Report of Session 2005-06. London: The Stationery Office. Page 16

43 Equality and Human Rights Commission, 2009. *Human Rights Inquiry*. Equality and Human Rights Commission. Page 13.

44 *Ibid.*, Chapter 4, section 5.0.

45 *Ibid.*, Chapter 5, section 2.1.

46 *Ibid.*, Chapter 5, section 11.0.

47 *Ibid.*, Chapter 3, section 2 and section 3.1.

Nevertheless the long running debate about the effectiveness of the HRA, lack of leadership and insufficient guidance about human rights has encouraged uncertainty and criticism about the remit of the Act. This led first the Labour Government, and now the Coalition Government, to consider whether it should be replaced with a Bill of Rights.

In July 2007 the Labour Government announced that it would consult the public on creating a Bill of Rights. It made clear it wanted to protect the Convention rights and freedoms in the HRA and the way the HRA worked,⁴⁸ but wanted to consider how to renew citizenship and national identity by looking at the responsibilities individuals owe others and the state.⁴⁹ It launched its Green Paper consultation on a Bill of Rights in March 2009 calling for views on whether responsibilities (and if so, which ones) should be incorporated into a Bill of Rights; whether additional rights beyond those in the HRA should be incorporated into a Bill of Rights; and the legal effect of the responsibilities and rights.⁵⁰

The Coalition Government set up an independent Commission on a Bill of Rights in March 2011 which will report by the end of 2012. Its terms of reference are to ‘investigate the creation of a UK Bill of Rights that incorporates and builds on all our obligations under the European Convention on Human Rights, ensures that these rights continue to be enshrined in UK law, and protects and extends our liberties’. It launched a consultation on a Bill of Rights in August 2011. The government has committed to retaining and building on all the UK’s obligations under the European Convention, but has left open how it will implement Convention rights. In particular it has not committed to retaining the mechanisms in the HRA such as the requirement that public authorities comply with Convention rights, and the way in which courts interpret and apply the Convention and decisions by the European Court.

The Equality and Human Rights Commission submitted its views to the consultations on the Green Paper on a Bill of Rights and Responsibilities⁵¹ and the

48 The working of the HRA included a duty on public authorities to act in compliance with the rights; a right to challenge infringements in the UK courts; an obligation on the higher courts to interpret legislation compatibly with the Convention rights; and powers for the courts to make declarations of incompatibility where they cannot do so. Ministry of Justice, 2009. *Rights and Responsibilities: developing our constitutional framework*. London: Ministry of Justice. Para 4.29.

49 House of Commons, 2007. *Green Paper Governance of Britain*. London: House of Commons.

50 Ministry of Justice, 2009. *Rights and Responsibilities: developing our constitutional framework*. London: Ministry of Justice.

51 Equality and Human Rights Commission, 2010. *HRA Plus: Human Rights for 21st-century Britain*. Equality and Human Rights Commission. Available at: http://www.equalityhumanrights.com/uploaded_files/pdfs/hra_plus_main_report.pdf. Accessed 20/12/2011.

Commission on a Bill of Rights.⁵² We argue that we already have a Bill of Rights embodied in the HRA and should therefore keep the HRA. We believe the HRA preserves parliamentary sovereignty, and allows our domestic courts to interpret Convention rights in a way that takes into account European Court judgments, but is in keeping with domestic law and traditions. Judges at the European Court similarly apply a ‘margin of appreciation’ to take into account the cultural, historic and philosophic differences in different countries. This flexibility allows British judges to suggest a way forward in keeping with British law. The HRA also requires all public authorities to comply with the Convention which has improved transparency and accountability of government. The HRA has allowed people the chance to have their cases heard in British courts by British judges and is speedier and more cost effective. The Commission believes the HRA is essential for the protection of human rights and is well crafted to balance Britain’s international obligations with our constitutional conventions.

The Human Rights Review: an assessment of how well public authorities implement human rights protections

During 2012 the way human rights are protected in the UK and in Europe will be under the spotlight. The Commission on a Bill of Rights will report on the future of the HRA; the UK government has made proposals for the reform of the European Court during its chairmanship of the Council of Europe; and the UN will examine and report on the UK government’s compliance with all its human rights obligations under the core UN Conventions as part of the Universal Periodic Review.⁵³ This report provides an objective assessment of how government has complied with its human rights obligations in Britain under the European Convention of Human Rights,⁵⁴ and will, we hope, be useful to domestic and international bodies interested in human rights in Britain.

⁵² Equality and Human Rights Commission, 2011. The case for the Human Rights Act. Available at: http://www.equalityhumanrights.com/uploaded_files/humanrights/bor_full.pdf. Accessed 20/12/2011. The Commission suggests retaining the HRA. However, should a Bill of Rights be introduced to replace the HRA, it should contain at least the same levels of protection of rights and the same system of balance and dialogue between government, parliament and the judiciary, and should comply with the UK’s international obligations.

⁵³ The Universal Periodic Review Process was established by the United Nations in 2006 to review the progress of human rights in all the 192 Member States of the United Nations. Available at: <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>. Accessed 18/01/2012.

⁵⁴ The Commission has a human rights mandate that covers England, Wales and reserved matters in Scotland. As a result, the review covers all of Britain but in relation to Scotland has only focused on certain reserved aspects or where it has been agreed with the Scottish Human Rights Commission that the Commission will conduct work. An example of this is the Commission’s Trafficking Inquiry.

The Review takes each article of the Convention and assesses whether government has met its negative obligations not to breach a Convention right, and its positive obligations to create laws, institutional structures and processes which enable people to enjoy their Convention rights and freedoms.

It draws on publically available evidence about the impact of laws, the way institutions work and the effectiveness of their policies. Our approach was shaped by our Human Rights Measurement Framework which is derived from the indicator framework of the Office of the High Commissioner on Human Rights.⁵⁵ The framework uses three kinds of indicators:

- **structural indicators:** human rights standards to which the UK is committed in principle through its ratification of treaties and conventions
- **process indicators:** evidence of the efforts made to meet the obligations that flow from human rights standards
- **outcome indicators:** evidence about the experiences of individuals and groups.

The range of evidence used for the human rights framework and for this Review includes:

- domestic human rights law and treaty ratifications
- human rights case law outcomes identifying human rights violations and breaches
- the public policy framework for protecting human rights
- reports by domestic and international human rights monitoring bodies, such as the JCHR and UN treaty monitoring committees
- findings of domestic investigations, inquiries and reviews
- reports by regulators, inspectorates and ombudsmen
- official statistics published by government
- reports and issues raised by non-governmental bodies and civil society institutions such as the media.

Each chapter begins with an explanation of a human right and the government's obligations to protect the right and avoid abusing it. It looks at how a right has

⁵⁵ Equality and Human Rights Commission Research Report 81. *Human Rights Measurement Framework: Prototype panels, indicator set and evidence base*. Page 5. Available at: www.equalityhumanrights.com/uploaded_files/humanrights/HRMF/hrmf.pdf. Accessed 18/01/2012.

developed historically in Britain, and the legal and institutional infrastructure in place that allows government to fulfil its obligations. Each chapter then focuses on institutional settings or activities where the evidence suggests human rights are not strongly protected.⁵⁶ We selected these issues following consultation with voluntary sector organisations, human rights experts and academics. As we explain below, we focused on issues which we considered were sufficiently grave because the law, or the way an institution or process worked, affected the rights of everyone, or had an impact on the rights of a particular group of people.

The chapters cover the following issues:

The chapter on Article 2 looks at how government and public authorities meet their obligations to protect the right to life. It assesses the effectiveness of policies to safeguard against suicide and self-harm of people in police custody, prisons, the youth secure estate, and immigration removal centres. It also considers institutions' inappropriate use of restraint leading to deaths in custody. Finally, it looks at the effectiveness of the government's investigative processes when individuals die in its care. We selected these issues as public authorities have particular responsibilities to safeguard individuals in their care, and because strong investigative processes ensure institutions are accountable to the public for how they work.

The chapter on Article 3 examines the right to freedom from torture, inhuman and degrading treatment in four different settings. It assesses whether people using health and social care services are at risk of inhuman or degrading treatment and the quality of protection offered by the HRA, local authorities' interpretation of their human rights obligations, and the regulator's inspections. As many people use health and social care services, risks of inhuman treatment are relevant to us all. The chapter turns to the inappropriate use of restraint on young people in detention, and the effectiveness of investigations in these settings. This affects a small number of young people, but public authorities have particular responsibilities for looking after individuals in its care. The chapter then considers cases of serious ill-treatment of children, disabled people and women at risk of domestic violence and assesses the effectiveness of police and local authority investigations. Public authorities have a duty to protect people from serious ill-treatment and our institutions should work effectively to protect everyone. Finally the chapter examines allegations that the UK government has been complicit in torture and inhuman and degrading treatment in counter-terrorism operations overseas.

⁵⁶ The review does not assess government performance against every Convention right, as in some cases the Commission believes that there are no current human rights concerns. The Commission did not find sufficient evidence to warrant concern about freedom from punishment without law (Article 7); right to marry (Article 12); or right to an effective remedy (Article 13).

In the chapter on Article 4 we assess how government is meeting its obligation to prevent slavery and forced labour. Most of us take for granted being paid and treated fairly in the workplace, but some adults and children are trafficked into slavery, forced labour or servitude. Trafficking is a hidden crime, but the government has introduced new laws and mechanisms to identify and protect victims of trafficking. We assess how well these are working.

The following chapter looks at the right to liberty and security in Article 5. Protection against arbitrary detention applies to everyone living in Britain, so this chapter looks at whether this right is extended to particular groups who may not be regarded favourably. It examines how counter-terrorism legislation is used to restrict the liberty and movement of people who have not been convicted of a criminal offence, and how our immigration detention processes treat detainees, such as children, asylum seekers and vulnerable individuals.

The chapter on Article 6 examines the right to a fair trial which is integral to the working of our legal system. We focus on three issues which suggest this principle is at risk. We look at the use of closed material procedures in trials that have a bearing on the public interest, the treatment of children in courts and cuts to legal aid. These examples demonstrate how transparency and accountability in our legal system and access to justice are potentially at risk.

The chapter on Article 8 looks at the right to respect for private and family life through four issues. It assesses the effectiveness of the legal framework and regulatory powers around information privacy which should provide protection from intrusive surveillance for everyone. It then examines the undignified treatment experienced by some older and disabled people in health and social care, and how this reflects the limited awareness by some public authorities of their human rights obligations and duty to treat service users with respect for their dignity. The shortage of suitable residential sites for Gypsies and Travellers exposes the way policy results in a minority group not being able to enjoy the right to respect for the home as other groups do. The difficulties faced by transsexual people who are forced to choose between ending their marriage and having their acquired gender recognised shows that Article 8 rights most people take for granted are denied to a particular group of people.

The next chapter looks at how effectively the Article 9 right to freedom of thought, conscience and religion is protected in our domestic law. This issue affects everyone, as the right to hold beliefs is integral to individuals' personality and to living in a tolerant society. The chapter focuses on issues relating to cases currently before the European Court of Human Rights, and looks at the extent to which the European Court and domestic courts are interpreting the right to manifest a belief too narrowly.

The chapter on Article 10 focuses on the right to freedom of expression, which is a cornerstone of democracy. Free access to information and ideas encourages accountable governance through public scrutiny. We look at libel and defamation law which could encourage self-censorship as legal defences are hard to use. The recent hearings for the Leveson Inquiry highlight widespread criticism of the failure of the current regulatory regime to uphold media standards and balance the right to freedom of expression with the right of individuals to a private life.

The following chapter looks at Article 11 which covers the right to freedom of assembly and association. Over the past few years there have been numerous large public demonstrations and the role of the police has come under scrutiny. So this chapter looks at public order legislation, the use and regulation of police force and containment, state surveillance of peaceful protestors and the misuse of stop and search powers and other pre-emptive legal actions. It also looks at limitations in our law in protecting trade union members from blacklisting and the impact of the procedural rules on the right to strike.

The final chapter examines Protocol 1 which provides for protection of property, the right to education and the right to free elections which includes the right to vote. The chapter focuses on the government's response to the European Court's judgment that it extend the right to vote to prisoners.

The findings set out in this Review demonstrate that Britain has strong legal and institutional structures protecting human rights, but that government still faces several challenges. Firstly, there remain shortcomings in how government and public authorities implement human rights protections in different sectors which they need to address urgently. Secondly, a culture of human rights should be part of how public institutions make decisions and deliver services. Individuals should not have to rely on our courts to protect their rights, but should know they will be treated fairly and with dignity and respect by public bodies. Our message is that government should ensure that its legislation, institutions, policy and services fully meet the human rights obligations outlined by the Convention so that every person living in Britain enjoys all their human rights.

Article 2: The right to life

Article 2 of the European Convention on Human Rights provides that:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Summary

Article 2 is one of the most fundamental provisions in the European Convention on Human Rights. With very limited exceptions, it cannot be derogated from. The state must never arbitrarily take someone's life and must also safeguard the lives of those in its care. In addition, the state must carry out an effective investigation when an individual dies following the state's failure to protect the right to life, or the use of force by government officials.

The idea that the right to life is a natural right has a history going back to the early Middle Ages. In Britain, the right to life is protected by a well-functioning criminal justice system. There are a number of processes and organisations which investigate deaths involving state agents, including the police, the inquest system, the Independent Police Complaints Commission, and the Prisons and Probation Ombudsman.

The key issues addressed in this chapter are:

Individuals in detention remain vulnerable to self-harm and suicide

When authorities know or should know that a person in its custody is liable to commit suicide, they must take all reasonable measures to avert the risk.

The review shows that:

- People with mental health conditions and addictions do not always receive appropriate support in the prison system, leaving them at risk of suicide and self-harm.
- Better training and clearer guidance is needed for staff on how to manage detainees at risk of suicide and self-harm.
- Immigration removal centres do not always offer sufficient care for detainees with mental health conditions.

More could be done to prevent deaths in police custody

Under Article 2, the state must safeguard the lives of those who are in its custody, when authorities know or should know that there is a risk that they might die.

The review shows that:

- A lack of adequate risk assessment of people in custody has contributed towards some deaths.
- Information about the risks to individuals in custody needs to be shared more effectively.

Lives can be put at risk due to an excessive use of restraint in custodial settings

Under Article 2 government agencies must not arbitrarily take someone's life. If restraint is used excessively or inappropriately and causes the death of a detainee, it may breach the state's obligation not to deprive an individual of his or her life.

The review shows that:

- There is a need for better recording and reporting on how many people die in custody due to the use of restraint.
- Dangerous restraint techniques, or techniques used without sufficient training, continue to put detainees' lives at risk.

Investigative requirements under Article 2 are not always met

Under Article 2 the state must carry out an effective investigation into deaths and near deaths resulting from its failure to protect the right to life, or from the use of force by its agents, or when a death occurs in custody. The precise form of the investigation can vary, but in all cases the authorities must investigate on their own initiative. In order to guarantee its effectiveness, the investigation must be independent, prompt, and open to an element of public scrutiny and should involve the family of the deceased.

The review shows that:

- There are very few prosecutions and convictions following deaths in custody. This raises questions about whether the current system meets Article 2 requirements.
 - Investigations are not always completed promptly enough to meet Article 2 requirements.
 - Investigations into deaths in custody are not always sufficiently independent or effective.
 - The system for investigating deaths of children in secure children's homes may not comply with Article 2.
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- The system for investigating deaths of patients in mental health settings may not meet Article 2 obligations.
 - Mental health patients who are not formally detained should also be protected by Article 2.
 - There is a lack of communication between sectors regarding the findings and recommendations from inquests and other investigations. This means that opportunities to learn lessons may be missed.

The UK's obligations under Article 2

The European Court of Human Rights has described Article 2 as „one of the most fundamental provisions in the Convention’.¹ It requires that the state protects the right to life. The right to life is the most basic human right of all: without it, a person could enjoy none of their other rights. The state upholds it primarily by providing an effective criminal justice system. The state must also refrain from intentionally taking anybody’s life, and it must investigate any death resulting from its failure to protect life. It is not necessary for a person to die to make a claim under Article 2; a living applicant may bring a claim regarding state conduct that put his or her life at risk.²

Article 2(1) contains an exception for lawful executions, although this exception has largely been superseded by Protocols 6 and 13. Protocol 6 prohibited the imposition of the death penalty in peacetime, while Protocol 13 extended the prohibition to all circumstances. Both protocols were ratified by the UK.

Under Article 2(2), an individual may lawfully be deprived of their right to life if it is necessary in order to:

- protect any person from unlawful violence
- lawfully arrest an individual or to prevent the escape of an individual from lawful custody, or
- lawfully prevent a riot or an insurrection or rebellion against the established authority of a state.

Where an individual is killed in any of the above circumstances, their right to life may have been breached if the force used was more than was absolutely necessary.

¹ *McCann v. the United Kingdom* [1995] 21 EHRR 97. Para 197.

² *R. (J.L.) v. Secretary of State for Justice* [2008] UKHL 68, [2008] 3 WLR 1325.

Article 2 imposes three different types of obligations:

- **A negative obligation** to refrain from taking life. Article 2 explicitly prohibits the taking of life. Deaths caused by use of force may be lawful if they come within the exceptions under Article 2(2), if they are to protect a person from unlawful violence, to lawfully arrest someone or prevent their escape from custody or to lawfully prevent a riot or insurrection. However, use of force will only be lawful under these exceptions if it is no more than is absolutely necessary.
- **A positive obligation** to take appropriate measures to safeguard life.³ In this regard, the principal duty is to have effective criminal legislation and law enforcement.⁴ The European Court has said that, in certain circumstances, the state's positive obligation extends to the protection of an individual whose life is at risk from the criminal acts of another individual,⁵ from domestic violence,⁶ from environmental hazards⁷ or suicide.⁸ This obligation is greater for individuals in custody.⁹
- **A procedural obligation** to conduct an effective official investigation into any death resulting from the use of force¹⁰ and any death resulting from the state's failure to protect the right to life.¹¹ The purpose of such investigations is to ensure that domestic laws protecting the right to life are applied, and also to hold state officials accountable, to bring all the facts to public notice, to rectify any dangerous practices, and to give relatives of the deceased the reassurance that any lessons learned from the death might save the lives of others.

3 *Osman v. the United Kingdom* [2000] 29 EHRR 245. Para 115. 4 *Keenan v. the United Kingdom* [2001] 3 EHRR 913. Para 88. 5 *Osman v. the United Kingdom* [2000] 29 EHRR 245.

4 *Keenan v. the United Kingdom* [2001] 3 EHRR 913. Para 88.

5 *Osman v. the United Kingdom* [2000] 29 EHRR 245.

6 *Opus v. Turkey* [2009] BHRC 159.

7 *Oneryildiz v. Turkey* [2004] 18 BHRC 145.

8 *Keenan v. the United Kingdom* [2001] 3 EHRR 913.

9 *Keenan v. the United Kingdom* [2001] 3 EHRR 913. Para 90; *Edwards v. the United Kingdom* [2002] 12 BHRC 190; *R. (J.L.) v. Secretary of State for Justice* [2008] UKHL 68, [2008] 3 WLR 1325 at [38].

10 *McCann v. the United Kingdom* [1995] 21 EHRR 97. Para 161; *R. v. Coroner for Western District of Somerset, ex parte Middleton* [2004] UKHL 10, [2004] 2 AC 182.

11 See, for example, *Edwards v. the United Kingdom* [2002] 12 BHRC 190.

Individuals in custody

People in custody are in a vulnerable position and the authorities are under a duty to protect them. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent when that individual dies.¹² This is the case even when the person is killed or threatened by a third party, such as a cell-mate,¹³ or if the prisoner harms him or herself.¹⁴ When a death occurs in custody, the detaining authorities must provide evidence to justify the death under one or more of the grounds in Article 2(2). If they cannot, then Article 2 is breached.¹⁵

The European Court has said: ‘where the events in issue are wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation’.¹⁶

¹² *Salman v. Turkey* [2002] 34 EHRR 17.

¹³ *Edwards v. the United Kingdom* [2002]; *R. (on the application of Amin) v. Secretary of State for the Home Department* [2003] UKHL 51, [2004] HRLR 3.

¹⁴ *Keenan v. the United Kingdom* [2001] 33 EHRR 913.

¹⁵ *Anguelova v. Bulgaria*, [2002] Application No. 38361/97.

¹⁶ *Salman v. Turkey* [2002] 34 EHRR 17. Paras 99 and 100.

The development of Article 2 in Britain

The idea that certain rights – such as the right to life – are natural or inalienable rights has a history going back to the early Middle Ages, when it was generally agreed that every person had a natural right to preservation and self-defence.¹⁷ In the 17th century, the philosopher John Locke identified ‘life’ as being one of those natural rights that could not be surrendered. English common law has recognised murder or manslaughter as a serious crime for centuries.¹⁸ In 1948, the UK signed up to the Universal Declaration of Human Rights, the first international treaty protecting the right to life.

Britain has a robust system for protecting the right to life. The death penalty was abolished in 1965. Article 2 rights are upheld by laws criminalising murder and manslaughter, and a well-functioning criminal justice system. The introduction of corporate manslaughter laws in 2007, which hold organisations responsible for causing a death by a gross breach of duty of care, is also part of this protective system.¹⁹

The UK has ratified the Optional Protocol to the Convention Against Torture, and has established, as required, a National Preventative Mechanism made up of 18 inspection bodies co-ordinated by HMI Prisons. This monitors the treatment and conditions for detainees and makes recommendations regarding the prevention of ill-treatment.

British police do not routinely carry firearms, and their use is strictly regulated.²⁰ There are guidelines and training for police and other agencies on the lawful use of force and there are very low numbers of individual deaths involving state agents.²¹

17 J. Kilcullen, *Medieval theories of natural rights*. Available at: <http://www.humanities.mq.edu.au/Ockham/NaturalRights.html>. Accessed 14/02/12.

18 W. Blackstone, 2003. *Blackstone Commentaries on the Laws of England, book 4*. Chapter 14 – Homicide (1765-1769).

19 Corporate Manslaughter and Corporate Homicide Act 2007.

20 Home Office Code of Practice on Police Use of Firearms and Less Lethal Weapons (2003).

21 Manual of Guidance on the Management, Command and Deployment of Armed Officers (2010) issued by ACPO and NPIA. See *Deaths During or Following Police Contact: statistics issued for England and Wales* issued by the IPCC at: http://www.ipcc.gov.uk/en/Pages/reports_polcustody.aspx. Accessed 01/02/2012.

There are a number of processes and organisations which help to investigate a death involving state agents. All deaths will be subject to an inquest. This is a legal inquiry into the causes and circumstances of a death. The European Court has held that it is a procedure capable of fulfilling the requirements of Article 2.²² There have been criticisms of the inquest system, with organisations such as the charity Inquest questioning whether it puts bereaved families ‘at the heart’ of the process, and highlighting the need to conduct inquests more promptly.²³

Depending on the circumstances of the death, other bodies such as the Independent Police Complaints Commission and the Prisons and Probation Ombudsman (in England and Wales) also conduct independent investigations.

Despite the strong legal and institutional framework supporting Article 2, there is evidence that Britain may not be fully meeting its obligations under this Article in some areas.

This chapter looks at whether the government meets its responsibilities to safeguard people in detention and custody, and its investigative requirements when individuals die in its care.

²² *Bubbins v. the United Kingdom* [2005] 41 EHRR 24; see also Coroners & Justice Act 2009.

²³ See Inquest reports available at: <http://inquest.org.uk/website/policy/reform-of-the-inquest-system/the-coroners-justice-act-2009/faqs-on-coronial-reform>.

Individuals in detention remain vulnerable to self-harm and suicide

How Article 2 protects detainees from self-harm and suicide

The European Court recognises that individuals in detention are vulnerable and that the authorities must protect them.²⁴ Officials working in police custody, prisons and young offender institutions, secure children's homes, secure training centres and immigration removal centres have a positive duty to take steps to protect individuals whose lives are known, or should be known, to be at risk.²⁵ This can arise where the threat to life comes from a third party, such as a cell-mate. It also applies if the detained person poses a risk to themselves.²⁶

For example, in *Savage v. South Essex Partnership NHS Foundation Trust*, the European Court of Human Rights found that the health authority had failed to fulfil its obligations under Article 2 to safeguard the life of a patient.²⁷ Although this case is about an NHS Trust, the same obligations apply in prisons and young offender institutions.

²⁴ *Keenan v. the United Kingdom* [2001] 3 EHRR 913 Para 91; *Edwards v. the United Kingdom* [2002] 35 EHRR 19. *R. (9JL) v. Secretary of State for Justice* [2009] UKHL 68.

²⁵ *Keenan v. the United Kingdom* [2001] 3 EHRR 913 *Osman v. the United Kingdom* [2000] 29 EHRR 245 and *Edwards v. the United Kingdom* [2002] 35 EHRR 19; *Anguelova v. Bulgaria*, Application No. 38361/97, 13/06/2002.

²⁶ *Salman v. Turkey* [2002] 34 EHRR 17 also re Art 2 obligations see case of *Tarariyeva v. Russia* Application No. 4345/03, 14 December 2006.

²⁷ *Savage v. South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 2 WLR 115 and *Savage v. South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) (28 April 2010).

Carol Savage was a patient at Runwell Hospital where she was detained under section 3 of the Mental Health Act. While in hospital she had been assessed as a suicide risk, but during the last two months of her detention hospital staff failed to follow the trust's policy on risk assessments and observation. Only one nurse knew about her previous history, even though her notes were at the hospital. On July 5 2004 she ran away and killed herself by walking or jumping in front of a train.

The High Court found that the trust, through its staff, did not do all that could have been expected of them to prevent Carol's suicide because it either knew or should have known that there was a real and imminent risk to Carol's life. She had previously been assessed as a suicide risk, had made a significant attempt to kill herself, and had run away several times during her final period of treatment.²⁸

Any measures the authorities take to prevent suicide and self-harm in custody must also uphold other rights and freedoms, such as personal autonomy.²⁹ For example, subjecting large groups of prisoners to intrusive surveillance, or removing items of clothing, may amount to disproportionate interference with the right to respect for private life under Article 8.

People in prison, young offender institutions and secure training centres are particularly at risk of self-harm and suicide. In 2010, there were 58 suicides in adult prisons, out of a total of 196 deaths in custody. There were also eight deaths which have not yet been classified.³⁰ The numbers of self-harm incidents in prisons increased between 2009 and 2010, from 24,184 to 26,983 (from 29 to 32 per cent of the prison population). This continues an upward trend since 2004, when relatively complete data collection began.³¹ Female prisoners are around four times more likely to self-harm than male.³²

In 2011, there were five self-inflicted deaths of teenagers in custody within five weeks of one another. This was a particularly shocking figure considering that in

²⁸ *Savage v. South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, [2009] 2 WLR 115 and *Savage v. South Essex Partnership NHS Foundation Trust* [2010] EWHC 865 (QB) (28 April 2010).

²⁹ *Keenan v. the United Kingdom* [2001] 3 EHRR 913 *Osman v. the United Kingdom* [2000] 29 EHRR 245.

³⁰ Ministry of Justice, 2011. *Safety in Custody 2010, England and Wales, Ministry of Justice Statistics Bulletin*. Page 4. Available at: <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/safety-custody-2010.pdf>. Accessed 01/02/2012.

³¹ Ministry of Justice, 2011. *Safety in Custody 2010, England and Wales, Ministry of Justice Statistics Bulletin*. Page 5. Available at: <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/safety-custody-2010.pdf>. Accessed 01/02/2012.

³² Ministry of Justice, 2010. *Safety in Custody 2009 England and Wales*. Available at: <http://www.justice.gov.uk/about/docs/safety-in-custody-2009-0710.pdf>.

the previous 30 years there had been 27 self-inflicted deaths in young offender institutions and one in a secure training centre.³³ It led the charity Inquest to call for an independent review, and for a ‘complete overhaul of the way we treat young people in conflict with the law’.³⁴

Young people in the criminal justice system are at high risk of self-harm. In 2010, 5,783 incidents of self-harm occurred among the 15- to 20-year-old age group. This makes them disproportionately likely to self-harm, compared to adult prisoners.³⁵

The government has implemented a number of initiatives to help support and treat those in custody.³⁶ It has also committed to diverting people with mental health conditions away from the criminal justice system to health services which are better placed to support them.³⁷ (See the case study on the Youth Justice Liaison and Diversion project in the chapter on Article 6.)

Key issues

1. People with mental health conditions and addictions do not always receive appropriate support in the prison system, leaving them at risk of suicide and self-harm

Research by the Prisons and Probation Ombudsman (PPO) indicates that people with mental health conditions are more likely to self-harm and commit suicide,³⁸ as are people undergoing drug and/or alcohol withdrawal.³⁹ It also

33 Ryan Clark, 17, at Wetherby young offenders’ institution (YOI) in Yorkshire on 18 April 2011. Mahry Rosser, 19, at New Hall YOI on 17 April 2011; Nicholas Saunders, 18, at Stoke Heath YOI on 2 April 2011; Trevor Llambias, 18, at Bedford Prison on 28 March 2011; and Nicholas Wheller, 19, at Aylesbury YOI, also in March 2011. Available at: http://www.cypnow.co.uk/Social_Care/article/1067790/youth-prison-suicides-prompt-call-review/. Accessed 01/02/2012. INQUEST has also called for a review.

34 Inquest e-newsletter Issue 11 Spring 2011. Available at: http://inquest.gn.apc.org/pdf/enewsletter/INQUEST_enewsletter_n011_spring_2011.pdf Accessed 14/02/12.

35 Ministry of Justice, 2011. *Safety in Custody 2010, England and Wales, Ministry of Justice Statistics Bulletin*. Page 11. Available at: <http://www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/safety-custody-2010.pdf>. Accessed 01/02/2012.

36 HM Government, 2011. *Consultation on preventing suicide in England, A cross government outcomes strategy to save lives*. Page 24. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_128463.pdf. Accessed 01/02/2012.

37 Ministry of Justice, 2010. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing for Offenders*. London: The Stationery Office. Page 36.

38 Prisons and Probation Ombudsman for England and Wales, 2011. *Learning from PPO Investigations: Self-inflicted deaths in prison custody, 2007-2009*. Pp. 11-12. Available at: <http://www.ppo.gov.uk/docs/self-inflicted-deaths-in-prison.pdf>. Accessed 01/02/2012.

39 Her Majesty’s Prison Service, 2007. *Prison Service Order 2700: Suicide Prevention and Self-Harm Management*. Para 6.3.1. Available at: http://pso.hmprisonservice.gov.uk/pso2700/pso%202700_-_front_index_and_pso_itself.htm. Accessed 01/02/2012.

shows that individuals with a history of self-harm are more likely to commit suicide. The PPO review of fatal incidents reports since 2004 noted that in over half (38 of 65) of all self-inflicted deaths, the person had a history of self-harm, with the majority having self-harmed in the previous 12 months.⁴⁰

The government has recognised that prison is not always the most appropriate place for offenders with mental health conditions.⁴¹ However, currently an estimated 90 per cent of the prison population suffers from a mental health condition.⁴² Imprisonment brings its own pressures, increasing feelings of isolation, and prompting worries about maintaining relationships, homes and jobs.⁴³

Many women contend with particularly difficult issues when they enter prison. They may have lost children to the care system; 66 per cent of women offenders have dependent children under the age of 18. Imprisonment, usually far from the family home, will have a detrimental impact on family ties. Over half of female prisoners say they have suffered domestic violence, one in three has experienced sexual abuse, and one quarter have spent time in local authority care.⁴⁴ The following example, taken from the 2010-11 HMI Prisons report, illustrates some of these challenges:

‘Bronzefield Women’s Prison, for instance, has to cope with distressingly high levels of self-harm. Because of their mental distress, some women repeatedly self-harmed – one woman had harmed herself more than 90 times in one month. This degree of self-harm led to a high level of the use of force as officers intervened to remove ligatures. The prison did its best to manage these women and keep them safe, but prison was clearly not a suitable environment for many with acute and complex mental health needs’.⁴⁵

⁴⁰ D. Ryan-Mills, 2010. *Review: fatal incidents report: from September 2008 to August 2009*. London: Prison and Probation Ombudsman. Available at: <http://www.ppo.gov.uk/docs/PPO-FII-Report-March-2010.pdf>. Accessed 01/02/2012. Prisoners harm themselves for a variety of reasons, not always with suicidal intent. It can be a way of managing distress and anxiety (PSO 2700).

⁴¹ Ministry of Justice, 2010. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing for Offenders*. London: The Stationery Office. Page 36. Also see, HM Government, 2009. *Healthy Children, Safer Communities*.

⁴² These include personality disorders and/or substance misuse.

⁴³ For isolation, see HM Government, 2011. *Consultation on preventing suicide in England, A cross government outcomes strategy to save lives*. Page 20. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_128463.pdf. Accessed 01/02/2012.

⁴⁴ Prison Reform Trust, 2010. *Bromley Briefings Prison Factfile*. Page 3. Available at: <http://www.prisonreformtrust.org.uk/Portals/0/Documents/FactfileDec10small.pdf>. Accessed 01/02/2012.

⁴⁵ HMI Prisons, 2011. *HM Chief Inspector of Prisons for England and Wales Annual Report 2010-11*. London: The Stationery Office. Page 9.

Prisons have taken steps to cope with the high level of need, both in terms of mental health and drug and alcohol misuse. Between 2004 and 2007 there was a 20 per cent increase in the size of mental health in-reach teams across the prison system, but they have since become over-stretched.⁴⁶ In his review of the treatment of people with mental health conditions or learning disabilities in the criminal justice system, Lord Bradley found that 85 per cent of in-reach team leaders said they were not sufficiently staffed to meet the needs of prisoners who were referred to them.⁴⁷

HM Chief Inspector of Prisons has highlighted both good and poor practice in suicide prevention and self-harm management in prisons. Samaritan-supported ‘listeners’ (prisoners who have been trained by the Samaritans) were found to have an important role in working with offenders who may need confidential support. However, the inspectorate still found that ‘the care of prisoners with mental health problems remains one of the most troubling aspects of the prison system’. It stated:

‘The high levels of mental health need are obvious as you walk around most prisons. I sometimes found prisoners with learning difficulties or moderate mental health needs – “poor copers” in prison jargon – seeking refuge from the pressures on the wings in segregation units or health care.’⁴⁸

HM Chief Inspector of Prisons concluded that prisons still hold too many prisoners with acute mental health needs, for whom this is a completely unsuitable environment. The report welcomed the government’s commitment to divert more of those with mental health problems away from the criminal justice system altogether.⁴⁹

The government is proposing to roll out liaison and diversion services for mentally ill offenders nationally by 2014. It also intends to increase the

46 The Offender Health Research Network, 2009. A National Evaluation of Prison Mental Health In-Reach Services. Available at <http://www.ohrn.nhs.uk/resource/research/Inreach.pdf>. Accessed 01/02/2012.

47 Department of Health, 2009. *The Bradley Report – Lord Bradley’s review of people with mental health problems or learning disabilities in the criminal justice system*. Page 104. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_098698.pdf. Accessed 01/02/2012.

48 HMI Prisons, 2011. *HM Chief Inspector of Prisons for England and Wales Annual Report 2010-11*. London: The Stationery Office. Page 8.

49 Ibid.

treatment capacity for high risk, sexual or violent offenders whose offending is linked to severe forms of personality disorder, as these offenders ‘pose challenging behavioural or control problems in prison, and high risk of reoffending if in the community’.⁵⁰

2. Better training and clearer guidance is needed for staff on how to manage detainees at risk of suicide and self-harm

If any member of staff in the prison system is concerned that an individual may be at risk of suicide or self-harm, they can open an Assessment Care in Custody and Teamwork plan (ACCT). This involves a case manager being assigned to work with the individual at risk using a range of available resources (e.g. Samaritan-trained ‘listeners’, healthcare staff and the chaplaincy). Prisoners are initially assessed and are then subject to frequent observation.

However, the ACCT process is not working as well as it needs to, for a number of reasons. Staff have reported that the procedure is too detailed, complicated and unwieldy. They have also criticised the online guidance for being difficult to access.⁵¹ A consultation by the National Offender Management Service (NOMS) found that staff often misunderstood the requirements for an ACCT plan. As a result, they may not be following the correct procedures to prevent prisoners taking their own life.⁵²

HM Chief Inspector of Prisons has found that the ACCT procedure is effective when the prison authorities work together with healthcare and other support staff.⁵³ However, in its 2008-09 and 2010-11⁵⁴ annual reports, the inspectorate found that in many prisons there was insufficient evidence of good and multi-disciplinary case management. Both reports also noted that ACCT care plans were often vague or ill-defined, sometimes including generic rather than personalised targets.

⁵⁰ Ministry of Justice, 2010. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing for Offenders*. London: The Stationery Office. Page 36.

⁵¹ Ministry of Justice, 2010. *Safer Custody News, January/February 2010*. Page 6. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2010/02/Safer-Custody-News-January-February-2010.pdf>. Accessed 01/02/2012.

⁵² Ibid.

⁵³ HMI Prisons, 2010. *Annual Report 2008-09*. London: The Stationery Office. Page 22.

⁵⁴ HMI Prisons, 2011. *Annual Report 2010-11*. London: The Stationery Office. Page 24.

NOMS has called for improved ACCT training and guidance, and has committed to taking forward the recommendations from the review.⁵⁵

3. Immigration removal centres do not always offer sufficient care to detainees with mental health conditions

Since 2004, the PPO has investigated six self-inflicted deaths in immigration detention.⁵⁶ In 2011 there were three deaths in immigration removal centres, one of which was self-inflicted. These deaths are currently being investigated.

The government do not routinely publish the figures on self-harm in immigration removal centres, and there is no data available on self-harm in short-term holding facilities.

Formerly, there was a ‘presumption in favour of release’ for those people in immigration detention who were suffering serious medical conditions or mental illnesses.⁵⁷ They would only be considered suitable for detention in very exceptional circumstances. Since 2010, however, the UK Border Agency’s guidance states that those suffering from serious mental illnesses may be detained so long as their condition can be ‘satisfactorily managed within detention’.⁵⁸ The government notes that there has not been a policy change, but a clarification of the policy.

People in immigration removal centres have varying degrees of access to mental health care (including access to psychiatrists and counselling, and mental health nurses), as provision is managed by different contractors in different centres.⁵⁹ Research by the charity Mind has found that people with significant and complex mental health conditions are being detained, and that mental health service providers do not feel that the provision is always adequate to deal with the high levels of mental distress experienced by detainees.⁶⁰

55 Ministry of Justice, 2010. *Safer Custody News, January/February 2010*. Page 6. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2010/02/Safer-Custody-News-January-February-2010.pdf>. Accessed 01/02/2012.

56 Prisons and Probation Ombudsman Investigation reports available at: <http://www.ppo.gov.uk/immigration-removal-centre-investigations.html>.

57 UKBA Enforcement Instructions and Guidance for 2008.

58 UKBA Enforcement Instructions and Guidance for 2010.

59 AVID, 2011. *Vulnerable groups in Immigration Detention: Mental Health*. Page 3. Available at: <http://www.aviddetention.org.uk/images/avid%20mental%20health%20briefing%20310311%20for%20det%20forum%20work.pdf>. Accessed 01/02/2012.

60 Mind, 2009. *A Civilised Society: Mental health provision for refugees and asylum seekers in England and Wales*. Page 21. Available at: http://www.mind.org.uk/assets/0000/5695/refugee_report_2.pdf. Accessed 01/02/2012.

HM Chief Inspector of Prisons has commented on the unsuitable facilities for vulnerable detainees, a lack of access to counselling, poor use of interpreting services and a lack of training for healthcare staff in identifying signs of torture or trauma. It concluded in its 2010-11 annual report that:

‘Mental health problems were evident for detainees in many centres, and some had reported significant trauma or torture. However the process intended to provide safeguards to detainees who were not fit to be detained, or had experiences of torture, did not appear to be effective.’⁶¹

HMI Prisons has highlighted both good and poor practice in suicide prevention and self-harm management in immigration removal centres. It found that staff had an adequate understanding of suicide and self-harm intervention, but that safeguarding policies were ineffective.⁶² The inspectorate found no equivalent to the Samaritans and Samaritan-supported ‘listeners’ who play such an important role across the prison system.

The inspectorate also emphasised the importance of keeping ‘at risk’ individuals in the company of others. Evidence shows that vulnerable detainees have been segregated while waiting for referral to secondary mental health services, although this is likely to have a detrimental effect on their condition.⁶³ The report also notes that staff in immigration detention centres do not carry anti-ligature knives, which is standard practice in prisons. This could delay attempts to save the life of a suicidal detainee.

In all of the centres it inspected, HMI Prisons found that official letters written by doctors to advise the UK Border Agency of concerns about detainees’ health often received cursory replies or no replies at all. For example, in Colnbrook immigration removal centre, of 125 such letters, only 61 had received replies.⁶⁴

⁶¹ HMI Prisons, 2011. *Annual Report 2010-11*. London: The Stationery Office. Page 68.

⁶² Ibid.

⁶³ AVID, 2011. *Vulnerable groups in Immigration Detention: Mental Health*. Page 5. Available at: <http://www.aviddetention.org.uk/images/avid%20mental%20health%20briefing%20310311%20for%20det%20forum%20work.pdf>. Accessed 01/02/2012; and HMI Prisons, 2010. *Annual Report 2008-09*. London: The Stationery Office. Page 22.

⁶⁴ HMI Prisons, 2010. *Report on an unannounced full follow-up inspection of Colnbrook Immigration Removal Centre and short-term holding facility 16–27 August 2010*. London: HMI Prisons. Page 32.

The report noted that:

‘Colnbrook had an especially high demand for mental health services. It managed this reasonably well but had little space for mental health nurse clinics and many patients had left the centre before they could be seen. Counselling services were limited across the inspected establishments.’⁶⁵

A recent case has also provided evidence that detainees with mental health conditions are being put at risk. In *R. (oao S.) v. Secretary of State for Home Department*, the UK Border Agency was found to have unlawfully detained a man with severe mental illness for five months.⁶⁶ While in detention he began to self-harm and was put on suicide watch, but he was still not removed from detention, despite advice to the UK Border Agency that he should be.

⁶⁵ HMI Prisons, 2011. *HM Chief Inspector of Prisons for England and Wales Annual Report 2010-11*. London: The Stationery Office. Page 69.

⁶⁶ *R. (oao S.) v. Secretary of State for Home Department* [2011] EWCA 2120 (admin).

More could be done to prevent deaths in police custody

How Article 2 protects people in police custody

Under Article 2, the police have a duty to protect the lives of the people in their custody. Many people who die in police custody are under the influence of drugs or alcohol, or already have physical injuries or mental health conditions. Despite these difficult circumstances, the police have a duty to assess the vulnerability of detainees, and check that custody is appropriate in each case.

Figures for deaths in police custody include the deaths which have occurred when a person is being arrested or taken into detention. The death may have taken place on police, private or medical premises, in a public place or in a police or other vehicle. In 2010, the Independent Police Complaints Commission (IPCC) conducted an analysis of all 333 deaths in custody since 1998/99.⁶⁷ It found that in half of the cases (166 of 333), alcohol was an issue identified at the point of arrest.⁶⁸ In 87 cases the individuals had been arrested for being drunk and incapable or drunk and disorderly, and 60 of these had committed no other crime.

Ideally, individuals who are severely intoxicated, and who have committed no other crime, should be taken to an alcohol treatment centre. Custody should be the last resort.⁶⁹ However, the IPCC noted that though there are some specialist facilities for people who are severely intoxicated, they are not very widespread in England and Wales, so most still end up in police custody.⁷⁰

⁶⁷ The most recent comprehensive analysis on deaths in or following police custody is, M. Hannan, I. Hearnden, K. Grace and T. Burke, 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission.

⁶⁸ M. Hannan et al., 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission. Page 33.

⁶⁹ Home Office, 2006. *Guidance on the safer detention and handling of persons in police custody*. Available at: <http://www.homeoffice.gov.uk/publications/police/operational-policing/safer-detention-guidance?view=Binary>. Accessed 01/02/2012.

⁷⁰ M. Hannan et al., 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission. Page 85.

Mental health is another important risk factor. Of the 333 deaths in custody, 39 had mental health needs identified by arresting officers or by custody officers, and 17 individuals had been detained under section 136 of the Mental Health Act.⁷¹ Under the Mental Health Act, the police may detain people in need of ‘immediate care and control’. However, such individuals should then be taken to a ‘place of safety’. Guidance indicates that a place of safety should ideally be a hospital, and that police custody should only be a place of safety in exceptional circumstances. However, research has shown that in some police force areas there are no alternative places of safety outside police custody.⁷²

Key issues

1. A lack of adequate risk assessment of people in custody has contributed towards some deaths

The Police and Criminal Evidence Act (PACE) 1984 sets out the procedure that the police must follow once a person is in custody, including guidance on risk assessments.⁷³ Since 2003, several legal changes have strengthened risk assessments for detainees, and in 2006, the Home Office, Association of Chief Police Officers and the National Centre for Policing Excellence produced guidance on the safer detention and handling of persons in police custody.⁷⁴

Nevertheless, an IPCC study found that the failure to conduct risk assessments correctly was likely to have been a contributory factor to some deaths in police custody. Despite the clear requirement to conduct and record the results of an assessment, only just under half (121 of 247) of people in the sample who died in police custody were actually risk assessed.⁷⁵ The study recognised that some improvements had taken place, but found they were not consistent. Different reasons were given for there being no risk assessment, with the detainee’s level of intoxication cited most often.⁷⁶

⁷¹ Ibid. Page 50.

⁷² Ibid. Page 85.

⁷³ Home Office, 2006. *Guidance on the safer detention and handling of persons in police custody*. Available at: <http://www.homeoffice.gov.uk/publications/police/operational-policing/safer-detention-guidance?view=Binary>. Accessed 01/02/2012.

⁷⁴ Ibid.

⁷⁵ M. Hannan *et al.*, 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission. Page 35

⁷⁶ Ibid. Page 17.

HM Chief Inspector of Prisons, which has joint responsibility for the inspection of police custody suites (with HMI Constabulary) found that a lack of adequate risk assessments compromised the dignity and respectful treatment of individuals.⁷⁷ This was often because the police applied blanket rules, rather than considering the risk relating to each individual.⁷⁸ By way of illustration, the report noted:

‘In one custody suite, we saw a detainee denied his spectacles, even though there was no evidence of a risk of self-harm; at another a young woman’s strapped top was cut off her in a public area, as a potential ligature threat (though ironically she retained her bra).’⁷⁹

The IPCC also found that individuals with mental health conditions, those at risk of suicide or self-harm, and those who were intoxicated were not checked as frequently as they should have been. The report indicates that officers were simply ‘going to the cell’ rather than waking the detainee and asking questions. Investigators identified a need for better training on questioning and rousing detainees, particularly if they are intoxicated.⁸⁰

The IPCC’s study recommends that custody personnel should be aware of the risk that symptoms of head injuries can be mistaken for intoxication.⁸¹

2. Information about the risks to individuals in custody needs to be shared more effectively

In their study the IPCC found that there is sometimes a lack of communication about the risks posed to individuals in custody. Inadequate communication between police officers on risk assessments led to some detainees not receiving adequate checks, not being considered as vulnerable, not receiving medication, or in one case being returned an item which had earlier been removed and which the detainee subsequently used as a strangulation aid.

⁷⁷ HMI Prisons, 2010. *HM Chief Inspector of Prisons for England and Wales Annual Report 2008-09*. London: The Stationery Office. Page 81.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ M. Hannan *et al.*, 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission. Page 62.

⁸¹ Ibid.

The study also raised concerns that the police do not adequately share information with healthcare agencies, such as ambulance and hospital staff, and vice versa.⁸² In particular, it highlighted the failure of hospital medical staff to fill in medical treatment forms required by the Metropolitan Police Service. This means detainees may re-enter police custody without anyone knowing whether they have received medical treatment.⁸³

⁸² Ibid. Pp. 47-48.

⁸³ T. Bucke, R. Teers, S. Menin, 2008. *Near Misses in Police Custody: a collaborative study with Forensic Medical Examiners in London*. London: Independent Police Complaints Commission. Page 37.

Lives can be put at risk by an inappropriate or excessive use of restraint in custodial settings

How Article 2 protects those in custody from an excessive use of restraint

Control and restraint techniques are used in custodial settings to bring adult detainees under control. In young offender institutions and secure training centres the use of restraint is governed by statute and may only be used to prevent harm to the child or young person, to others, or to property, or to prevent escape.⁸⁴ In young offender institutions, restraint can also be used to maintain the good order of the establishment. It cannot be used to force compliance with an instruction, or as a punishment.

There is no statutory regulation of police powers of control and restraint. There is specific guidance and training for all officers in restraint, but the extent to which this is adopted is a matter for individual police forces. This means that there is little consistency in the use of control and restraint across different police forces. The Joint Committee on Human Rights recommends that ‘there should be a national Code of Practice on restraint in police custody, which takes account of the Convention rights, backed up by statutory obligations ... to record all incidents of the use of force, and to train on the basis of the Code of Practice.’⁸⁵

The control and restraint procedures usually used by state authorities are designed to minimise the possibility of pain and injury to the detainee and the person or people who are restraining them.⁸⁶ Under Article 2, the use of force while carrying out these techniques must be necessary and proportionate.

⁸⁴ Use of restraint in secure children’s homes must follow guidance from the Department of Health.

⁸⁵ JCHR 3rd report, para 270.

⁸⁶ N. O’Loan, 2010. *Report to the United Kingdom Border Agency on “Outsourcing Abuse.”* Available at: http://www.gla.ac.uk/media/media_147177_en.pdf. Accessed 01/02/2012.

In rare cases, people have died in custody after being physically restrained. The Independent Advisory Panel on Deaths in Custody reports that from 2000 to 2010, there were 5,998 deaths in state custody, including those who died in prisons, young offender institutions and secure training centres, immigration removal centres, police custody and detained patients in in-patient mental health settings. Of these, 19 were as a direct result of restraint.⁸⁷

However, this figure only includes the deaths which occurred as a direct result of restraint. It does not take into account deaths in which restraint was deemed to be a contributory factor. At a seminar held by the Independent Advisory Panel in 2011, experts concluded that there have been more restraint-related deaths than indicated by that data.⁸⁸

In such cases, the authorities must provide evidence to justify the death under one or more grounds in Article 2. Force may be used in self-defence or defence of another, to affect a lawful arrest or prevent an escape, or to quell a riot. Article 2 may be breached when deliberate or negligent acts of restraint by public officials lead to the death of a detainee. It is also breached when failings in management, instruction and training combine to produce an unnecessary or excessive use of force.⁸⁹

The government has taken steps to ensure that different custodial centres share information and knowledge about such deaths and how to prevent them. In 2009 it established the Ministerial Council on Deaths in Custody (MCDC), a cross-sector body designed to bring about a sustained reduction in the number and rate of deaths in state custody by sharing best practice. It is a three tier organisation made up of a Ministerial Board, an Independent Advisory Panel of experts, and a stakeholder and practitioner group including government departments and organisations, non-governmental organisations and charities.⁹⁰

⁸⁷ Independent Advisory Panel on Deaths in Custody, 2011. *Statistical Analysis of all recorded deaths of individuals detained in state custody between 1 January 2000 and 31 December 2010*. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/10/IAP-Statistical-Analysis-of-All-Recorded-Deaths-in-State-Custody-Between-2000-and-2010.pdf>. Accessed 01/02/2012.

⁸⁸ Independent Advisory Panel on Deaths in Custody, 2010. *Report of the cross-sector restraint workshop held in May 2010*. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/11/Caring-Solutions-UK-Ltd-Review-of-Medical-Theories-of-Restraint-Deaths.pdf>. Accessed 01/02/2012.

⁸⁹ *McCann v. the United Kingdom* [1996] 21 EHRR 97.

⁹⁰ More information is available at: <http://iapdeathsincustody.independent.gov.uk/about/ministerial-council-on-deaths-in-custody/>. Accessed 01/02/2012.

Key issues

1. There is a need for better recording and reporting on how many people die in custody due to the use of restraint

It is clear from the available evidence that the unsafe use of restraint remains a problem across all forms of detention.⁹¹ The Independent Advisory Panel has noted that there is ‘an inconsistent approach to recording and reporting on the use of force across the custodial sectors’.⁹²

A major problem, as noted above, is that there is no record kept of deaths in which restraint may have been a contributory factor, as opposed to the primary cause. This means that it is impossible to assess how far the government is meeting its obligation not to deprive an individual in its care of his or her life.

The National Confidential Inquiry into Suicide and Homicide by People with Mental Illness Annual Report collects information on sudden unexplained deaths of mental health inpatients. Between 1999 and 2007 there were 371 such deaths in England and Wales, 15 of which directly followed restraint. However it is not known whether restraint caused those deaths.⁹³ The Joint Committee on Human Rights (JCHR) has argued that without a national database of figures for how many such deaths were connected to the use of restraint, some deaths recorded as being from natural causes may in fact be attributable to restraint.⁹⁴

⁹¹ House of Lords, 2004. *Joint Committee on Human Rights. Deaths in Custody Third Report of session 2004-05*. London: The Stationery Office. Para 227; P. Smallridge and A. Williamson, 2008.

Independent Review of restraint in juvenile settings. Available at: http://www.justice.gov.uk/publications/docs/restraint_review.pdf. Accessed 01/02/2012. See also, C. Berriew, 2006. *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes*. London: Howard League for Penal Reform. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Carlile_Report_pdf.pdf. Accessed 01/02/2012.

⁹² Independent Advisory Panel on Deaths in Custody, 2011. *Statistical Analysis of all recorded deaths of individuals detained in state custody between 1 January 2000 and 31 December 2010*. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/10/IAP-Statistical-Analysis-of-All-Recorded-Deaths-in-State-Custody-Between-2000-and-2010.pdf>. Accessed 01/02/2012.

⁹³ See: http://www.medicine.manchester.ac.uk/mentalhealth/research/suicide/prevention/nci/inquiryannualreports/Annual_Report_July_2011.pdf.

⁹⁴ House of Lords, 2004. *Joint Committee on Human Rights. Deaths in Custody Third Report of session 2004-05*. London: The Stationery Office. Para 224.

Specifically in relation to psychiatric deaths in detention, the charity Inquest states that: ‘the existing internal systems for examining and reporting these deaths are so poor that we believe some contentious deaths could escape any public scrutiny’.⁹⁵

2. Dangerous restraint techniques, or techniques used without sufficient training, continue to put detainees’ lives at risk

‘Prone restraint’, which involves holding an individual face down on the floor, is one example of a potentially dangerous restraint technique. In 1998 David Bennett died in a mental health facility after he was restrained in this way for a prolonged period. The report into his death recommended that detainees should not be subjected to prone restraint for more than three minutes.⁹⁶ The government responded that patients should only be held in the prone position as a last resort, and only for as long as necessary.⁹⁷

An inquest into the death of Roger Sylvester in 2003 after he was restrained by eight police officers using this technique also said that a time limit should be set.⁹⁸ In 2005 the JCHR added their concern:

‘restraint in the prone position was particularly controversial because of the dangers it carried, and its implications in a number of deaths in custody ... there is a case for guidance prescribing time-limits for prone restraint, departure from which would have to be justified by individual circumstances’.⁹⁹

Subsequently Godfrey Moyo died at London’s Belmarsh prison in 2005 after he was restrained for approximately 30 minutes in the prone position. The inquest found that the use of restraint was a contributing factor in his death.¹⁰⁰ Nevertheless, so far the government has not introduced any guidance on how long detainees should be held in the prone position.

95 Inquest, 2004. Submission to the Joint Committee on Human Rights – Inquiry into deaths in custody, Page 12. Available at: <http://inquest.gn.apc.org/pdf/INQUESTs%20Submission%20to%20the%20Joint%20Committee%20on%20Human%20Rights.pdf>. Accessed 01/02/2012.

96 Norfolk, Suffolk and Cambridgeshire Strategic Health Authority, 2003. *Independent Inquiry into the death of David Bennett*. Page 52.

97 Department of Health, 2005. *Delivering Race Equality in Mental Health Care*. Page 26.

98 Rule 43 Roger Sylvester. Available at: <http://4wardeveruk.org/wp-content/uploads/2010/05/Roger-Sylvester-Rule-43-Recomendations.pdf>. Accessed 01/02/2012

99 House of Lords, 2004. *Joint Committee on Human Rights. Deaths in Custody Third Report of session 2004-05*. London: The Stationery Office.

100 Garden Court Chambers, 2009. *Positional Asphyxia and Restraint Death at HMP Belmarsh – Jury Find Healthcare Guilty of Neglect*. Available at: http://www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=504. Accessed 01/02/2012.

Nose distraction technique, in which the detainee is given a sharp upward jab under the nose, also continues to be used. It was prohibited in secure training centres after 14-year-old Adam Rickwood hanged himself in 2004 after being subjected to this technique, and the jury identified it as a factor which contributed to his death.¹⁰¹ There is evidence that it continued to be used in young offender institutions for prisoners under 18 until January 2011.¹⁰² The nose control technique, which is very similar to the nose distraction technique, was also banned in under-18 young offender institutions in January 2011. It continues to be used in adult prisons and in young offender institutions holding 18-20-year-olds.

The risk of death may be higher when restraint techniques are used by individuals who are not properly trained. This has been highlighted as a concern in a number of reports. A review commissioned by the government in 2008 into the use of restraint in juvenile secure settings recommended that, 'All staff in the secure estate should have consistent and comprehensive training in the awareness of risk factors in restraint.' An independent review commissioned by the government in 2010 to investigate alleged abuse of detainees by contractors of the UK Border Agency found that:

'There should be a review of the training provided for the use of force, and of the annual retraining, to ensure that, in any case in which force is used, officers are trained to consider constantly the legality, necessity and proportionality of that use of force.'¹⁰³

¹⁰¹ In the second inquest into his death the jury found that „[amongst other factors] the use of the Nose Distraction Technique more than minimally contributed to Adam taking his own life’.

¹⁰² Youth Justice Board communication with the Equality and Human Rights Commission, received on 17 October 2011. Department for Children, Schools and Families, 2008. *The Government's Response to the Report by Peter Smallridge and Andrew Williamson of a Review of the Use of Restraint in Juvenile Secure Settings*. Available at: <http://www.justice.gov.uk/publications/docs/govt-response-restraint-review.pdf>. Accessed 01/02/2012.

¹⁰³ N. O'Loan, 2010. *Report to the United Kingdom Border Agency on "Outsourcing Abuse."* Available at: http://www.gla.ac.uk/media/media_147177_en.pdf. Accessed 01/02/2012.

In October 2010, Jimmy Mubenga died while being deported to Angola. It was reported in the media that he died ‘while being heavily restrained by security guards’¹⁰⁴ employed by G4 Security (G4S), a private firm, and that ‘he complained of breathing difficulties before he collapsed’.¹⁰⁵ There has been neither a criminal prosecution nor an inquest so far. The post-mortem tests have so far proved inconclusive, but three security guards from the firm have been arrested and released on bail while inquiries continue.¹⁰⁶ The most recent press release from the Prisons and Probation Ombudsman states that they are still exploring the events leading up to Jimmy Mubenga’s death to establish if there are any lessons that can be learnt to avoid similar deaths, and that the report will be published after the forthcoming inquest.¹⁰⁷

The *Guardian* reported that three days after Mubenga’s death, the Home Office instructed ‘all private security firms to halt using force while they checked that the techniques used to restrain deportees (which are the same as used in prisons), were safe’. According to the article, the Home Office lifted the ban soon after and issued new written instructions to all private security firms. The *Guardian* claims that the Home Office has refused to release the new guidance on the grounds that it is ‘operational and sensitive’.¹⁰⁸

104 Investigations are also ongoing against G4S security guards involved in the violent restraint of Cameroonian Ludovic Paykong on a flight in March 2010, and of Colombian Jose Gutierrez, just days before Jimmy Mubenga’s death. See The *Guardian*, 29 October 2010. *G4S security company loses bid to renew deportee contract*. Available at: <http://www.guardian.co.uk/uk/2010/oct/29/g4s-security-loses-deportee-contract>. Also, The *Guardian*, 21 October 2010. *G4S security guards accused over restraint of Colombian deportee*. Available at: <http://www.guardian.co.uk/uk/2010/oct/21/g4s-jose-gutierrez-deportee-alleged-mistreatment>. Accessed 01/02/2012.

105 See The *Guardian*, 16 March 2011. *Jimmy Mubenga: security firm G4S may face charges over death*. Available at: <http://www.guardian.co.uk/uk/2011/mar/16/mubenga-g4s-face-charges-death>. Accessed 01/02/2012.

106 See BBC, 14 October 2011. *Family of dead deportee Jimmy Mubenga seek ‘justice’*. Available at: <http://www.bbc.co.uk/news/uk-england-london-15314511>. Accessed 01/02/2012.

107 Prisons and Probation Ombudsman, 2010. *Prison and Probation Ombudsman (PPO) Official Statement Death of Mr Mubenga on 12/10/2010*. Available at: <http://www.ppo.gov.uk/news-and-press-releases.htm>. Accessed 01/02/2012.

108 The *Guardian*, 27 October 2010. *Chaos over restraint rule for deportees*. Available at: <http://www.guardian.co.uk/uk/2010/oct/27/deportation-restraint-rules-chaos>. Accessed 01/02/2012.

In response to Mubenga's death the National Offender Management Service (NOMS) conducted an immediate review of how restraint was used by UK Border Agency escorts and concluded that the techniques were not fundamentally dangerous. The review has not been made public.¹⁰⁹ In October 2010 Detention Services requested that the NOMS assess the feasibility of reviewing all restraint techniques and mechanical restraints used by the UK Border Agency. This is still ongoing.¹¹⁰

The charity Inquest published a briefing on Jimmy Mubenga's death, and called for a parliamentary committee inquiry into the use of restraint and force in deportation cases.¹¹¹ There was subsequently an inquiry into the treatment of people being deported, conducted by the Commons home affairs select committee. It found that potentially lethal head-down restraints may still be used, even though they are not authorised. The Committee recommends urgent guidance be given by the Home Office to all staff in enforced removals about the dangers of seated restraint techniques in which the subject is bent forward. It also recommends that the Home Office commission research into control and restraint techniques which are suitable for use on aircraft.¹¹²

109 UKBA respond to IAP request for information about restraint review. Available at: <http://iapdeathsincustody.independent.gov.uk/news/ukba-respond-to-iap-request-for-information-about-restraint-review/>. Accessed 01/02/2012. Inquest states that without that report it is not possible to scrutinise the current restraint process or to be satisfied that the current process is in fact any different to that employed at the time of Mr Mubenga's death without access to the full un-redacted document.

110 Ministry of Justice comments provided in the review of this report.

111 Inquest produced briefing on death of Mr Jimmy Mubenga. Available at: <http://iapdeathsincustody.independent.gov.uk/news/inquest-produce-briefing-on-death-of-mr-jimmy-mubenga/>. Accessed 01/02/2012.

112 House of Commons, 2012. *Home Affairs Committee Rules governing enforced removals from the UK – Eighteenth Report of Session 2010-12*. London: The Stationery Office.

Investigative requirements under Article 2 are not always met

How an Article 2 investigation should be conducted

Article 2 requires that there should be an independent investigation into deaths and near deaths¹¹³ resulting from the state's failure to protect the right to life, or from the use of force involving government officials. An inquest is one of the primary methods of fulfilling this requirement for deaths in custody, and is conducted by a coroner, with a jury. Depending on the circumstances of the death, other bodies including the Independent Police Complaints Commission (IPCC) and the Prisons and Probation Ombudsman (PPO) are required to conduct independent investigations.

The precise form of an Article 2 investigation can vary, but in all cases, there are a number of requirements that must be met. The authorities must initiate the inquiry themselves.¹¹⁴ It must be independent,¹¹⁵ and those in charge must not be implicated in the events in question, or part of any institution connected with the death.¹¹⁶ The investigation should be reasonably prompt,¹¹⁷ open to an element of public scrutiny, and involve the deceased's next of kin.¹¹⁸ It should also be effective, meaning it is capable of leading to the identification and punishment of those responsible. Accordingly, civil proceedings, on their own,

¹¹³ *R. (J.L.) v. Secretary of State for Justice* [2008] UKHL 68, [2008] 3 WLR 1325; *Edwards v. the United Kingdom* [2002] 12 BHRC 190; *McCann v. the United Kingdom* [1995] 21 EHRR 97; *R. v. Coroner for Western District of Somerset, ex parte Middleton* [2004] UKHL 10 [2004] 2AC 182.

¹¹⁴ *Nachova and ors v. Bulgaria* [2005] ECHR 43577/98. Para 111.

¹¹⁵ *Brecknell v. the United Kingdom* [2008] 46 EHRR 957.

¹¹⁶ *Jordan v. the United Kingdom* [2001] 37 EHRR 52.

¹¹⁷ See, for example, *Angelova v. Bulgaria* [2007] 23 BHRC 61; *Brecknell v. the United Kingdom* [2008] 46 EHRR 957.

¹¹⁸ *Edwards v. the United Kingdom* [2002] 12 BHRC 190. Paras 69-73; *Ramsahai and ors v. Netherlands* [2007] ECHR 52391/99. Para 353. See also *R. (D.) v. Secretary of State for the Home Department* [2006] EWCA Civ 143, [2006] 3 All ER 946.

will not constitute an effective investigation.¹¹⁹ To be effective, an investigation must include appropriate eye witness and forensic evidence.¹²⁰ Investigations that fail to gather such evidence within a short time of the death may fail to meet Article 2 requirements.¹²¹

The main types of investigations that take place, depending on the circumstances of death, are set out below:

Inquests

The government regards the inquest system as the principal means for meeting its obligation under Article 2 to investigate deaths in custody and failures by the state to protect lives.¹²² An inquest takes place where a death that is reported to the coroner is violent or unnatural, where the cause of death is uncertain, or where the death occurs in custody. The purpose of an inquest is to establish who the deceased was and how, when and where he or she died.¹²³ This can benefit the deceased's family and friends, and provide important information that may prevent future risks to life. Investigations by the IPCC, the PPO and others can provide evidence to an inquest.

The domestic courts have clarified how an inquest must take place to comply with the provisions of Article 2.¹²⁴ The inquest must be open to public scrutiny, involve the family of the deceased and allow cross-examination of witnesses. Any deaths in custody cases must be heard before a jury. An Article 2 inquest must be able to determine 'by what means and in what circumstances' the death happened, and must culminate in 'an expression of the jury's conclusion on the central factual issues in the case'.¹²⁵

119 *McShane v. the United Kingdom* [2002] ECHR 43290/98. Para 125. See generally L. Thomas, A. Straw and D. Friedmann, 2008. *Inquests: A Practitioner's Guide*. London: Legal Action Group. *Keenan v. the United Kingdom* (27229/95) (2001) 33 EHRR 38.

120 See, for example, *Jordan v. the United Kingdom* [2001] 37 EHRR 52; *Ramsahai v. Netherlands* [2007] 46 EHRR 983,

121 *R. (J.L.) v. Secretary of State for Justice* [2008] UKHL 68 [2008] 3 WLR 1325 and *Jordan v. the United Kingdom* [2001] 37 EHRR 52; *Ramsahai v. Netherlands* [2007] 46 EHRR 983.

122 Independent Advisory Panel on Deaths in Custody, Work of the AIP: Article 2 Compliant Investigations. Available at: <http://iapdeathsincustody.independent.gov.uk/work-of-the-iap/working-groups/article-2-compliant-investigations/>. Accessed 01/02/2012.

123 *R. (On the application of Middleton) v. HM Coroner for the Western District of Somerset and another* [2004] UKHL 10.

124 *R. (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51. *R. (On the application of Middleton) v. HM Coroner for the Western District of Somerset and another* [2004] UKHL 10. *R. (J.L.) v. Secretary of State for Justice* [2008] UKHL 68.

125 *R. (On the application of Middleton) v. HM Coroner for the Western District of Somerset and another* [2004] UKHL 10.

The inquest into the death of Ian Tomlinson, who died in April 2009 after he was pushed by a police officer during the G20 protests, illustrates the effectiveness of this system. Lawyers representing Tomlinson's family were able to ask questions of key witnesses and evidence of what occurred was heard and tested. The jury returned a verdict of unlawful killing. Following the inquest, the Crown Prosecution Service reviewed the evidence and decided to charge PC Simon Harwood with the manslaughter of Tomlinson. Harwood, who pleaded not guilty, is awaiting trial.

The Independent Police Complaints Commission

The Independent Police Complaints Commission (IPCC) was established by the Police Reform Act in 2002, to increase public confidence in the police complaints system in England and Wales. It was set up to conduct independent investigations following deaths arising from police contact. The IPCC also has some jurisdiction over the Serious Organised Crime Agency, Her Majesty's Revenue and Customs and UK Borders Agency. It has limited authority to investigate deaths that occur while private contractors carry out 'police-like' functions. The IPCC has stated that this is a shortcoming and has called for its jurisdiction to be extended.¹²⁶

The IPCC compiles annual statistics on the number of deaths in custody. Between 2004/05 and 2008/09 there were 128 deaths in or following police custody. These deaths may have taken place on police, private or medical premises, in a public place, or in a police car or other vehicle.¹²⁷ The IPCC's investigations can uncover evidence as to how a death occurred. It has the power to make recommendations, including recommending or directing disciplinary action if appropriate. If the investigation indicates that a criminal offence may have been committed, it must refer its findings to the Crown Prosecution Service (CPS). The final decision as to whether to prosecute rests with the CPS.

¹²⁶ The Independent Police Complaints Commission, 2010. The Independent Police Complaints Commission response to: *policing in the 21st century: re-connecting the police and the people*. Available at: http://www.ipcc.gov.uk/Documents/policing_in_the_21st_century_-_the_ipcc_response.pdf. Accessed 01/02/2012.

¹²⁷ M. Hannan *et al.*, 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission. Page 2.

The Prisons and Probation Ombudsman

The Prisons and Probation Ombudsman (PPO) is an arms-length body appointed by the secretary of state for justice. It investigates complaints from prisoners, people subject to probation supervision and those held at immigration removal centres. It is also responsible for investigating the deaths of prisoners, residents of probation service-approved premises, and immigration detainees, including those held in immigration removal centres. Deaths in any of these settings are always referred to the coroner for an inquest. Life-threatening injuries, or ‘near deaths’, are not usually investigated by the PPO, but are reported to the National Offender Management Service, which then considers if an independent investigation is required.

Key issues

1. There are very few prosecutions and convictions following deaths in custody. This raises questions about whether the current system meets Article 2 requirements

In order to meet Article 2 requirements, an investigation must be capable of identifying and punishing those responsible for deaths which occur in custody, where appropriate.¹²⁸ There is evidence to show that this is not the case under the current system.

Although deaths in police custody are thankfully rare, they do happen. Between 1998/99 and 2008/09 there were 333 deaths in or following police custody. Of these, the IPCC recommended misconduct or disciplinary proceedings against 78 police officers. Prosecutions were recommended in 13 cases.

Even where misconduct has been identified as a possible contributory factor to a death in custody, police officers are very rarely tried and found guilty. In the 13 cases which were prosecuted between 1998/99 and 2008/09, none resulted in a guilty verdict.¹²⁹ In the last 42 years there has only been one police officer convicted for the death of a person in custody, and that was in 1969.¹³⁰

¹²⁸ *Öğür v. Turkey* [1999] ECHR 21594/93.

¹²⁹ M. Hannan et al., 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission.

¹³⁰ The Guardian, 28 October 2011. *Let there be justice for those who have died in custody*. Available at: www.guardian.co.uk/commentisfree/2011/oct/28/deaths-in-police-custody. Accessed 01/02/2012.

Since 1990 eight inquests into cases of death in custody have returned verdicts of unlawful killing. Despite this, none of the police officers involved have been successfully prosecuted.¹³¹

In relation to its own research, the IPCC commented:

‘The acquittal rate of police officers and staff members is ... very high despite, in some cases, there appearing to be relatively strong evidence of misconduct or neglect.’¹³²

The Equality and Human Rights Commission has argued that the criminal law provisions of England and Wales fail to meet Article 2 obligations.¹³³ This is firstly because the CPS imposes an inappropriately high evidential threshold when deciding whether or not to prosecute. Secondly, the law of self defence in English law is very wide, and is inconsistent with the requirements of Article 2(2). The practical result is that, in cases involving killing by state officials, those responsible are rarely prosecuted or punished.

2. Investigations are not always completed promptly enough to meet Article 2 requirements

Under Article 2, investigations and inquests must occur promptly. Delays may lead to a direct breach of Article 2 obligations.¹³⁴ To assemble the necessary evidence for an inquest it is essential that an independent investigation is carried out immediately after a death. The passage of time may erode the amount and quality of the evidence available.

If there is a long delay before an inquest is concluded, poor practice which contributed to the death may remain unaddressed by the relevant authorities. Delays are also clearly of concern to the family of the deceased.

¹³¹ Inquest. Unlawful Killing Verdicts and Prosecutions. Available at: <http://inquest.gn.apc.org/website/statistics/unlawful-killing-verdicts>. Accessed 24/02/12. One case, related to the death of Ian Tomlinson, goes to trial in June 2012.

¹³² M. Hannan *et al.*, 2010. *Deaths in or Following Police Custody: An examination of the cases 1998/99–2008/09*. London: Independent Police Complaints Commission.

¹³³ De Silva v. the United Kingdom ECHR Application No. 5828/08. Third party intervention from the Equality and Human Rights Commission.

¹³⁴ Jordan v. the United Kingdom [2001] 37 EHRR 52. Para 107, Ramsahi and others v. Netherlands [2005] No. 52391/99, 15.5.07.

According to Ministry of Justice data, the estimated average time taken to process an inquest in 2010 – from the date the death was reported until the conclusion of the inquest – was 27 weeks. However, this data does not distinguish between relatively straightforward non-jury cases, and cases of death in custody, which require a jury and may be considerably more complex.

The charity Inquest has analysed the progress of 500 complex cases in which it has been involved. In 48 per cent of these cases the process took two years or more to conclude, 24 per cent took three years or more, and 9 per cent took four years or more. Recent inquests have been held into deaths in prison which had been outstanding for more than five years.¹³⁵ The Independent Advisory Panel on Deaths in Custody, assisted by the Coroners' Society for England and Wales, conducted a survey in early 2011 which indicated that approximately 25 per cent of inquests into deaths in custody take more than two years to complete.¹³⁶

There are a number of reasons why cases take this long. Delays tend to be concentrated in geographical areas with high numbers of prisons and other custodial settings, where coroners are disproportionately burdened with complex cases.¹³⁷ Inquest's research cites the lack of resources available to coroners, a shortage of experts and the difficulty of obtaining timely clinical reviews.

The length of IPCC,¹³⁸ PPO and other investigations can also contribute to inquest delays, as inquests are not usually finalised until other proceedings are completed. In 2010-11 the PPO reduced the time it took to investigate deaths, but still only published 15 per cent of reports within its target of 20-26 weeks.¹³⁹

¹³⁵ Inquest, 2011. Briefing on delays in the inquest system and coronial reform. Available at: http://inquest.gn.apc.org/pdf/briefings/INQUEST_briefing_on_delays_and_coronial_reform_July_2011_Lords.pdf. Accessed 01/02/2012.

¹³⁶ Independent Advisory Panel on deaths in custody. *Independent Advisory Panel on Deaths in Custody report on delays to inquests into deaths in custody*. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/11/Delays-in-DiC-Inquests-IAP-Cross-Sector-Learning.pdf>. Accessed 01/02/2012.

¹³⁷ Ibid.

¹³⁸ 60 per cent of IPCC independent investigations are completed within 157 working days. Publication of investigations reports may be delayed pending the conclusion of inquest or criminal justice proceedings.

¹³⁹ Prisons and Probation Ombudsman for England and Wales, 2011. *Annual Report 2010-2011*. Available at: http://www.ppo.gov.uk/docs/ppo-annual-report_2010-11_web.pdf. Accessed 01/02/2012.

Some cases are particularly complex and there will be an inevitable delay in order to conduct thorough investigations, but these cases should be the exception. As the Independent Advisory Panel notes:

‘Whilst some delays are unavoidable, the panel does not believe that delays over 18 months are reasonable’.¹⁴⁰

3. Investigations into deaths in custody are not always sufficiently independent or effective

Inquests

Inquests are not as effective as they could be. As discussed above, delays arguably mean that the system does not comply with Article 2, which requires prompt investigation.¹⁴¹ The Coroners and Justice Act 2009 introduced a number of changes to the inquest system to make it more consistent and effective. The Act established the office of chief coroner, with powers to drive up standards at inquests and tackle delays. Although this post still remains vacant, the government states that it is working with the lord chief justice to implement the office of chief coroner as soon as possible. The proposed right of appeal to the chief coroner, which organisations on behalf of bereaved families considered would reduce the need for expensive litigation, has been removed.¹⁴²

The Independent Police Complaints Commission

For an investigation to comply with Article 2, it must be independent. In 2010 the home affairs committee heard evidence from a range of witnesses to assess the general progress of the IPCC since its inception, and to consider lack of trust and confidence in and the independence of the IPCC.¹⁴³ Some witnesses

¹⁴⁰ See: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/11/IAP-on-Deaths-in-Custody-Newsletter-November-2011.pdf>.

¹⁴¹ Independent Advisory Panel on deaths in custody. *Independent Advisory Panel on Deaths in Custody report on delays to inquests into deaths in custody*. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/11/Delays-in-DiC-Inquests-IAP-Cross-Sector-Learning.pdf>. Accessed 01/02/2012.

¹⁴² Royal British Legion, Inquest briefing on the Public Bodies bill. Available at: http://inquest.org.uk/pdf/briefings/INQUEST_RBL_joint_briefing_Lords_on_Commons_amendments_Public_Bodies_Bill_Nov11.pdf.

¹⁴³ House of Commons, 2010. *The Home Affairs Committee – The work of the Independent Police Complaints Commission Eleventh Report*. London: The Stationery Office. Available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/366/366.pdf>. Accessed 01/02/2012.

questioned the IPCC's independence, given that some former police officers are among its investigative staff. Others also felt that the IPCC sided with the police.¹⁴⁴ As the home affairs committee commented,

'The IPCC thus often presents an impression to the public of being an arm's length police investigation unit rather than a public complaints/ombudsman service.'¹⁴⁵

The committee concluded that:

'Whether or not the IPCC is failing in its duty of objectivity and impartiality, it is clearly failing to convey such qualities to many of its users.'¹⁴⁶

It recommended that steps were taken to improve trust and confidence in the IPCC, to place the complainants at the heart of the process.¹⁴⁷ In response to these concerns the government has acknowledged the work the IPCC has done to put complainants' needs first and to make the complaints system more accessible. The IPCC has stated that there are processes in place to ensure that former police officers are not involved in investigations involving their former colleagues.¹⁴⁸

¹⁴⁴ See for example Case: *R. (on the application of Saunders) v. Independent Police Complaints Commission* [2008] EWHC 2372 (Admin); [2009] P.T.S.R. 1192 (QBD (Admin) where the applicants sought a judicial review of the failure of the IPCC to give directions to the police to prevent officers from collaborating or conferring when making their statements.

¹⁴⁵ House of Commons, 2010. *The Home Affairs Committee – The work of the Independent Police Complaints Commission Eleventh Report*. London: The Stationery Office. Page 8. Available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/366/366.pdf>. Accessed

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ The Government Reply To The Eleventh Report From The Home Affairs Committee Session 2009-10 HC 366: The Work of the Independent Police Complaints Commission Cm 8056. Available at: <http://www.official-documents.gov.uk/document/cm80/8056/8056.pdf>.

The IPCC has received positive feedback from family members, their representatives and the judiciary for its investigations. The coroner at the inquest into the death of Ian Tomlinson thanked the IPCC for their thorough and timely investigation.¹⁴⁹ The family of Cheryl Flanagan stated that the IPCC inquiry into failures by the British Transport Police to investigate their daughter's death was rigorous and left no stone unturned.¹⁵⁰

In 2011, the IPCC was criticised for its investigation into the death of Mark Duggan. At the opening of the inquest, counsel on behalf of the family of Mark Duggan stated that the family had „a complete breakdown in confidence for this investigation'.¹⁵¹ He pointed out errors the IPCC had made in providing misinformation about the shooting shortly after Mark Duggan's death, including incorrect suggestions that he had been involved in a shoot-out with the police. At the inquest the IPCC accepted that it had made a mistake and provided inaccurate information. The family has demanded an apology from the IPCC and the police.¹⁵²

The Prisons and Probation Ombudsman

The PPO lacks formal statutory independence. Unlike the IPCC, the PPO's remit is not laid out in any statute; rather it is an arm's length body sponsored by the Ministry of Justice. This led the Joint Committee on Human Rights (JCHR) in 2004 to state that

‘...until such a statutory basis is provided, investigations by the Ombudsman are unlikely to meet the obligation to investigate under Article 2 ECHR’.¹⁵³

¹⁴⁹ It should be noted that the family of Ian Tomlinson and campaign groups have criticised the IPCC for failing to immediately instigate an independent investigation and for their actions during their investigation, in particular the agreement of media releases with the police, and failure to pass on information to the family and lawyers of the deceased.

¹⁵⁰ See: <http://www.irwinmitchell.com/news/Pages/Jury>Returns-Open-Verdict-Into-Tram-Death.aspx>.

¹⁵¹ BBC, 12 December 2011. *Duggan family's 'breakdown in confidence' in IPCC*. Available at: <http://www.bbc.co.uk/news/uk-england-london-16141820>. Accessed 01/02/2012.

¹⁵² *London Evening Standard*, 23 January 2012. *'Met treated my family disgracefully after officers killed Mark'*. Available at: <http://www.thisislondon.co.uk/standard/article-24030054-met-treated-my-family-disgracefully-after-officers-killed-mark.do>. Accessed 01/02/2012.

¹⁵³ House of Lords, 2004. *Joint Committee on Human Rights. Deaths in Custody Third Report of session 2004-05*. London: The Stationery Office. Para 332.

The courts have accepted that PPO investigations comply with Article 2,¹⁵⁴ and in practice the PPO has been able to operate independently of government interference or control. In theory, however, its semi-detached status could give rise to an Article 2 compliance challenge.¹⁵⁵ In April 2011 the government reiterated its commitment to the independence of the PPO, and said it was continuing to review whether this should be placed on a statutory basis.¹⁵⁶

Clinical reviews form a key part of the investigations undertaken by the PPO. In some circumstances these reviews are commissioned by the same primary care trust that provided healthcare to the custodial setting. In these cases the level of independence has been questioned.¹⁵⁷

4. The system for investigating deaths of children in secure children's homes may not comply with Article 2

Since 1990, there have been 31 deaths in custody of young people aged 14-17.¹⁵⁸ When a child or young person dies in the youth justice system the obligation to carry out an Article 2 compliant investigation is mainly met through the inquest procedure, as it is with adults.

There are three distinct custodial settings used for young people. Young offender institutions are for those between the ages of 15 and 21, although those over 18 are held separately. Secure training centres house vulnerable young people for whom a young offender institution would not be suitable. Secure children's homes are for the youngest or otherwise most vulnerable young offenders, as well as children in local authority care.

¹⁵⁴ *R. (J.L.) v. Secretary of State for Justice* [2008]UKHL.

¹⁵⁵ A. Barty, 2009. *Will a death in custody always be subject to independent investigation?* Forum for preventing deaths in custody: Report on Article 2-Compliant Investigation of Deaths in Custody. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012. See also *Khan v. the United Kingdom* [2000] ECHR 195, in which the European Court of Human Rights held that the lack of independence of the Police Complaints Authority meant that it failed to provide an adequate remedy under Article 13 of the ECHR.

¹⁵⁶ See letter from the secretary of state for justice to the IAP, 7 April 2011. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012.

¹⁵⁷ Report of the IAP's workstream considering investigations of deaths in custody – compliance with Article 2 ECHR MBDC 36.

¹⁵⁸ Inquest, ongoing. *Child Deaths in penal custody* (England & Wales) 1990-date. Available at: http://inquest.gn.apc.org/pdf/Deaths_of_Children_in_Penal_Custody_1990-date.pdf. Accessed 01/02/2012.

When a young person dies in a young offender institution or a secure training centre, an investigation is carried out by the PPO. However, its remit does not extend to children and young people in custody in secure children's homes. When a child dies in a secure children's home, Ofsted inspects the establishment to ensure that it is safe for other residents. The local safeguarding children boards are obliged to carry out a child death review, and a serious case review.¹⁵⁹

The Independent Advisory Panel on Deaths in Custody reported that regarding this process 'there is a gap in terms of Article 2 compliance'.¹⁶⁰ Neither Ofsted investigations, nor the local safeguarding children boards and serious case reviews focus on establishing the facts around the cause of death. They may not involve the family and are not carried out in public. The local safeguarding children board at least is unlikely to be sufficiently institutionally independent as it is comprised of organisations that report to the same local authority that has responsibility for running the secure children's home.¹⁶¹

The government argues that these processes, while important, are not intended to meet the Article 2 requirements, which are primarily met through the inquest.¹⁶² However, the Independent Advisory Panel has responded that it may be difficult for inquests to comply with Article 2 without information provided by an independent investigation. It recommends that this should be done by the PPO.¹⁶³ The government is currently considering this recommendation.¹⁶⁴

159 Department for Children, Schools and Families, 2010. *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*. Para 8.4. Available at: <https://www.education.gov.uk/publications/eOrderingDownload/00305-2010DOM-EN.pdf>. Accessed 01/02/2012.

160 Report of the IAP's workstream considering investigations of deaths in custody – compliance with Article 2 ECHR MBDC 36.

161 A. Barty, 2009. *Will a death in custody always be subject to independent investigation?* Forum for preventing deaths in custody: Report on Article 2-Compliant Investigation of Deaths in Custody. Page 15. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012.

162 See Letter from the Secretary of State for Justice to the IAP, 7 April 2011. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012.

163 Report of the IAP's workstream considering investigations of deaths in custody – compliance with Article 2 ECHR MBDC 36.

164 Independent Advisory Panel on deaths in Custody E bulletin July 2011 issue 5. Available at: <http://www.ohrn.nhs.uk/resource/policy/IAP5thNewsletter.pdf>. Accessed 01/02/2012.

5. The system for investigating deaths of patients in mental health settings may not meet Article 2 obligations

There is no single person or agency automatically responsible for investigating deaths of patients in mental health settings. Such deaths may be investigated by an inquest, an internal hospital inquiry, the Strategic Health Authority, a commissioned independent body, or a combination of some or all of them.¹⁶⁵ The Care Quality Commission is notified of all deaths, and has a discretionary role in reviewing them. Though it aims to share the lessons learnt from each case across organisations, there is no formal mechanism for doing this.

The government considers that an inquest is sufficient to meet Article 2 requirements, supplemented by Strategic Health Authority investigations, and criminal, civil or disciplinary proceedings.¹⁶⁶

However, to meet Article 2 requirements, the inquest may need information that is obtained from an independent investigation immediately after the death. The Forum for Preventing Deaths in Custody criticised Strategic Health Authority investigations, specifically questioning their independence, and recommended that for all deaths involving people with mental health conditions that engage Article 2, an independent investigator should be immediately appointed.¹⁶⁷

The Independent Advisory Panel on Deaths in Custody has followed up the work of the Forum. It pointed out that the coronial system is not sufficiently responsive or properly resourced to undertake effective investigation into all deaths of all detained mental health patients. The lack of a system for independent investigation may mean that learning will be missed.

¹⁶⁵ In Wales the Health Inspectorate of Wales reviews deaths of mental health patients. This is not a statutory requirement, and the process is currently under review. See Heath Inspectorate of Wales, 2011. *Monitoring the use of the Mental Health Act in 2009-2010*. Available at: <http://www.hiw.org.uk/Documents/477/Monitoring%20Mental%20Health%20Act%2009%2010%20MP%203.pdf>. Accessed 01/02/2012.

¹⁶⁶ Letter from the Secretary of State for Justice to the IAP, 7 April 2011. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012.

¹⁶⁷ A. Barty, 2009. *Will a death in custody always be subject to independent investigation?* Forum for preventing deaths in custody: Report on Article 2-Compliant Investigation of Deaths in Custody. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/05/Forum-for-Preventing-Deaths-in-Custody-Report-on-Article-2-Compliant-Investigations.pdf>. Accessed 01/02/2012.

The Independent Advisory Panel has made a number of recommendations to ensure compliance with Article 2. It has called for a review of the quality of independent investigations carried out by Strategic Health Authorities and for revision of guidance. It also recommended that NHS Commissioning Board should provide guidance to clarify when independent investigations should be commissioned, and that the Care Quality Commission should take a role in conducting or commissioning independent investigations.¹⁶⁸

6. Mental health patients who are not formally detained should also be protected by Article 2

Under Article 2, the state has an operational duty to protect those in custody. Previously it was considered that this duty only applied to those detained under the Mental Health Act. However, recently the Supreme Court ruled that this operational duty may also apply to voluntary mental health patients in particular circumstances.

In the case of Melanie Rabone, a voluntary patient who died after at least three suicide attempts between 4 March and 20 April 2005, the Supreme Court held that the NHS Trust had an operational duty to protect a voluntary patient from a real and immediate risk of suicide. The trust had breached this duty to Melanie, by allowing her home on leave shortly after she had been admitted to hospital in a depressed suicidal state.¹⁶⁹

This judgment is important in providing protection for vulnerable mental health patients, even if they are not detained, or in a formal hospital setting. Hospitals and other institutions working with mental health patients will need to ensure their procedures meet the positive obligation to protect patients, where there is a real and immediate risk of harm, and the investigative procedures following deaths (discussed above) will need to be capable of meeting Article 2 requirements for both detained and non-detained patients.

7. There is a lack of communication between sectors regarding the findings and recommendations from inquests and other investigations. This means that opportunities to learn lessons may be missed

A major objective of inquests and the other systems for investigating deaths in custody is to ensure that lessons are learnt, and that similar deaths are prevented in future. In 2008, the government set up the cross-departmental

¹⁶⁸ Report of the IAP's workstream considering investigations of deaths in custody – compliance with Article 2 ECHR MBDC 36.

¹⁶⁹ *Rabone v. Pennine Care NHS Foundation Trust* [2012] EWHC 1827.

Ministerial Council on Deaths in Custody (MCDC)¹⁷⁰ to facilitate this, and it has proved to be an important forum for sharing information, research and learning, and co-ordinating responses.

Some sectors have developed effective ways of sharing information and learning lessons. For example, the Learning the Lessons Committee, which is made up of representatives of various agencies, produces regular bulletins to disseminate key IPCC findings across the police service. The Ministry of Justice produces bulletins twice a year that draw together all the ‘rule 43’ reports produced by coroners. The purpose of these reports is to advise organisations about specific measures they could take to avoid future deaths. The Independent Advisory Panel has conducted a review of all rule 43 reports in relation to restraint-related deaths, and made recommendations for further actions based on these.¹⁷¹

The National Offender Management Service has a strategy in place to learn from deaths in prisons and a dedicated team to disseminate lessons learnt. HMI Prisons has found that most prisons develop action plans in response to the PPO’s investigations, although it warns that ‘these action plans are not widely disseminated in some prisons or reviewed’.¹⁷²

However, more could be done to share learning across different sectors. At the moment prisons, for example, do not automatically have the opportunity to learn from deaths in police custody. The Independent Advisory Panel has criticised the lack of formal structures in place to promote learning from a wide variety of other investigations, including clinical reviews into deaths in prison custody, primary care trust clinical reviews, and reviews into deaths in secure mental health settings.¹⁷³

¹⁷⁰ This was following recommendations of the Fulton Review into the functioning of the Forum on Deaths in Custody. The Ministerial Council comprises of a ministerial board, an independent advisory panel and a practitioner and stakeholder group.

¹⁷¹ Independent Advisory Panel on Deaths in Custody, Themes from the Independent Advisory Panel (IAP) on deaths in custody review of rule 43 reports, narrative verdicts, and investigations reports where restraint was identified as a direct cause or contributory factor in death. Available at: <http://iapdeathsincustody.independent.gov.uk/wp-content/uploads/2011/12/REview-of-Rule-43-and-narrative-reports-on-restraint-deaths.pdf>. Accessed 01/02/2012.

¹⁷² HMI Prisons, 2011. *HM Chief Inspector of Prisons for England and Wales Annual Report 2010-11*. London: The Stationery Office. Page 23.

¹⁷³ Independent Advisory Panel on deaths in Custody E bulletin April 2011 issue 4. Available at: <http://www.ohrn.nhs.uk/resource/policy/IAPDeathsInCustody4.pdf>. Accessed 01/02/2012.

Case study:**Protecting the right to life of voluntary mental patients**

In February 2012, the Supreme Court ruled that under Article 2 voluntary patients are entitled to the same duty of care as a patient detained under the Mental Health Act.

In April 2005, Melanie hanged herself the day after a psychiatric unit in Stockport, Cheshire, allowed her to go home. For Melanie's parents, Richard and Gillian, their grief at her death was compounded by a six-year legal battle to prove that the local NHS Trust had failed in its duty under Article 2 to protect their daughter's life. "Melanie's death was a great shock to us. It completely blew us apart and we did not know where we were or what we could do," says Richard.

Melanie, who had a history of depression, was 24 when she took her life. She had been diagnosed with depression in 2000 but made a full recovery, Richard recalls. Then in 2005 she became ill again, shortly after the Boxing Day tsunami in Asia when she was working for a relief agency in Manchester. "Following the disaster she was completely overwhelmed with work and just seemed to lose confidence in herself," he says. "She had also split up with a boyfriend a couple of months earlier."

On 4 March 2005, Melanie tried to commit suicide and was admitted to Stepping Hill Hospital in Stockport. She was diagnosed as suffering from severe depression and prescribed a course of drugs. The hospital discharged Melanie on 18 March, but two weeks later she attempted suicide again. Although the hospital wanted to admit her to its psychiatric unit, no beds were available, and she remained at home. On 11 April she tried again to kill herself, and agreed to return to hospital voluntarily, where she was monitored every 15 minutes because she was deemed at high risk of suicide.

Two days later, Melanie's father expressed grave concern to hospital staff about his daughter's condition and told them that she should not be allowed home in

“The Supreme Court’s decision is a landmark in human rights law ... it recognises that non-detained psychiatric patients are entitled to the same level of protection”

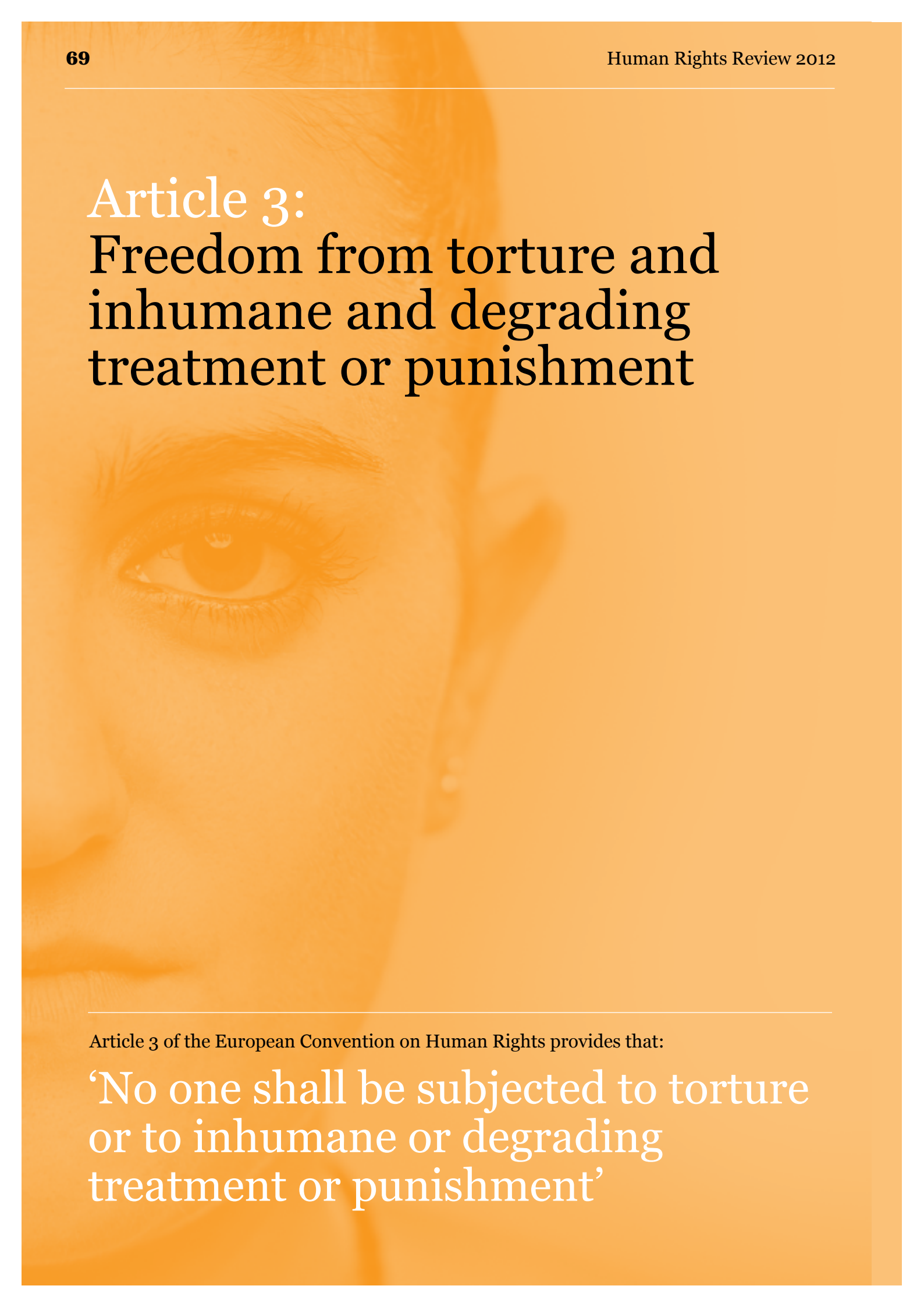
case she tried to self-harm. Despite this information, a consultant psychiatrist agreed on 19 April to give Melanie home leave for two days at her request. She hanged herself the next day.

Richard and Gillian maintained that staff at Stepping Hill Hospital should not have allowed Melanie to go home and that Pennine Care NHS Trust was responsible for their daughter’s death. They started proceedings against the trust in August 2006, claiming negligence and breach of the right to life under Article 2. The high court ruled in 2010 that the NHS had no duty under the Human Rights Act to protect Melanie’s life because she had not been detained at Stepping Hill, but was a voluntary patient. The Court of Appeal upheld this decision.

The Rabones then took their case to the Supreme Court. In February 2012, the court found in their favour. The five judges unanimously decided that under Article 2 Melanie was entitled to the same duty of care as a patient detained under the Mental Health Act. They ruled that the trust should therefore have taken reasonable steps to protect her, even though Melanie was a voluntary patient.

Gill Edwards, a partner at Manchester law firm, Pannone, who represented Gillian and Richard says: “The Supreme Court’s decision is a landmark in human rights law in that it recognises that non-detained psychiatric patients are entitled to the same level of protection as detained patients. Now the parents of adult children who die in such circumstances have a remedy in law which acknowledges their own loss and bereavement.”

Richard says that while the decision won’t bring back their daughter, it was an important victory. “Hopefully the judgment will mean hospitals will take far more care, as it is now irrelevant whether a psychiatric patient has been sectioned or not.”



Article 3: Freedom from torture and inhumane and degrading treatment or punishment

Article 3 of the European Convention on Human Rights provides that:

‘No one shall be subjected to torture
or to inhumane or degrading
treatment or punishment’

Summary

Article 3 is an absolute right prohibiting torture, and inhumane or degrading treatment or punishment. The state must not itself engage in torture, or in inhumane or degrading treatment. It is also obliged to prevent such treatment happening, and to carry out an investigation into allegations that it has. The state must comply with its obligations within its territory and, in exceptional circumstances, in different countries where it exercises effective jurisdiction.

The prohibition on torture has been part of the British common law framework since the 18th century. Today the legal framework around torture is considerably more sophisticated. It is prohibited both by civil law and by several Acts of Parliament. The UK has also ratified several international conventions prohibiting torture and ill-treatment. This framework is supported by an institutional structure of regulators, including the Care Quality Commission (CQC), the Independent Police Complaints Commission (IPCC) and Her Majesty's Chief Inspectorate of Prisons for England and Wales (HMI Prisons).

The key issues we address in this chapter are:

People who use health and social care services may be at risk of inhumane or degrading treatment

People who use health and social care services have a right to be protected from inhumane and degrading treatment and when there are allegations of mistreatment the state has an obligation to investigate. There is evidence of mistreatment of some users of health and social care services that breaches Article 3.

The review shows that:

- People who are receiving health or social care from private and voluntary sector providers do not have the same level of direct protection under the Human Rights Act as those receiving it from public bodies.
- Local authorities do not make the most effective use of the scope that they have for protecting and promoting human rights when commissioning care from other providers.
- Better inspections of all care settings are needed.

Children and young people in custody may be at risk of inhumane or degrading treatment

Children detained in young offender institutions, secure training centres or secure children's homes are under the full control of the authorities, so the responsibilities of the state are enhanced. Because of the vulnerability of young people in these circumstances the threshold of severity for defining torture, inhumane or degrading treatment or punishment is lowered.

The review shows that:

- There is evidence that restraint is used extensively, but better data are needed.
- Authorised restraint techniques used in young offender institutions and secure training centres do not meet human rights standards.
- The use of restraint as a form of discipline, rather than in cases of absolute necessity or safety, is in breach of Article 3.
- Possible breaches of Article 3 in these settings are not always effectively investigated.

The state sometimes fails in its duty to protect vulnerable people against ill-treatment by other individuals

Under Article 3, the state is required to have both laws and systems in place to prevent people suffering ill-treatment at the hands of other individuals. This means that criminal laws must be effective and punish those who perpetrate torture, and inhumane or degrading treatment. It also means that public authorities have an obligation to act to protect vulnerable individuals from ill-treatment that reaches the level of severity of Article 3, when they know or should have known about it.

The review shows that:

- Public authorities sometimes fail to fulfil their positive obligation to intervene in cases of serious ill-treatment of children, disabled people, and women at risk of domestic violence.
- Local authority mechanisms to investigate and learn from serious cases of ill-treatment may be insufficient.
- Agencies do not always work together effectively to prevent ill-treatment of children and disabled people.
- Despite some advances, police forces still too often fail to investigate cases of rape and domestic violence.

- Despite improvements in the approach of the police and Crown Prosecution Service, hate crime against disabled people still has a low prosecution and conviction rate.
- The law regarding the defence of ‘reasonable punishment’ of children may be incompatible with Article 3.

The UK government has itself been accused of perpetrating and being complicit in torture and inhumane or degrading treatment

Article 3 obliges the state to refrain from subjecting anyone within its jurisdiction to treatment or punishment that meets the threshold for torture, or inhumane or degrading treatment. This includes an obligation to refrain from being complicit in these acts. When serious allegations of ill-treatment are made, the state then has an obligation to undertake an effective investigation, regardless of the identity of the alleged victim. There is also an obligation not to expel individuals to countries where there is a real risk that they may face torture.

The review shows that:

- There have been allegations that the security and intelligence services were complicit in the ill-treatment of prisoners and civilians in counter-terrorism operations overseas in the immediate aftermath of the 9/11 attacks.
- Guidance for intelligence officers on detaining and interviewing detainees abroad breaches Article 3.
- There have been allegations that British military personnel have been involved in the torture and ill-treatment of civilians and detainees in Iraq. These allegations have not been investigated thoroughly enough to meet Article 3 obligations.
- Despite concerns as to their effectiveness in preventing torture, the government continues to rely on memorandums of understanding in order to deport people to places where they are at risk of torture and degrading treatment.

The UK's obligations under Article 3

Freedom from torture and inhumane or degrading treatment or punishment is an absolute right. This right applies even during a war or in times of threats to national security. States can never, under any circumstances, suspend or derogate from this article, be it for public order purposes or in the interest of society, or due to threats to national security. Everybody has a right to protection under Article 3, regardless of their identity or actions.¹

Torture is also regarded as one of the few principles of international law that is '*jus cogens*', or accepted by the international community as a norm which is universal and must be upheld regardless of the circumstances.²

Minimum threshold

To be considered a breach of Article 3, the conduct in question must involve a minimum level of severity. Whether the threshold of either torture or inhumane or degrading treatment or punishment has been reached will depend on all the circumstances of the case.

The more vulnerable the victim is the more likely it is that the threshold of minimum severity will be met.³ The assessment of the minimum threshold is relative and depends on all the circumstances of the case including the duration of treatment, the physical or mental effects and the sex, age and state of health of the victim.⁴ A victim's inability to complain coherently, or at all, about how he or she is being affected by any particular treatment, is also taken into account.⁵

1 *Chahal v. the United Kingdom* [1996] EHRR 413 and confirmed in *Saadi v. Italy* [2008] BHRC 123.

2 The absolute prohibition on torture is also included in other international treaties, such as the International Covenant on Civil and Political Rights (ICCPR) Article 7, the United Nations Convention Against Torture (UNCAT) and the European Convention Against Torture (ECPT) ratified by the United Kingdom.

3 *Price v. the United Kingdom* [1988] 55 DR 224.

4 *Ireland v. the United Kingdom* [1978] 2 EHRR 25, para 162; see also *Selmouni v. France* [1988] EHRLR 510, para 160.

5 *Herczegfalvy v. Austria* [1992] 15 EHRR 437, para 82; *Aerts v. Belgium* [1998] 29 EHRR 50, para 66.

Individuals in custody

When an individual, whether a child or an adult, is in custody and under full control of state agents, the responsibilities of the state are enhanced. In this case, the starting point for assessing whether any ill-treatment has taken place is a decision as to whether physical force has been used **at all** against a person deprived of their liberty.⁶ If a detainee, whether a child or an adult, shows signs of injury during detention as a result of physical force, the authorities have an obligation to show that the force ‘was necessitated by the detainee’s own conduct and that only such force as was absolutely necessary was used’.⁷

Different types of ill-treatment

There are differences between the various types of ill-treatment. All must, however, meet the minimum level of severity.

- **Torture**

For treatment to amount to torture it must be particularly severe.⁸

For example, the European Court of Human Rights found that stripping someone naked, tying their arms behind their back, and then suspending them by their arms, amounted to torture; as did rape of a detainee by an official of the state; and subjection to electric shocks, hot and cold water treatment, blows to the head and threats of ill-treatment to the applicant’s children.⁹

- **Inhumane treatment or punishment**

If treatment or punishment causes intense physical or mental suffering, but is not severe enough to amount to torture, it is defined as inhumane treatment. Physical assaults can amount to inhumane treatment if sufficiently serious. Deliberately cruel acts may also amount to inhumane treatment. *In Asker, Selçuk, Dulas and Bilgin v. Turkey* the court held

6 *Ribitsch v. Austria* [1995] 21 EHRR 573, para 34; and *Assenov and others v. Bulgaria* [1999] EHRLR 225, para 94.

7 *Tomasi v. France* [1992] 15 EHRR 1, paras 108-111; *Ribitsch v. Austria* *ibid.*, para 34; *Aksoy v. Turkey* [1996] 23 EHRR 553.

8 The United Nations Convention Against Torture in Article 1 defines torture as: ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

9 *Akkoc v. Turkey* (21987/93).

that the destruction of the applicants' homes by the security forces was an act of violence and deliberate destruction which disregarded the safety and welfare of the applicants, who were left without shelter and in circumstances which caused anguish and suffering.¹⁰

- **Degrading treatment or punishment**

Degrading treatment or punishment arouses a feeling of fear, anguish and inferiority and humiliates and debases the victim. It includes treatment designed to break the physical or moral resistance of a victim. Whether the treatment or punishment is degrading is subjective: it is sufficient for the victim to feel humiliated, even if the state agent does not perceive the treatment as humiliating. One of the first illustrations of degrading treatment was the case *Tyrer v. the United Kingdom* about corporal punishment.

In the presence of his father and a doctor the applicant, a 15-year-old boy, was made to take down his trousers and underpants and bend over a table; he was held by two policemen while a third administered the punishment of three strokes of the birch. The Court considered that the punishment did not amount to torture but was degrading.¹¹

Article 3 imposes three different types of obligations on the state:

- **a negative obligation** which means that the state must itself refrain from subjecting anyone within its jurisdiction to treatment or punishment that meets the 'threshold' of being torture, inhumane or degrading treatment.

¹⁰ *Selçuk and Asker v. Turkey*, judgment of 24 April 1998, ECHR 1998-II.

¹¹ *Tyrer v. the United Kingdom* (5856/72) ECHR 1978. The definition of degrading treatment has also been applied to asylum seekers. In 2005 the House of Lords in the case of *R. (Limbuella and Others) v. S/S for the Home Department* [2005] UKHL 66 found that the removal of support from three destitute asylum-seekers under section 55 was unlawful as it breached their right not to be subjected to inhumane or degrading treatment under Article 3 ECHR. Section 55 of the Nationality, Immigration and Asylum Act 2002 denied access to asylum support to those asylum-seekers who had not applied for asylum 'as soon as reasonably practicable' after arriving in the UK. This had the effect of singling out late asylum claimants and removing them from eligibility for support, at the same time as barring them from working or accessing mainstream benefits. The judgment found that treatment is inhumane or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. Where the inhumane or degrading treatment or punishment results from acts or omissions for which the state is directly responsible, there is an absolute obligation on the state to refrain from such conduct. The threshold test was whether 'the treatment to which the asylum-seeker was being subjected by the entire package of restrictions and deprivations that surrounded him was so severe that it could properly be described as inhumane or degrading treatment within the meaning of [Article 3]'.

- **a positive obligation** to require public authorities to take steps to prevent torture and ill-treatment. This requires the state to have laws in place to adequately protect vulnerable groups from ill-treatment and for public officials to act to protect vulnerable people from harm inflicted on them by others.
- **a procedural obligation** to carry out an effective investigation where there are credible allegations of serious ill-treatment. For an investigation to be considered effective, there need to be procedural safeguards in place and the investigation should be prompt and independent and it should be capable of leading to the identification and punishment of those responsible of any violation of Article 3.

Relation to other articles

Since inhumane or degrading treatment violates human dignity there is sometimes an overlap between Article 3 and Article 8 (the right to respect for private and family life). It is not uncommon where ill-treatment fails to meet the level of severity demanded by Article 3 that a violation of Article 8 may have occurred as Article 8 protects a person's physical integrity as an aspect of private life; this has also been recognised by the European Court of Human Rights.¹² Where the treatment can or has led to the death of the person, and the authorities were aware of this, the Court has recognised that Article 2 is relevant.¹³

¹² *E.S. and Others v. Slovakia* (8227/04) 15 December. See above.

¹³ In *Opuz v. Turkey* [2009] ECHR 33401/02 the applicant and her mother were assaulted and threatened over many years by the applicant's husband H.O., at various points, leaving both women with life-threatening injuries. With only one exception, no prosecution was brought against him on the grounds that both women had withdrawn their complaints, despite their explanations that H.O. had harassed them into doing so, threatening to kill them. He subsequently stabbed his wife seven times and shot dead his mother-in-law. The Court found a violation of Article 2 (right to life) concerning the murder of H.O.'s mother-in-law and a violation of Article 3 (prohibition of inhumane or degrading treatment) concerning the state's failure to protect his wife.

European Court of Human Rights. *Factsheet – Violence against Women*. Available at: http://www.echr.coe.int/NR/rdonlyres/39C38938-2E29-4151-9280-D5AC063DD02E/o/FICHES_Violence_femmes_EN.pdf. Accessed 18/11/2011.

See also, General Recommendation No. 19 (1992) Violence Against Women issued by the UN Committee On the Elimination of Discrimination Against Women (CEDAW).

The development of Article 3 in Britain

The prohibition of torture has been part of the British common law framework since the 18th century. In 1709 the government passed the Treason Act – the first Act prohibiting torture of any person accused of any crime. Previously, if an individual stood mute and refused to plead guilty or not guilty for a felony, he would be tortured until he entered a plea. This Act put an end to torture as a legal means of criminal inquiry in the United Kingdom, and was the first formal abolition of torture in any European state.¹⁴

Today the legal framework satisfying the negative, positive and procedural obligations of the state in relation to torture is considerably more sophisticated. Our legal system continues to prohibit torture and other forms of ill-treatment through its criminal and civil law framework. For example, section 134 of the Criminal Justice Act 1988 prohibits torture undertaken by a public official, regardless of whether the victim is or is not a British citizen and whether or not the torture was committed in Britain.¹⁵ Criminal law also outlaws acts or omissions which might constitute torture or inhumane or degrading treatment, and allows the prosecution of perpetrators, across offences ranging from hate crimes or harassment, to rape or assault and grievous bodily harm.

Civil law gives expression to Article 3 through mechanisms such as injunctions and restraining orders to protect a victim. Protection from domestic violence, for example, is provided largely by civil law. Harassment can also be dealt with through civil law and individuals can bring tort (or personal injury) proceedings and claim damages for trespass or assault, battery or false imprisonment.¹⁶

14 J. Wade, 1839. *British history, chronologically arranged; comprehending a classified analysis of events in church and state; and of the constitutional, political, commercial, intellectual and social progress of the United Kingdom, from the first invasion by the Romans to the accession of Queen Victoria*. Volume: 2. London: Effingham Wilson.

15 This Act was introduced when the UK government signed up to the UN Convention Against Torture which required the government to have a law prohibiting torture.

16 See Protection of Harassment Act 1997, Section 2 – Harassment can be either a civil or criminal matter.

Lastly, in public law there are statutes, regulations, rules and codes which govern public functions and services such as the reception of a child into care to avoid harm (the Children Act 1989 and 2004); treatment and conditions of residential care; conditions of detention (the Prison Rules 1999); and discipline in detention (Criminal Justice and Public Order Act 1994).

The UK has ratified several international conventions that are not part of domestic law but, by ratifying them, the UK commits itself to being legally bound by their obligations, and respecting and implementing their provisions. Examples of these are the two specific conventions which prohibit torture and inhumane and degrading treatment: the United Nations Convention Against Torture and the European Convention Against Torture. The United Nations Convention imposes a duty on the state to submit a periodic report to the United Nations Committee Against Torture outlining how it is complying with its obligations. Both Conventions have protocols establishing a system of regular visits by an independent expert committee to all places where people are deprived of their liberty, to prevent torture and other cruel, inhumane or degrading treatment or punishment. The protocol to the UN Convention also obliges States to designate or establish a national body or bodies, called National Preventive Mechanisms, to conduct regular preventative visits to places of detention in that country.

The UK has also ratified a number of international treaties that provide further protection against torture and ill-treatment. For example, it has ratified the four Geneva Conventions and their two additional protocols,¹⁷ which are the international laws that define the basic rights of civil and military prisoners and civilians during war and the obligation not to torture prisoners in armed conflicts.

The UK's legal framework that gives expression to Article 3 is also supported by an institutional structure of regulators. These include the 18 inspection bodies that come under the National Preventative Mechanism, like the Care Quality Commission (CQC), Her Majesty's Inspectorate of Prisons (HMI Prisons), the Independent Police Complaints Commission (IPCC) and the Office for Standards in Education, Children's Services and Skills (Ofsted).

¹⁷ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea. Convention (III) relative to the Treatment of Prisoners of War. Convention (IV) relative to the Protection of Civilian Persons in Time of War.

However, despite the apparent strong legal and institutional framework supporting Article 3, the evidence suggests Britain may not be fully meeting its obligations under this article in some areas.

The issues we have chosen for this chapter demonstrate a range of applications of Article 3. They show, for example, that the protection against torture and inhumane or degrading treatment is not confined to the actions of state agents in prisons or during war time; this protection extends to any individual who has been or is at risk of being seriously ill-treated at home or in the community or when accessing a public service.

We will examine each of these in turn in this chapter. In each setting we look at whether there are adequate laws to comply with Article 3; and whether there are institutions and processes in place to protect and uphold the law. We draw conclusions about the key issues which must be tackled if Britain is to fully meet its human rights obligations under Article 3.

People who use health and social care services may be at risk of inhumane or degrading

How Article 3 protects people who receive health or social care

People who use health or social care services – by definition, some of the most vulnerable people in society – have a right to be protected from inhumane or degrading treatment. For example, Article 3 should protect people from severe mistreatment such as that exposed by the BBC Panorama programme in May 2011, which showed how disabled residents of Winterbourne View hospital near Bristol were routinely slapped, kicked, teased and taunted by members of staff.

To be covered by Article 3, the treatment must be bad enough to reach the minimum level of severity, outlined above. It is not the only human right which may apply to cases of abuse or neglect in health and social care settings. There may be cases in which older people, for example, have been badly treated by a care worker but not so badly that the behaviour would constitute inhumane or degrading treatment. The treatment in this case may still breach Article 8, the right to physical integrity as an aspect of private life (see the chapter on Article 8, the right to respect for private and family life, home and correspondence).

Three institutions are in place to protect individuals who are users of health and social care services. The Care Quality Commission (CQC) was established in 2009 to regulate, register, inspect and review health and adult social care services in the public, private and voluntary sectors in England. The CQC can take legal action against providers that fail to meet the minimum requirements outlined by the CQC's essential standards.¹⁸ The Parliamentary and Health

¹⁸ Care Quality Commission, 2010. *Essential standards of quality and safety*. Available at: http://www.cqc.org.uk/sites/default/files/media/documents/essential_standards_of_quality_and_safety_march_2010_final_o.pdf. Accessed 24/11/2011.

Service Ombudsman (PHSO) investigates complaints by individuals about improper actions or poor treatment by government departments, public bodies and the National Health Service (NHS) in England. The Local Government Ombudsman also has the capacity to investigate complaints about adult social care providers, such as care homes and home care providers, across public, private, and third sector settings.

There is evidence that some people who use health and social care services are at risk of inhumane and degrading mistreatment which breaches Article 3. In February 2011, the PHSO reported on 10 investigations into the care of older people by NHS institutions, of which several revealed ill-treatment possibly serious enough to breach Article 3.¹⁹

Mrs H, 88, was deaf and partially sighted. After a fall at home, she was hospitalised for four months suffering from acute confusion. While in hospital, she experienced poor standards of care and had several further falls, one of which broke her collarbone. She was transferred to a care home by ambulance while strapped to a stretcher in a state of agitation and distress. On her arrival the manager noticed that she had numerous unexplained injuries, was soaked with urine and was dressed in clothing held up with large paper clips. She was bruised, dishevelled and confused. The following day she had to be readmitted to a local hospital. She died before the PHSO could conclude its investigation.²⁰

This was not an isolated case: 18 per cent of the 9,000 complaints made to the PHSO in 2010 were about the care of people over 65 and the organisation accepted 226 cases about older people for investigation, twice as many as all other age groups put together in 2011.²¹

In November 2011, the Equality and Human Rights Commission (the Commission) published the report of its formal inquiry into older people and human rights in home care. The inquiry found some evidence of good practice in

19 Parliamentary and Health Service Ombudsman, 2011. *Care and compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of older people*. Available at: http://www.ombudsman.org.uk/__data/assets/pdf_file/0016/7216/Care-and-Compassion-PHSO-0114web.pdf. Accessed 18/11/2011.

20 Ibid.

21 Ibid.

the commissioning and delivery of home care services, with many care workers providing excellent care under challenging circumstances. However, there were also worrying examples of poor treatment. In a few cases this treatment appears to have been serious enough to approach or exceed the threshold for a breach of Article 3.²²

As people often receive health and social care services at home, behind closed doors, it is hard to say how often breaches of Article 3 may be happening. The frequency of serious abuse and neglect in these settings should not be exaggerated, but the fact that such incidents happen at all underlines a number of serious issues relating to Britain's compliance with Article 3.

Key issues

1. People who are receiving health and social care from private and voluntary sector providers do not have the same level of direct protection under the Human Rights Act as those receiving it from public bodies

The Human Rights Act (HRA) applies to both public authorities and to other organisations when they are performing functions of a public nature. This is important in health and social care settings because most care homes are owned by private or voluntary sector organisations, as are most home-based care services. Most care homes in England are privately owned (two-thirds), and the remaining are operated by the public sector and voluntary sectors. Private ownership also predominates for domiciliary agencies (at over 70 per cent), with 17 per cent being operated by public sector bodies.²³

This mixed economy has some complex legal consequences in relation to the scope of the HRA (see Article 8 for further information). A House of Lords ruling in 2007 excluded independent providers of residential social care from the scope of the Act.²⁴ The court did not expressly discuss home care but its reasoning almost certainly applies to independent providers in this sector too. The following year, legislation was put in place to reverse the effects

22 Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/>. Accessed 23/11/2011. See page 28.

23 Department of Health, 2010. *How social care is delivered* [Archived internet page]. Available at: <http://webarchive.nationalarchives.gov.uk/+/www.dh.gov.uk/en/SocialCare/Aboutthedirectorate/Howsocialcareisdelivered/index.htm>. Accessed 23/11/2011.

24 *Y.L. v. Birmingham City Council and others* [2007] UKHL 27.

of this decision for care home residents whose places are arranged by local authorities.²⁵ However, people who pay for their own residential care are not entitled to the same protection.

The courts have ruled that for patients who are detained under the Mental Health Act (1983) a private hospital is performing a ‘public function’ under the HRA.²⁶ However, there is no case law relating to other categories of patient. Private hospitals treating NHS patients may not have obligations under the HRA.²⁷

This means that a sizeable minority of people who use health and social care services may not have their human rights directly protected by the law. Their rights may, however, be protected indirectly as the public authorities that commission health and social care services from independent providers have positive obligations to promote and protect the human rights of individual service users, which may extend to services provided by independent organisations.

2. Local authorities do not make the most effective use of the scope that they have for protecting and promoting human rights when commissioning care from other providers

Local authorities and primary care trusts are currently responsible for commissioning health and social care services from private and third sector organisations. Local authorities have positive obligations to carry out their powers and duties in a way that promotes and protects the rights contained in the HRA. This applies to every aspect of their day-to-day work. At a strategic level, commissioners can identify the needs of the local population and plan how these should be met, in ways that fit with equality and human rights legislation and meet their positive obligations to promote and protect human rights. During the procurement and contract management processes, local authorities can actively manage and monitor how well social care protects and promotes human rights in practice, and take action if any risks to human rights become apparent. If local authorities and primary care trusts included human rights as part of the commissioning criteria around the quality and delivery of care, this would help to raise standards across the board.²⁸

25 Health and Social Care Act 2008.

26 *R. (A.) v. Partnerships in Care Ltd* [2002] EWHC 529 (Admin).

27 Private hospitals are subject to inspections from the Care Quality Commission.

28 Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/>. Accessed 23/11/2011.

However, evidence from the Commission's inquiry into older people and human rights in home care suggests that commissioning bodies have a poor understanding of their positive obligations and so do not make the most effective use of the scope they have for protecting and promoting human rights. The inquiry found that local authorities believe they take account of human rights in their commissioning plans and procurement processes, but it was clear from interviews with them and analysis of their commissioning and procurement documentation that they had a patchy understanding of human rights and their own obligations in protecting and promoting these rights for older people.

The Commission found that commissioning bodies usually addressed human rights superficially in their commissioning documents. If mentioned at all, the HRA and related legislation was usually listed in the standard terms of the document, often in the legal appendices, without setting out substantive requirements of how providers should address human rights when delivering a service. Commissioning documents might also refer to principles of dignity, respect and independence but did not necessarily mention human rights, the HRA and the public authorities' positive human rights obligations.

The inquiry also found that practice on commissioning varied a great deal between local authorities – some local authorities adopted a quality-driven approach, incorporating human rights principles at all stages of the commissioning process, while others appeared to focus on price above all other considerations – an approach which is likely to reduce the quality of services. However, very few are consistently adopting commissioning principles that are firmly underpinned by an understanding of human rights.²⁹

²⁹ Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/>. Accessed 23/11/2011.

3. Better inspections of all care settings are needed

The state is under an obligation to investigate well-founded allegations of inhumane or degrading treatment in the health and social care system, even when it has occurred in services provided by a private or third sector organisation.

In June 2010, the CQC stopped conducting routine inspections of all providers. Instead, they now take a risk-based approach, trying to identify through self-assessment from providers where a potential need for regulatory action exists. There are fears that this has made scrutiny of human rights issues less effective, as it pays insufficient attention to qualitative and anecdotal evidence that may reveal abuse, for example from members of the public and whistleblowing employees. In the Winterbourne View case, the CQC's last routine inspection in 2009 did not give rise to any significant concerns. The CQC relied on the provider to notify it of any serious incidents, and the hospital did not comply with this legal duty.³⁰

As from October 2010, the CQC ceased monitoring the commissioning practices of local authorities. This means that the CQC cannot comment on poor commissioning, but only on the quality of care services that result from those commissioning practices. The Commission's inquiry into older people and human rights in home care received evidence of serious concerns about this gap in the regulatory system.³¹

In response to criticisms arising from the Winterbourne View case, the CQC has amended its whistleblowers policy and now provides clearer information on its website explaining how members of the public can give feedback, whether good or bad, about health and social care services.³² It has also recently announced plans for a programme of random, unannounced inspections of hospitals providing care for people with learning disabilities. Acting in response to the

³⁰ House of Commons Health Committee, 2011. *Annual accountability hearing with the Care Quality Commission Ninth report of session, 2010-2012, September 2011*. Available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhealth/1430/1430.pdf>. Accessed 18/11/2011.

³¹ Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-home-care-of-older-people/>. Accessed 07/12/2011.

³² Care Quality Commission, 2010. *Whistleblowing: Guidance for providers who are registered with the Care Quality Commission and who employ workers*. Available at: http://www.cqc.org.uk/sites/default/files/media/documents/20110616_ext_gdce_wblowing_reg_persons_vo_04_cb_collated__no_tracks_for_external_publication.pdf. Accessed 24/11/2011.

Commission's inquiry, the CQC has made plans to carry out a themed inspection programme of around 250 care home providers starting in April 2012.³³

More generally, the CQC is now piloting a new inspection approach that incorporates the views and experiences of service users, and is considering a move away from generic inspection models to more specialist inspection approaches aimed at particular types of provider. It has launched a consultation on proposals to review its judgement framework and enforcement policy.³⁴ The CQC's aims are to simplify and strengthen its regulatory model of monitoring and inspecting providers and to build on what it has learned over the last 18 months. The proposals include looking at the frequency with which the CQC carries out inspections of providers and how these inspections are targeted.

As the regulator for the health and social care sector, the CQC has a central role in protecting the human rights of disabled and older people in regulated care settings. Building on a previous memorandum of understanding between the CQC and the Commission, the two bodies have recently published joint guidance for CQC inspectors on equality and human rights.³⁵

33 Care Quality Commission, 2011. *CQC to target care home services*. Available at: <http://www.cqc.org.uk/node/386875>. Accessed 07/12/2011.

34 Care Quality Commission, 2011. *Our proposals for our judgement framework and Enforcement policy consultation*. Available at: http://www.cqc.org.uk/sites/default/files/media/documents/20110916_consultation_document_judgement_framework_and_enforcement_policy_consultation.pdf. Accessed 18/11/2011.

35 Equality and Human Rights Commission and CQC. *Guidance for Care Quality Commission Inspectors*. Available at: <http://www.equalityhumanrights.com/key-projects/care-and-support/guidance-for-care-quality-commission-inspectors/>. Accessed 18/11/2011.

Children and young people in custody may be at risk of inhumane or degrading treatment

How Article 3 protects children and young people in custody³⁶

Children and young people who have been convicted of crimes may be detained in the youth secure estate (made up of young offender institutions, secure training centres and secure children's homes). Young offender institutions are for young offenders between the ages of 15 and 21, although those over 18 are held separately. Secure training centres house vulnerable young people for whom a young offender institution would not be suitable. Secure children's homes are for the youngest or otherwise most vulnerable young offenders, as well as children in local authority care.

Children and young people detained in these institutions are under the control and care of the authorities, so the responsibilities of the state are enhanced.³⁷

All children and young people in custody are vulnerable due to their age and immaturity. Many will have experienced neglect, abuse, domestic violence, poor parenting³⁸ and poverty.³⁹ They are also more likely to have poor educational experiences and have learning disabilities.⁴⁰

³⁶ Children in these settings are also protected by the Children Act 1989 and Children Act 2004 Section 11. This imposes a general duty on young offenders institutions and secure training centres and secure children's homes to safeguard and promote the welfare of children.

³⁷ See: Convention on the Rights of the Child: Article 40, and General Comment No 10. See also United Nations Standard Minimum Rules for the Administration of Juvenile Justice, para 19.1.

³⁸ Office of the Children's Commissioner in England, 2011. *'I think I must have been born bad': Emotional wellbeing and mental health of children and young people in the youth justice system*. Available at: http://www.childrenscommissioner.gov.uk/content/publications/content_503. Accessed 18/11/2011.

³⁹ Youth Justice Board, 2007. *Accommodation needs and experiences*. London: Youth Justice Board.

⁴⁰ Youth Justice Board, 2006. *Barriers to engaging in education, training and employment*. London: Youth Justice Board.

Such children are likely to have behavioural difficulties and may come into conflict with other children or staff in the youth secure estate. In extreme situations, staff can rely on restraint of children to prevent harm to either the child or to others.

The use of physical force for chastisement is unlawful and any use of physical force that is not strictly necessary to protect the safety of an individual, whether children or staff, is in principle a breach of Article 3.⁴¹

The UN Committee on the Rights of the Child has stressed that any restraint against children should be used only as a last resort and exclusively to prevent harm to the child and others around the child.⁴² The Convention on the Rights of the Child also provides that children have the right to be protected from being hurt and mistreated, either physically or mentally, that no-one is allowed to punish children in a cruel or harmful way when they are in custody, and that children who break the law should not be treated cruelly.⁴³

In 2007, the government introduced the Secure Training Centre (Amendment) Rules. The rules allowed officers working in these institutions to physically restrain young offenders to ensure 'good order and discipline'. The Commission and other children's rights organisations challenged these rules arguing that they amounted to 'inhumane and degrading treatment'. The High Court ruled that because the Secretary of State could not establish that physical restraint was necessary to establish good order and discipline, the Amendment Rules were in breach of Article 3. The rules were quashed, and secure training centres are no longer allowed to restrain young offenders on these grounds.⁴⁴ This ruling did not apply to young offender institutions where restraint may be used to maintain good order and discipline. Restraint may not be used for good order and discipline in secure children's homes.

⁴¹ *Keenan v. the United Kingdom* [2001] 33 EHRR 38.

In 2008 the Court of Appeal established that the use of restraint for the purpose of good order and discipline, rather than for safety, was a breach of Article 3 in the case of *R. (C.) v. Secretary of State for Justice* [2008] EWCA Civ 882. See also European Court on Human Rights: *Ribitsch v. Austria*, judgment of 4 December 1995, Reports of judgments and decisions 1996, p. 26, para 34; Tekin, pp. 1517-1518, paras 52 and 53; and *Assenov and others v. Bulgaria*, judgment of 28 October 1998, Reports 1998 - VIII, para 94.

⁴² UN Committee on the Rights of the Child, 2008. *Concluding Observations*. UNCRC. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>. Accessed 18/11/2011.

⁴³ Article 19 and 37 Convention on the Rights of the Child.

⁴⁴ This judgment does not apply to young offender institutions or secure children's homes. See *R. (C.) v. Secretary of State for Justice* [2008] EWCA 882.

The government has put in place regulations and processes to safeguard children and young people in its care. To ensure young offender institutions, secure training centres and secure children's homes meet the requirements on safeguarding and the use of restraint, the Youth Justice Board uses a monitoring team which visits and reports on all secure establishments, and directs resources to where risks exist. The Criminal Justice and Public Order Act 1994 provides for the appointment of an independent monitor to every secure training centre who is required to investigate and report on allegations made against custody officers. Under Rule 38 (3) of the Secure Training Centre Rules 1998 the monitor should be notified within 12 hours of a child being physically restrained and each incident report is reviewed to understand what led up to it and how it was handled. Measures to mitigate any risks or issues of concern are reviewed monthly. If a young person dies, becomes seriously ill or sustains any serious injury, then secure training centres must comply with a Serious and Significant Incident Reporting Protocol. Independent monitors also ensure that the secure training centre uses external agencies to provide additional independent scrutiny and investigation where necessary.

The monitors also visit young offender institutions. Young offender institutions are required to have a safeguarding children manager to ensure safeguarding is part of policies and practices in the institution. Young offender institutions are required to inform a young person's family or appropriate adult if control and restraint is used on the young person, and all uses of force should be recorded, and serious injuries reported to the Youth Justice Board.

Secure children's homes are required to comply with the regulatory framework for children's homes which is explicit about the use of restraint, namely that it should only be used when there is a real risk of injury, serious damage to property or to prevent escape, and that children must not be restrained for good order and discipline, or to intend to inflict pain.⁴⁵ The Children's Act 1989 requires local authorities to implement a complaints procedure for children in its care, including those in secure children's homes.

Local safeguarding children's boards have oversight of safeguarding arrangements within the youth secure estate in their area. Government guidance requires that there are protocols between local authorities, young

⁴⁵ Department for Children, Schools and Families, 2006. *Getting the Best from Complaints; Social Care Complaints and Representations for Children, Young People and Others*. Nottingham: DCSF publications. Paras 2.29-2.32.

offender institutions, secure training centres and local safeguarding children's boards which set out how they will work together and share information to safeguard and promote the welfare of children and young people in secure establishments.⁴⁶

Key issues

1. There is evidence that restraint is used extensively, but better data are needed

Restraint statistics are likely to be an underestimate and it remains unclear from the available literature whether all incidents across detention centres are captured.⁴⁷ In 2008 the government's independent review of restraint in juvenile secure settings concluded that: 'There is a need for better, more consistent reporting, monitoring and analysis of information on restraint by units across the estate [young offender institutions, secure training centres, and secure children's homes]'.⁴⁸ The follow up report in 2011 observed that information systems in young offender institutions had improved and were more accurate, but the process of data collection was in need of change. Several stakeholders expressed their 'serious concern' to the review, that 'the current system ... distorts figures and does not present an accurate account of real events'.⁴⁹

46 Department for Children, Schools and Families, 2010. *Working together to safeguard children*. DCSF. Available at: <https://www.education.gov.uk/publications/eOrderingDownload/00305-2010DOM-EN.pdf>. Accessed 18/11/2011.

47 See: The Howard League for Penal Reform, 2011. *Twisted: the use of force on children in custody*. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Restraint.pdf. Accessed 18/11/2011. See: Children's Commissioner for England. Memorandum of Lord Carlile's public hearing on the use of restraint, Evidence submitted by the Office of the Children's Commissioner April 2011.

48 P. Smallridge and A. Williamson, 2008. *Independent Review Of Restraint In Juvenile Secure Settings*. Available at: http://www.justice.gov.uk/publications/docs/restraint_review.pdf. Accessed 18/11/2011.

49 P. Smallridge and A. Williamson, 2011. *Report On Implementing The Independent Review Of Restraint In Juvenile Secure Settings*. Available at: <http://www.justice.gov.uk/publications/docs/report-implement-review-restraint-juvenile-secure-settings.pdf>. Accessed 21/11/2011.

With these caveats, Youth Justice Board statistics in 2009/10 revealed that there were a total of 6,904 incidents of reported use of restraint in England and Wales in young offender institutions, secure training centres and secure children's homes.⁵⁰ On average, this means 575 restraints per month. In one establishment, nearly half of the children had been restrained.⁵¹ Of these 6,904 incidents, 257 resulted in the injury of a child, of which 249 were a minor injury requiring medical treatment, which could include cuts, scratches, grazes, bloody noses, concussion, serious bruising and sprains. The remaining eight were classified as a serious injury requiring hospital treatment and could include serious cuts, fractures, loss of consciousness and damage to internal organs.⁵²

Statistics supplied by the Youth Justice Board stated that 134 of the minor injuries occurred in young offender institutions, 111 in secure training centres and 4 in secure children's homes. Of the major injuries 7 occurred in a young offender institution and 1 in a secure children's home.⁵³ However, statistics on the number of injuries by establishment are not published, so it is difficult to identify whether there are systemic problems in particular institutions.

2. Authorised restraint techniques used in young offender institutions and secure training centres do not meet human rights standards

The approved methods of restraint in young offender institutions and secure training centres do not meet internationally agreed standards, which prohibit the use of intentional pain. The European Committee for the Prevention of Torture recommended the discontinuation of the use of manual restraint based upon pain compliant methods,⁵⁴ and the Commissioner for Human Rights of the Council of Europe has urged:

‘...the immediate discontinuation of all methods of restraint that aim to inflict deliberate pain on children (among which physical restraints, forcible strip-searching and solitary confinement)’.⁵⁵

50 Ministry of Justice, 2011. *Youth Justice Statistics 2009/10 for England and Wales*. Available at: <http://www.justice.gov.uk/publications/docs/yjb-annual-workload-data-0910.pdf>. Accessed 22/11/2011.

51 Ibid.

52 Ibid.

53 Youth Justice Board. Briefing note for Equality and Human Rights Commission. September 2011.

54 Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment (CPT) from 18 November to 1 December 2008.

55 Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe following his visits to the United Kingdom (5-8 February and 31 March-2 April 2008). Issue reviewed: Rights of the child with focus on juvenile justice.

Currently, the two authorised methods of restraint used in young offender institutions and secure training centres in England and Wales are called ‘control and restraint’ and ‘physical control in care’.

‘Control and restraint’ is a system that uses holds which can be intensified to cause pain. One of the techniques is the intentional infliction of pain by immobilising the arms, employing joint locks using wrist flexion.⁵⁶ ‘Physical control in care’ authorises the use of distraction techniques such as the thumb technique, where fingers are used to bend the upper joint of the thumb forwards and down towards the palm of the hand, and a rib technique, which involves the inward and upward motion of the knuckles into the back of the child, exerting pressure on the lower rib.⁵⁷

‘Control and restraint’ is used in young offender institutions holding young people between 15 and 21. ‘Physical control in care’ is used in secure training centres holding boys and girls aged between 14 and 17.

The government is currently considering authorising a new system of restraint to be used across young offender institutions and secure training centres. Formal approval is not likely to be announced until the beginning of 2012.⁵⁸ The new system of restraint will introduce new strategies and policies on the use of force. However, it is believed that some of these methods will also rely on the use of pain, as pain-compliant techniques are being considered as part of the new restraint system.⁵⁹

56 Howard League for Penal Reform, 2011. *Twisted: the use of force in children's custody*. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Restraint.pdf. Accessed 22/11/2011.

57 Ibid.

58 Since March 2011 the Restraint Advisory Board and the National Offender Management Service (NOMS) have developed the restraint methods to be presented to Ministers. The roll out of this new technique is set out in P. Smallridge and A. Williamson, 2011. *Report on implementing the independent review of restraint in juvenile secure settings*. Page 7. Available at: <http://www.justice.gov.uk/downloads/publications/policy/moj/report-implement-review-restraint-juvenile-secure-settings.pdf>. Accessed 22/11/2011.

59 *The Carlile Inquiry: five years on: A public hearing on the use of force on children in custody*. Joint written evidence from the Ministry of Justice and the Youth Justice Board for England and Wales. Page 5. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Events/MoJ_ans_YJB_joint_Written_Evidence_for_Carlile_Inquiry_Five_Years_On_sent_to_Howard_League_09-05-2011.doc. Accessed 22/11/2011. See also P. Smallridge and A. Williamson, 2011. Report on implementing the independent review of restraint in juvenile secure settings. Ministry of Justice.

3. The use of restraint as a form of discipline, rather than in cases of absolute necessity or safety, is in breach of Article 3

In 2008, the Court of Appeal established that the use of restraint in secure training centres for the purpose of good order and discipline, rather than for safety, was a breach of Article 3.⁶⁰ Additionally, Article 3 when applied to children should be interpreted in light of international conventions. In particular, interpretation must take into account Article 37(c) of the Convention on the Rights of the Child, which provides that every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her own age.⁶¹

The Committee on the Rights of the Child has urged the UK to ensure that restraint against children is used only as a last resort and exclusively to prevent harm to the child or others and that all methods of physical restraint for disciplinary purposes be abolished.⁶²

The evidence suggests that restraint is being used unlawfully or inappropriately. Unlawful use occurs where restraint is used for reasons other than those stated in the rules. For example restraint cannot be used as a punishment or, in secure training centres, to force compliance with an instruction. Even where restraint is used lawfully, it may still be an inappropriate response to an incident because it is not the last resort and alternative measures are available. Inappropriate use may be inferred from the evidence of high use and frequency.

Since 2006, numerous reports have consistently drawn attention to restraint used for purposes other than safety. For example, the Howard League for Penal Reform convened an independent inquiry into young offender institutions, secure training centres and secure children's homes in 2006 and found that restraint was used both as a punishment and to secure compliance.⁶³

60 The Commission intervened in the case of *R. (C.) v. Secretary of State for Justice* [2008] EWCA Civ 882.

61 Convention on the Rights of the Child Article 37.

62 Committee on the rights of the child. Forty-ninth session. Concluding observations: United Kingdom of Great Britain and Northern Ireland (2008) UN document: CRC/C/GBR/CO/4. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.GBR.CO.4.pdf>. Accessed 22/11/2011.

63 The Lord Carlile of Berriew QC, 2006. *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes*. Page 43. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Publications/Carlile_Report_pdf.pdf. Accessed 22/11/2011.

Evidence submitted by Her Majesty's Inspectorate of Prisons to the Carlile Inquiry into children in custody states that, in 2011, restraint is still being used to secure compliance with instructions in all young offender institutions, and only two institutions report a proportionate but slow decrease in the use of restraint.⁶⁴ For example, the inspection in 2010 of Ashfield young offender institution stated:

'The use of force was slowly decreasing, but there were examples of force being used to secure compliance, which was inappropriate.'⁶⁵

The 2009 inspection of Hindley young offender institution found that restraint was sometimes used inappropriately.⁶⁶

In 2008, when the Joint Committee on Human Rights (JCHR) carried out an inquiry into the use of restraint in secure training centres they found that the high use of restraint suggested that it was being used more frequently than absolutely necessary.⁶⁷

In 2011, the UK National Preventive Mechanisms (NPMs) also questioned the extent to which restraint is being used safely and only when absolutely necessary and whether appropriate methods are used on children.⁶⁸

64 HM Inspectorate of Prisons. Evidence submitted to The Howard League for Penal Reform for the Carlile inquiry: five years on. Para 19. Available at: <http://www.howardleague.org/carlile-inquiry/>. Accessed 22/11/2011.

65 Report on a full unannounced inspection of HMYOI Ashfield 10-14 May 2010 by HM Chief Inspector of Prisons. Available at: <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/ashfield-2010-rps.pdf>. Accessed 22/11/2011.

66 Report on an announced inspection of HMYOI Hindley 19-23 October 2009 by HM Chief Inspector of Prisons. Available at: [http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/Hindley_2009_rps\(1\).pdf](http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/Hindley_2009_rps(1).pdf). Accessed 22/11/2011.

67 Joint Committee on Human Rights, 2008. *The Use of Restraint in Secure Training Centres. Eleventh Report of Session 2007-08*. London: House of Commons. Available at: <http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/65/65.pdf>. Accessed 22/11/2011.

68 Ministry of Justice, 2011. *Monitoring places of detention, First Annual Report of the United Kingdom's National Preventive Mechanism 2009-10, London*. Available at: [http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/National_Preventive_Mechanism_Annual_report_2009-2010\(web\).pdf](http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/National_Preventive_Mechanism_Annual_report_2009-2010(web).pdf). Accessed 22/11/2011. The UK NPMs is a collective of 18 bodies set up following Britain's ratification of the Optional Protocol to the Prevention Against Torture, and its role is to visit all places of detention and monitor the treatment of and conditions for detainees.

4. Possible breaches of Article 3 in these settings are not always effectively investigated

If a child in custody shows signs of injury after restraint has been employed, the authorities have an obligation to prove that the force used ‘was necessitated by the detainee’s own conduct and that only such force as was absolutely necessary was used’.⁶⁹ The state also has an obligation to carry out an effective investigation that is capable of identifying and punishing the individual or individuals responsible for any acts of ill-treatment.

There is no national database that records the number of times physical restraint was used, whether injuries were caused, or links this to whether an investigation was conducted. Neither is there a record of the outcome of any such investigation.⁷⁰ Data provided by the Youth Justice Board shows that there were 285 cases of serious injuries reported in secure training centres between 2006 and November 2011.⁷¹ The Youth Justice Board could not provide details about the outcome of investigations into the use of restraint in young offender institutions or secure children’s homes because it is not collected centrally.

There is also evidence that children and young people are unlikely to report incidents, and as a consequence cases of use of restraint are going unaddressed: reports from non-governmental organisations that provide advice to children in these settings suggest that children and young people are reluctant to pursue complaints about their treatment in custody.⁷² In some cases where young people do complain about their treatment, the institutions involved are reluctant to disclose evidence or provide a detailed formal response.⁷³ This point is backed up by an investigation by the Children’s Commissioner for England, who found that the vast majority of children interviewed knew how to use the complaints system, but that they rarely did so because they had little or no faith that it would be effective for them. The system was felt to be selective, with complaints that were inconvenient to staff often ignored. Children considered

69 *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, 108-111; *Ribitsch v. Austria*, judgment of 4 December 1995, Reports of judgments and decisions 1996, pp. 26, 34; *Aksoy v. Turkey*, judgment of 18 December 1996, pp. 17, 61.

70 Since recorded instances are also partial statistics, it is likely that many incidents are not recorded and not investigated.

71 Hansard HL, col WA72 (09 November 2011). Available at: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111109w0001.htm>. Accessed 24/01/2012.

72 Children’s Rights Alliance for England, 2010. *State of Children’s Rights in England 2010*. Page 65. Available at: <http://www.crae.org.uk/assets/files/CRAE%20State%20of%20childrens%20rights%20Nov%202010.pdf>. Accessed 23/11/2011.

73 The Howard League for Penal Reform, 2011. *Twisted: the use of force on children in custody*. Available at: <http://www.howardleague.org/restraint/>. Accessed 22/11/2011.

the procedures to be slow and impersonal. Some feared reprisals if they complained.⁷⁴ This does not, however, excuse the lack of investigations because the state has a duty to investigate whenever there is a reasonable suspicion of ill-treatment, regardless of how it comes to their attention.

In response to the criticisms of the complaints system, the Youth Justice Board commissioned an independent review of complaints mechanisms in young offender institutions, secure training centres, and secure children's homes in 2011. In March 2011, it published an action plan for its improvement. The action plan identified principles that all establishments should consider putting in place a system of complaints. This included recommendations that the complaints system should be easy to use, that written responses should be timely and of a high quality, and that responses to complaints should be discussed with the young person involved.⁷⁵

74 Children's Commissioner for England, 2011. *Memorandum of Lord Carlile's public hearing on the use of restraint. Evidence submitted by the Office of the Children's Commissioner*. Available at: http://www.howardleague.org/fileadmin/howard_league/user/pdf/Events/Office_of_the_Children_s_Commissioner_Submission_to_Lord_Carlile_s_public_hearing_on_the_use_of_restraint__April_2011_.pdf. Accessed 22/11/2011.

75 Youth Justice Board, 2011. *Review of the Complaints System in the Secure Estate for Children and Young People*. Ministry of Justice: London. Available at: <http://www.yjb.gov.uk/publications/Resources/Downloads/Review%20of%20the%20Complaints%20System%20-%20Summary%20and%20Action%20Plan.pdf>. Accessed 30/11/2011.

The state sometimes fails in its duty to protect vulnerable people against ill-treatment by other individuals

How Article 3 protects people from ill-treatment at the hands of individuals

The state has a positive obligation to take effective protective measures to prevent inhumane and degrading treatment.⁷⁶ In practical terms, this obligation means that once the authorities – for example, the police or social services – have been made aware that someone has been threatened or harmed by another person to the level of severity that qualifies for Article 3, then they should take adequate steps to prevent the aggressor carrying out this threat or committing further acts of violence.⁷⁷

The idea that Article 3 protects people from ill-treatment caused not only by agents of the state but also by other individuals is fairly new. It was not until 1994 that the European Court of Human Rights (the Court) found, for example, that a state had breached its Article 3 obligations by allowing guardians to physically punish children. The Court considered that children and other vulnerable individuals, in particular, were entitled to protection in the form of effective deterrence:

⁷⁶ See para 176 *Opuz v. Turkey* [2009] ECHR 33401/02.

⁷⁷ *Ibid.*, paras 200-202.

In *A. v. the United Kingdom* the European Court of Human Rights found a violation of Article 3 when a step-father was acquitted of assault, after beating his step-son to such an extent that the treatment amounted to inhumane and degrading treatment. At that time UK law permitted a defence of lawful chastisement. The Court held that, even though the treatment was perpetrated by one private person against another, the state was still responsible because there was not an adequate system of law in place to protect against such treatment.⁷⁸

In 1995 the Court found that a failure of a local authority to intervene to stop ill-treatment to which children were subjected by their parents was a breach of the UK's obligations under Article 3.⁷⁹ More recently, it also found a breach of Article 3 in domestic violence cases where the authorities knew that serious assaults were occurring, and failed to prevent them.⁸⁰

The Court has also found breaches of Article 3 where authorities have failed to properly investigate and prosecute any non-consensual sexual act, even where the victim had not resisted physically.⁸¹

The state's positive obligations include a requirement to intervene where it is clear that there has been an Article 3 breach in order to stop it.⁸² This section looks at examples of Article 3 breaches arising from the failure to intervene effectively to safeguard abused children, disabled people who are ill-treated and women experiencing domestic violence. It focuses on violence against women, children and disabled people because there have been several cases in which individuals from these groups have been subjected to ill-treatment that reached the level of severity of Article 3. There is also evidence that the authorities may have failed in their obligations to protect them. The same duty would apply to any other individuals subject to treatment of the necessary severity to breach Article 3.

⁷⁸ *A. v. the United Kingdom* [1998] EHRLR 82.

⁷⁹ *Z. and Others v. the United Kingdom* [2001] 29392/95 2 F.L.R. 612.

⁸⁰ *Opuz v. Turkey* [2009] ECHR 33401/02.

⁸¹ *E.S. and Others v. Slovakia* (8227/04). *M.C. v. Bulgaria* [2003] ECHR 646.

⁸² *Satik v. Turkey* (31866/96).

Key issues

1. Public authorities sometimes fail to fulfil their positive obligation to intervene in cases of serious ill-treatment of children, disabled people, and women at risk of domestic violence

In recent years many cases have emerged in which public authorities have failed to act to protect a vulnerable person – a child, a disabled person, or a woman experiencing domestic abuse, for example – despite the fact that the ill-treatment has been brought to their attention. These cases indicate that the authorities in question are failing to fulfil their Article 3 obligations to protect people from ill-treatment where possible.

The case of Peter Connelly, or Baby P, is an example of ill-treatment that reached the level of severity of Article 3. The authorities failed to act effectively despite knowing that the child was at risk of ill-treatment.

In 2007 Peter Connelly's mother called an ambulance but, despite efforts of hospital and ambulance staff, the 17-month-old boy was pronounced dead 48 minutes after her call. A post-mortem examination revealed that he had eight fractured ribs on the left side and a fractured spine. Peter had been on Haringey's child protection register under the category of physical abuse and neglect since December 2006 – he had suffered over 50 injuries in the eight months before his death – and was the subject of a child protection plan. Over this period his family was seen 60 times by different agencies including the local authority, a hospital, and the police service. The serious case review concluded that – despite the fact that all the staff involved in this case were well motivated and concerned to play their part in safeguarding Peter – his death could have been prevented if authorities had identified the severity of the abuse and intervened. It concluded that 'the culture of safeguarding and child protection at the time, was completely inadequate to meet the challenges presented by the case'.⁸³

83 Local Safeguarding Children's Board Haringey, 2009. *Serious Case Review: Baby Peter*. Available at: http://www.haringeyscbs.org/executive_summary_peter_final.pdf. Accessed 22/11/2011.

Serious case reviews investigate the death or serious injury of a child where abuse or neglect is known or suspected to be a factor. These reviews show that in over 70 per cent of cases evaluated by Ofsted in which a child has been seriously injured or died due to abuse or neglect, social services were aware of the risk but failed to act to protect the child, or their actions were inadequate and failed to protect the child. In 119 of 194 serious case reviews evaluated by Ofsted in 2009/10, social care services knew that children were vulnerable to abuse due to past incidents of domestic violence, mental ill-health, and drug and alcohol misuse. In many cases the parents were also receiving support from agencies in their own right.⁸⁴

Of the 194 cases evaluated by Ofsted, 90 had resulted in the death of a child, of which 31 were receiving services as ‘children in need’.⁸⁵ The other 104 cases involved physical abuse or long-term neglect causing serious harm, and in each case the family had a history of contact with the agencies involved.⁸⁶

Similar failures are evident in cases of disabled people suffering persistent harassment. In 2011 the Commission published the report of its formal inquiry into disability-related harassment. It found that authorities do not take the complaints of disabled people seriously or respond with sufficient urgency because there is a culture of disbelief about the issue. For this reason, the inquiry described disability harassment as a problem which is ‘hidden in plain sight’. It highlighted examples of ill-treatment of disabled people, and police and social workers’ failure to recognise it.⁸⁷

84 Ofsted, 2010. Learning lessons from serious case reviews 2009-2010. Available at: <http://www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Documents-by-type/Statistics/Other-statistics/Learning-lessons-from-serious-case-reviews-2009-2010>. Accessed 22/11/2011.

85 Children in need are those who are believed to need local authority services to achieve or maintain a reasonable standard of health or development or need local authority services to prevent significant or further harm to health or development or are disabled and they are defined under section 17 of the Children Act 1989. Some children are in need because they are suffering, or likely to suffer, significant harm.

86 Ofsted, 2010. Learning lessons from serious case reviews 2009-2010. Available at: <http://www.ofsted.gov.uk/Ofsted-home/Publications-and-research/Browse-all-by/Documents-by-typassd> 22/11/2011.

87 Equality and Human Rights Commission, 2011. Hidden in Plain Sight. Inquiry into disability-related harassment. Pp. 11, 53. Available at: http://www.equalityhumanrights.com/uploaded_files/disabilityfi/ehrc_hidden_in_plain_sight_3.pdf. Accessed 22/11/2011.

Michael Gilbert, who had an undiagnosed mental health condition, had lived with the Watt family for more than 10 years. During this time, the court heard that he was seriously assaulted and abused, including beatings and scolding, for entertainment on a regular basis. Michael ran away several times and was abducted and brought back to the family. Despite police knowledge of these abductions, no one was charged or prosecuted. Michael also visited GPs and hospitals several times but none of them recognised the abuse. The assaults got worse towards the end of his life: one of the members of the family did press-ups on a piece of wood placed in his mouth and jumped on his stomach, making him doubly incontinent and leaving his stomach so swollen he could hardly walk. On the last day of his life he ‘suffered beating upon beating and was gravely ill’ and was found by two members of the family lying on a deflated blow-up bed, where he had defecated and urinated. At this point, ‘he requested and was given medication but he could only just about speak. He was left there and died that evening’. Four members of the Watt family, and two of their girlfriends, were sentenced to a total of 93 years in prison for offences connected with Michael Gilbert’s death in January 2009, including causing or allowing the death of a vulnerable adult.⁸⁸

As in the case of children, local authorities should conduct serious case reviews when the death or harm of a ‘vulnerable adult’ has occurred.⁸⁹ A vulnerable adult is a person over 18 years of age ‘who is or may be in need of community care services by reason of mental or other disability, age or illness; and who is or may be unable to take care of him or herself, or unable to protect him or herself against significant harm or exploitation’.⁹⁰

88 Equality and Human Rights Commission, 2011. *Hidden in Plain Sight. Inquiry into disability-related harassment*. Pp. 45. Available at: http://www.equalityhumanrights.com/uploaded_files/disabilityfi/ehrc_hidden_in_plain_sight_3.pdf. Accessed 22/11/2011.

89 The Law Commission, 2011. *Adult Social Care*. London: The Stationery Office. Para 9.3.

90 Department of Health, 2000. *No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*. Pp. 8-9. Available at: http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4074540.pdf. Accessed 22/11/2011.

Serious case reviews of ‘vulnerable adults’ are not compulsory, not collected centrally, and local authorities do not have the obligation to publish them. There has only been one study into serious case reviews of vulnerable adults. As it looked at only 22 reviews, its findings are indicative rather than representative of all adult serious case reviews. Nevertheless, in all the cases when the victim died or was seriously injured it was found that the victim was in contact with at least one agency and that concerns about the victims’ vulnerability and harm existed.⁹¹

The Commission’s inquiry into the harassment of disabled people found a systemic failure by public authorities to recognise the extent and impact of harassment and abuse and to intervene effectively when it had been identified.⁹²

In cases of domestic violence, too, there is evidence to suggest that authorities do not act effectively to protect women they know to be vulnerable. The 2009/10 annual report of the Independent Police Complaints Commission (IPCC) noted an increasing number of deaths in domestic violence cases where the victim was in prior contact with the police.⁹³ Since the IPCC was created in 2004, it has recorded 26 cases of women who had prior contact with the police about domestic violence incidents, who were subsequently killed by their partners or ex-partners.

91 J. Manthorpe and S. Martineau, 2010. Serious Case Reviews in Adult Safeguarding in England: An analysis of Sample reports. *British Journal of Social Work* 1-18. Available at: <http://www.yhip.org.uk/silo/files/serious-case-reviews-in-adult-safeguarding-in-england.pdf>. Accessed 22/11/2011.

92 Equality and Human Rights Commission, 2011. *Hidden in plain sight: Inquiry into disability-related harassment*. Available at: http://www.equalityhumanrights.com/uploaded_files/disabilityfi/ehrc_hidden_in_plain_sight_3.pdf. Accessed 22/11/2011.

93 Independent Police Complaints Commission, 2010. *Annual Report 2009/2010*. Available at: http://www.ipcc.gov.uk/en/Pages/corp_reports-plans.aspx. Accessed 22/11/2011.

In 2010, the IPCC carried out an investigation into the way Lancashire Constabulary failed to respond to calls from Ms A, a woman that the police knew was a repeat victim of domestic violence. Early in the morning she went to the police to report that her ex-partner had attacked her the evening before; she had a black eye and swollen face. An arrest request was issued, but not carried out due to the lack of police patrols. She called six times through the day to report that her ex-partner was harassing her and sending text messages saying that he was going to hurt her. A phone call was also made by the nursery staff where her children were placed, because they feared she was in danger. No patrols were sent to Ms A's house and the police arrest warrant was not followed through. By the end of the day her ex-partner had stabbed her and poured boiling water over her. The IPCC's investigation concluded that the police failed to identify the vulnerability of the victim and opportunities were missed to give her the protection she needed.⁹⁴

2. Local authority mechanisms to investigate and learn from serious cases of ill-treatment may be insufficient

Local Safeguarding Children's Boards are the statutory mechanism through which, for the purposes of safeguarding and promoting the welfare of children, the local authority and other relevant organisations within the area co-ordinate and monitor the service they provide. They are uniquely positioned to monitor how professionals and services are working together to safeguard and promote the welfare of children. They are also well placed to identify emerging problems by learning from good practice, and to oversee efforts to improve services in response.

Serious case reviews are one of the mechanisms available to these boards after a child dies or is seriously injured. When conducting a serious case review, the board looks at how local professionals and services worked together to safeguard the child and what may have gone wrong. It also identifies good practice and lessons learned.

94 Independent Police Complaints Commission, 2010. *Investigation into contact with Lancashire Constabulary regarding the safety of Ms A on September 2010*. Available at: http://www.ipcc.gov.uk/en/Pages/investigation_reports.aspx. Accessed 22/11/2011.
Another IPCC Commissioner's Report Investigation was conducted into the police management of reports of domestic abuse made in relation to Casey Brittle (2011). Available at: http://www.ipcc.gov.uk/en/Pages/investigation_reports.aspx. Accessed 22/11/2011.

This is of course not the only mechanism in place, the police will also investigate cases that come to their attention and when the child dies a coroner may also open an investigation. But serious case reviews are uniquely positioned to understand the causes of safeguarding failures and can help all agencies involved learn lessons and reduce the risk of ill-treatment of children in their local area.⁹⁵

However, according to the Munro Review, a government review of the child protection system published in 2010, serious case reviews are failing to identify the core issues that prevent child protection professionals from protecting children. Munro recommended that in serious case reviews there ‘should be a stronger focus on understanding the underlying issues that made professionals behave in the way they did and what prevented them from being able to properly help and protect children’.⁹⁶

Supporting this finding Ofsted noted: ‘Serious case reviews were generally successful at identifying what had happened to the children concerned, but were less effective at addressing why’.⁹⁷

The Munro Review also highlighted the tendency of serious case reviews to find that human error is the reason for safeguarding failure rather than taking a broader view when drawing lessons. As a result, the response of the authorities in question has often been to control staff more closely. This has created increasing pressure on staff to comply with procedures, leading to a ‘heavily bureaucratised system’ that is unable to respond to the needs of the child.⁹⁸

95 HM Government, 2010. *Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children*. Nottingham: DCSF (Department for Children, Schools and Families) Publications. *Working together to safeguard children* is the guidance that sets out the situations when a review should take place, it requires Local Safeguarding Boards to consider conducting a serious case review when a child has died or the child has been seriously harmed and there is concern as to the way in which the authority, their Board partners or other relevant persons have worked together to safeguard the child’s welfare.

96 E. Munro, 2011. *The Munro Review of Child Protection: Final Report. A child-centred system*. London: Department for Education. Available at: <http://www.education.gov.uk/munroreview/>. Accessed 22/11/2011.

97 Ofsted, 2008. *Learning lessons, taking action: Ofsted’s evaluations of serious case reviews 1 April 2007 to 31 March 2008*. Available at: <http://www.ofsted.gov.uk/resources/learning-lessons-taking-action-ofsteds-evaluations-of-serious-case-reviews-1-april-2007-31-march-2008>. Accessed 22/11/2011.

98 E. Munro, 2011. *The Munro Review of Child Protection: Final Report. A child-centred system*. London: Department for Education. Available at: <http://www.education.gov.uk/munroreview/>. Accessed 22/11/2011.

For serious case reviews of vulnerable adults the situation is worse. Reviews are not compulsory for local authorities and they are not obliged to publish the findings. Unlike serious case reviews relating to the death or harm of a child, no central institution has the obligation to collect and analyse serious case review findings to identify the failures of the system.⁹⁹ At present, therefore, public authorities are not able to learn lessons from previous cases where vulnerable adults have been seriously ill-treated.

In addition, there is no legislation making adult safeguarding boards mandatory (although they are referenced in statutory guidance). The Law Commission has recently recommended that they should become statutory bodies in order to strengthen their role and clarify the responsibilities of their member agencies.¹⁰⁰ In a statement of policy on 16 May 2011, the government confirmed its intention to legislate for statutory safeguarding adult boards, although legislative proposals are yet to be introduced.¹⁰¹ The Law Commission has also set out its recommendations in relation to adult safeguarding and law reform.

The government is starting to recognise the shortcomings of the system. It has acknowledged that it must provide appropriate legislative powers and duties, ensuring that the law on keeping people safe is clear, proportionate and effective. The Department of Health published, in May 2011, a Statement of Government Policy on Adult Safeguarding, which begins to set out a new framework for safeguarding, and the intention to legislate for safeguarding adults boards.¹⁰²

99 J. Manthorpe and S. Martineau, 2010. Serious Case Reviews in Adult Safeguarding in England: An analysis of Sample reports. *British Journal of Social Work 1-18*. Available at: <http://www.yhip.org.uk/silo/files/serious-case-reviews-in-adult-safeguarding-in-england.pdf>. Accessed 22/11/2011.

100 Law Commission, 2011. *Law Commission recommendations bring adult protection into the 21st century, say two leading organisations that challenge elder abuse*. Available at: http://www.safeguardingdurhamadults.info/SiteCollectionDocuments/NEWS_RELEASE_Law_Commission_11.05.11.pdf. Accessed 22/11/2011.

101 Department of Health, 2011. *Statement of Government policy on adult safeguarding*. Available at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126748. Accessed 22/11/2011.

102 Ibid.

3. Agencies do not always work together effectively to prevent ill-treatment of children and disabled people

In cases involving the ill-treatment of disabled people, there are often blurred lines of responsibility between the criminal justice system, social care, and other relevant agencies.¹⁰³ A review of 22 serious case reviews of vulnerable adults found that the most common cause of failure to protect an individual was the lack of inter-agency communication. Of the 22 case reviews, 17 cited a poor relationship between care staff, police, hospital staff and the system of safeguarding within the local authority as the cause of failure.¹⁰⁴

Some local authorities and their social care agencies have failed to intervene in cases of abuse of vulnerable adults, and have argued that there is no duty for them to do so. However, the 'No Secrets Guidance' on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse, makes it clear that the local authority is expected to take on this role.¹⁰⁵

The police also appear to be failing to intervene in cases of ill-treatment of disabled individuals because they find it difficult to identify the 'needs' of the disabled individuals and their families or to recognise when the problem might escalate. A report by Her Majesty's Inspectorate of Constabulary (HMI Constabulary) found that only half (22 out of 43) of police forces in England and Wales are able to identify and prioritise repeat callers at the time when the call is made and less than a third (13 out of 43) can effectively identify the most at risk callers.¹⁰⁶ The Commission's inquiry into the harassment of disabled people also found that control room operators may not be aware of the history or impact of harassment when grading the call. As a result the police may not visit at all or may take some days to respond. Individual officers may also deprioritise low-level harassment in order to focus on 'criminal behaviour'.¹⁰⁷

¹⁰³ J. Perry, 2004. 'Is Justice Taking a Beating?', *Community Care*.

¹⁰⁴ J. Manthorpe and S. Martineau, 2010. Serious Case Reviews in Adult Safeguarding in England: An analysis of Sample reports. *British Journal of Social Work* 1-18. Available at: <http://www.yhip.org.uk/silo/files/serious-case-reviews-in-adult-safeguarding-in-england.pdf>. Accessed 22/11/2011.

¹⁰⁵ Ibid.

¹⁰⁶ Her Majesty's Inspectorate for Constabulary, 2010. *Anti-social Behaviour: Stop the rot*. Page 11. Available at: http://www.hmic.gov.uk/SiteCollectionDocuments/Anti-social_behaviour_2010/ASB_SPE_20100923.pdf. Accessed 22/11/2011.

¹⁰⁷ Equality and Human Rights Commission, 2011. *Hidden in plain sight: Inquiry into disability-related harassment*. Page 143. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/>. Accessed 23/11/2011.

In child protection cases there is often a lack of accountability within services, and a blurring of boundaries between different agencies, that make it very difficult for authorities to identify who should be doing what.¹⁰⁸ Ofsted reports have commented on poor communication either within agencies, for example between different parts of the health service, between different agencies, or from one local authority to another.¹⁰⁹ When serious incidents occur, weaknesses have been found in the systems used by agencies to communicate information at key points in children's lives. For example, the transfer of information from a GP to a midwifery service and then to the health visiting service was not sufficiently reliable. There were also concerns about poor communication between specialist children's services, such as child and adolescent mental health services, and universal services such as individual schools.¹¹⁰ This lack of communication means that at-risk children can fall through the net.

4. Despite some advances, police forces still too often fail to investigate cases of rape and domestic violence

People who have been victims of ill-treatment should be able to have their case heard in the criminal justice system and perpetrators should face the consequences of their actions.

The Crown Prosecution Service (CPS) has a good record in responding to issues relating to violence against women, including rape. Attitudes, policies and practices around dealing with rape allegations have changed for the better in recent years, in response to sustained campaigns by women's organisations. In England and Wales there is a specialised system for dealing with rape at the police, prosecution and judicial levels. Measures in the courtroom to minimise the trauma of the trial for the complainant have been introduced and there is a programme to provide state-of-the-art medical centres in every police force area, where victims of rape can be examined and assisted.

¹⁰⁸ The Social Work Task Force, 2009. *Building a safe, confident future – The final report of the Social Work Task Force*. London, Department for Education. Available at : <https://www.education.gov.uk/publications/standard/publicationdetail/page1/DCSF-01114-2009>. Accessed 22/11/2011.

¹⁰⁹ Ofsted, 2010. *Learning lessons from serious case reviews 2009-2010*. Available at: <http://www.ofsted.gov.uk/resources/learning-lessons-serious-case-reviews-2009-2010>. Accessed 22/11/2011.

¹¹⁰ Ibid.

While the policies are laudable, there are serious problems with their implementation. The Stern Review (2010) into the handling of rape allegations exposed areas in which criminal law is not being enforced by the police. It noted that although 58 per cent of people charged with rape are convicted, only 6 per cent of rapes initially reported to police get to the point of conviction.¹¹¹ In 2006 statutory charging was introduced. Under this scheme, police officers are provided with access to CPS prosecutors for advice and charging decisions. Since its introduction, around half of all cases reported to the police have been referred to the CPS. This still suggests that a large proportion of cases reported to the police do not progress any further.¹¹²

The Stern Review highlighted that despite special efforts to improve the way the police respond when a rape is reported, ‘there is a long history of disbelief, disrespect, blaming the victim, not seeing rape as a serious violation, and therefore deciding not to record it as a crime’. The Review also noted that the police have a series of arrangements for getting access to forensic physicians, who can take appropriate samples, assess any injuries, reassure and provide care for victims. However, there are problems with the quality of the physicians involved and the police sometimes experience delays in finding one, and in particular obtaining the services of female physicians (who are preferred by both male and female victims).

Several independent reports have criticised the police for their insensitive and dismissive approach to victims of sexual violence. The Home Office review on the criminal justice system’s response to rape victims was heavily critical of the way police handled and prosecuted rape complaints. For example, it found that several women believed that the police had not properly investigated their cases; and many women reported that the police did not believe them, particularly if they had previous criminal convictions or had been drinking.¹¹³ One rape victim reported:

111 Government Equalities Office, 2010. *The Stern Review: a report by Baroness Vivien Stern CBE of an independent review into how rape complaints are handled by public authorities in England and Wales*. Available at: http://beneaththewig.com/wp-content/uploads/2011/08/Stern_Review_acc_FINAL4.pdf. Accessed 22/11/2011.

112 Equality and Human Rights Commission, 2010. *Triennial Review: How fair is Britain?* Page 139.

113 S. Payne, 2009. *Rape: The Victim Experience Review*, London: Home Office. Available at: <http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/vawg-rape-review/rape-victim-experience2835.pdf?view=Binary>. Accessed 22/11/2011.

‘The police did a cursory drive around, they knocked on two doors, and then said they were never going to find them. Their attitude is: it’s a university town, if we worked on all on these things we would never stop working on suspected rape cases.’¹¹⁴

The Stern Review also argued that the CPS’s current policies are the right ones, but that the policies have not been fully implemented. The CPS’s target for reducing ‘unsuccessful outcomes,’ influences their decisions to take forward to trial only cases with the strongest evidence. The Review found that cases were not properly prepared, as prosecution lawyers were often not ready for what might be disclosed about the complainant, and did not respond effectively to material presented by the defence.

The case of John Worboys demonstrated the impact of the police’s reluctance to believe rape victims and the lack of proactive investigation.¹¹⁵ Worboys was a taxi driver who picked up women late at night, drugged them, and then sexually assaulted or raped them. The first victims contacted the police in 2006 but their allegations were not investigated. Worboys was identified as a suspect following an allegation of sexual assault in July 2007, when he was arrested but not charged with any offence. He went on to attack a further seven women before he was finally charged in February 2008 and convicted in 2009. The Independent Police Complaints Commission (IPCC) investigation noted that:

‘The overwhelming themes in these cases are of an actual or perceived sceptical or insensitive police response to victims of sexual violence, investigations that lack rigour and during which the victims feel they are not being kept informed.’¹¹⁶

Advances have been made to protect women from domestic abuse. Rape in marriage was recognised as a crime by abolition of the historic marital rape exemption in 1991. Sentencing guidelines recognising the seriousness of domestic violence were issued in 2006, and the law on murder was reformed to limit the scope of the ‘provocation defence’ as an excuse for domestic homicide in 2009. The key problems seem to lie not in the law or the policies themselves, but in their implementation. The IPCC’s investigation into domestic abuse cases where the woman has been seriously injured or killed shows

114 Ibid.

115 Independent Police Complaints Commission, 2010. *IPCC independent investigation into the Metropolitan Police Service’s inquiry into allegations against John Worboys*. Available at: http://www.ipcc.gov.uk/Documents/worboys_commissioners_report.pdf. Accessed 22/11/2011.

116 Ibid.

that the failure to prevent deaths and serious injuries is in part explained by police attitudes. In some cases police did not listen to or believe victims who asked for help. In other cases, police appeared not to understand domestic violence, did not identify risks or appreciate how these might escalate. Calls were wrongly prioritised with fatal consequences.¹¹⁷ The IPCC has made useful recommendations to improve policing, but again there is evidence that some local forces have failed to implement them.¹¹⁸

5. Despite improvements in the approach of the police and Crown Prosecution Service, hate crime against disabled people still has a low prosecution and conviction rate

In 2009, the High Court of Justice found that if a witness with a mental health condition is treated as unreliable because of stereotyping and false assumptions, and not given appropriate support, then this may amount to a breach of Article 3.¹¹⁹ The Crown Prosecution Service (CPS) subsequently reviewed its policies and took a number of steps to improve its understanding of disability hate crime and its performance in dealing with it. In 2009 it published a ‘public policy statement’ to explain how it would deal with cases involving victims and witnesses with mental health issues.

In 2010 the CPS worked in partnership with Mind, the mental health charity, to produce a prosecutors’ toolkit for dealing with cases involving people with mental health issues as victims or witnesses. This aimed to help victims with mental health conditions by improving understanding of how mental distress affects a victim’s evidence.¹²⁰

¹¹⁷ Independent Police Complaints Commission, *Learning the lessons, Bulletin 11: Gender and domestic abuse*. Available at: <http://www.learningthelessons.org.uk/Pages/Bulletin11.aspx>. Accessed 22/11/2011; see also the most recent IPCC report into police failures contributing to a woman’s murder by her husband: http://www.ipcc.gov.uk/news/Pages/pr_200112_merseysidemott.aspx. Accessed 24/01/2012.

¹¹⁸ IPCC find individual and systemic failures in Nottinghamshire Police’s handling of domestic incidents involving Casey Brittle, 18 October 2011. Available at: http://www.ipcc.gov.uk/news/Pages/pr_181011_brittle.aspx?auto=True&l1link=pages%2Fnews.aspx&l1title=News%20and%20press&l2link=news%2FPages%2Fdefault.aspx&l2title=Press%20Releases. Accessed 24/01/2012.

¹¹⁹ *(B.) v. Director of Public Prosecutions* (Equality and Human Rights Commission intervening) [2009] EWHC 106 (Admin) [2009] WLR (D) 25 QBD.

¹²⁰ Mind, 2010. *Achieving justice for victims and witnesses with mental distress*. London. Available at: http://www.mind.org.uk/assets/0000/9950/Prosecutors__toolkit.pdf. Accessed 22/11/2011.

‘Special Measures’ also exist to help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence.¹²¹

Nevertheless, disability harassment and disability hate crimes still have unacceptably low prosecution and conviction rates.¹²² Keir Starmer, Director of Public Prosecutions, giving evidence to the Commission’s inquiry into the harassment of disabled people, criticised the system of special measures as ‘just too complicated’ because ‘applying for special measures is almost like a series of tripwires for a prosecutor’.¹²³ He also suggested that these improvements may be insufficient because of continuing risk that a witness’s impairment may be used to discredit their evidence in court. The fear of such an ordeal can lead disabled victims to withdraw their complaints or not to come forward in the first place.

The Commission’s inquiry also found that the police often do not recognise hostility and prejudice to disability as a potential motivating factor for either antisocial behaviour or crime. Although prosecution decisions are a matter for the CPS (England and Wales) they depend on the evidence gathered by the police. If the police do not adequately consider the possibility that a crime against a disabled person was motivated by hostility to disability, then they are unlikely to investigate it. Without evidence of any such motivation, prosecutors cannot argue for an extended sentence, which would apply in the case of a hate crime.

Disabled people face many barriers in making allegations of ill-treatment. Many cases are reported to third parties, such as GPs.¹²⁴ Disabled people who approach the police may find it difficult to get an advocate as police do not always appoint one, despite the fact that they are obliged to do so for vulnerable victims.¹²⁵

121 The Youth Justice and Criminal Evidence Act 1999 (YJCEA) defines vulnerable witnesses as:

- All child witnesses (under 18); and
- Any witness whose quality of evidence is likely to be diminished because they:
 - are suffering from a mental disorder (as defined by the Mental Health Act 1983);
 - have a significant impairment of intelligence and social functioning; or
 - have a physical disability or are suffering from a physical disorder.

122 Equality and Human Rights Commission, 2010. *Triennial Review: How fair is Britain?* Chapter 8, Physical Security.

123 Equality and Human Rights Commission, 2011. *Hidden in plain sight: Inquiry into disability-related harassment*. Page 150. Available at: <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment/hidden-in-plain-sight-the-inquiry-final-report/>. Accessed 22/11/2011.

124 Mencap, 1999. *Living in Fear. The need to combat bullying of people with a learning disability*. London: Mencap.

125 C. H. Sin, A. Hedges, C. Cook, N. Mguni and N. Comber, 2009. *Disabled people’s experiences of targeted violence and hostility*. Manchester: Equality and Human Rights Commission. Available at: http://www.equalityhumanrights.com/uploaded_files/research/disabled_people_s_experiences_of_targeted_violence_and_hostility.pdf. Accessed 22/11/2011.

Police may also attribute health problems to a person's disability and as a result, not follow standard procedures to collect evidence and build a case.¹²⁶ For example, people with learning disabilities who are victims of sexual violence may not have medical checks carried out, resulting in a lack of medical evidence to prosecute the case later.¹²⁷ Incidents of sexual violence against disabled people, especially people with mental health conditions, are frequently not treated as crimes.¹²⁸

6. The law regarding the defence of 'reasonable punishment' of children may be incompatible with Article 3

In 1998 the European Court of Human Rights found that UK domestic law did not provide adequate protection for children from 'inhumane or degrading treatment or punishment' to satisfy Article 3. At the time, the law permitted parents and others who had care and control of a child under 16 to use the defence of 'reasonable punishment' when they were charged with wounding or causing grievous bodily harm, assault, occasioning actual bodily harm or cruelty.¹²⁹

Section 58 of the Children Act 2004 limits the use of the defence of reasonable punishment so that it can no longer be used when people are charged with offences against a child, such as causing actual bodily harm or cruelty to a child. However, the reasonable punishment defence remains available when parents or guardians are charged with common assault under section 39 Criminal Justice Act 1988 and in civil proceedings for trespass to the person.

The government has argued that conduct charged as common assault does not achieve the level of severity of Article 3 and therefore the law does not violate the Convention.¹³⁰ This has been accepted by the Court.

The CPS has, as a result of section 58, amended its charging standard so that only the most minor of injuries sustained by a child and inflicted by an adult can be charged as common assault. The injuries must be 'transient or trifling' and no more than a 'temporary reddening of the skin', otherwise they will be charged as actual bodily harm for which the reasonable punishment defence is not available.

126 Disability Rights Commission, 2006. *Equal Treatment: Closing the Gap – a formal investigation into physical health inequalities experienced by people with learning disabilities and/or mental health problems*. London: DRC.

127 D. Gillard, and C. Wallace, 2003. *No Way to Handle Assault, Community Care* (1499) 20 Nov 2003-26 Nov 2003. Pp. 46-47.

128 Equality and Human Rights Commission, 2010. *Triennial Review How fair is Britain?* Chapter 7.

129 *A. v. the United Kingdom* [1998] ECHR 100/1997/884/1096.

130 UK statement to Council of Europe Committee of Ministers, June 2005.

However, sometimes in practice it can be difficult to distinguish between common assault and actual bodily harm.¹³¹ In 2007 the Department for Children, Schools and Families carried out a review of section 58 of the Children Act 2004. The analysis of responses showed that health and social services professionals considered that section 58 made it difficult to give consistent advice to parents and that the lack of understanding of the law made it difficult for practitioners to work with parents. According to the professionals, giving advice on positive parenting was difficult because parents responded by citing the law allowing smacking.¹³² The review concluded that the legal position was clear and appropriate but that the law was difficult to understand.

The Joint Committee on Human Rights considered the issue of legal certainty in its nineteenth report in 2004, concluding that prohibiting corporal punishment would make the law clearer.¹³³ In addition, the UN Committee on the Rights of the Child (General Comment No. 8) expressly prohibits the use of physical punishment on children and urges all states to move quickly to prohibit and eliminate all corporal punishment and other cruel or degrading forms of punishment. The Committee has also recommended three times that the UK change its law.¹³⁴

¹³¹ For definition in levels of severity required for common assault, actual bodily harm, and grievous bodily harm, see Crown Prosecution Service, *Offences against the Person*, incorporating the Charging Standard. Available at: http://www.cps.gov.uk/legal/l_to_o/offences_against_the_person/. Accessed 24/01/2012.

¹³² Department for Children, Schools and Families, 2007. *Review of Section 58 of the Children Act 2004*. Paras 21-26.

¹³³ Joint Committee on Human Rights Nineteenth Report September 2004.

¹³⁴ UN Committee on the Rights of the Child Concluding observations CRC/C/GBR/CO/4 20 October 2008.

The UK government has itself been accused of perpetrating and being complicit in torture and inhumane or degrading treatment

Terrorism and Article 3

Since the 9/11 attacks, governments around the world have taken additional measures to protect their citizens from the threat of terrorism. While it is crucial for the state to protect public safety, it must also meet its human rights obligations. Article 3 applies even in times of conflict, and regardless of the identity or actions of the person.

Article 3 imposes a negative obligation on the state to refrain from subjecting anyone within its jurisdiction to treatment or punishment that meets the threshold for torture, or inhumane or degrading treatment. This includes an obligation to refrain from being complicit in these acts. Neither the European Court of Human Rights nor the domestic courts have defined the concept of complicity. The Joint Committee on Human Rights (JCHR), after hearing evidence from a number of academics and experts, concluded that complicity has different meanings depending on whether the context is individual criminal responsibility or state responsibility.¹³⁵

¹³⁵ For a complete discussion see: Joint Committee on Human Rights, 2009. *Allegations of UK Complicity in Torture. Twenty-third Report of Session 2008-09*. London: House of Commons.

- For the purposes of individual criminal responsibility for complicity in torture, complicity requires proof of three elements: (1) knowledge that torture is taking place, (2) a direct contribution by way of assistance that (3) has a substantial effect on the perpetration of the crime.
- For the purposes of state responsibility for complicity in torture, however, complicity means simply one state giving assistance to another state in the commission of torture, or acquiescing in such torture, in the knowledge, including constructive knowledge, of the circumstances of the torture which is or has been taking place.

An additional obligation of the state is to carry out an effective investigation if there are credible allegations of ill-treatment. An effective investigation must be independent, impartial, subject to public scrutiny, and include access to the investigative process for the victims. The investigation should also be prompt and capable of establishing the facts and identifying those who were responsible for the violations.¹³⁶

One of the principal legal challenges posed by the government's response to terrorism is the extent to which UK jurisdiction extends into areas beyond the country's borders, and particularly whether it extends to territories such as Iraq and Afghanistan. If so, the rights contained in the European Convention would also apply in these areas. According to Article 1 of the Convention, the state is only responsible for securing the rights of the Convention in places where the state is exercising its jurisdiction. The definition of what falls under the jurisdiction of the state has evolved over time. Initially it was thought that the

¹³⁶ Letter from Liberty, The AIRE Centre, Amnesty International, British Irish Rights Watch, Cageprisoners, Justice, The Medical Foundation for the Care of Victims of Torture, Redress and Reprieve. To Rt. Hon. Sir Peter Gibson (Chair of the Inquiry) on 8 February 2010. Available at: http://www.justice.org.uk/data/files/resources/161/Submission_to_Detainee_Inquiry_NGOletter_8feb11.pdf. Accessed 22/11/2011/ Quoting: *Aksoy v. Turkey* (21987/93), para 98 (1996) 23 E.H.R.R. 553; *Aydin v. Turkey*, para 103 (1999) 28 E.H.R.R. 25; *Kurt v. Turkey* (24276/94), para 140 (1999) 27 E.H.R.R. 373; *Ergi v. Turkey* (23818/94), para 98 (2001) 32; E.H.R.R. 18, 28 July 1998; *Akkoç v. Turkey* (22947/93) and (22948/93), para 118, 10 October 2000; *Mikheyev v. Russia* (77617/01), para 107-110; *Jordan v. the United Kingdom*, para 109.

jurisdiction was limited to the physical territory of the state. However, the Court has widened this interpretation in some exceptional cases. States have been held to be responsible for securing the rights of the Convention over territories outside their physical borders, where they have ‘effective jurisdiction’.¹³⁷

For example, in 2011 the European Court of Human Rights found that the UK had jurisdiction over the city of Basra in Iraq in 2003.¹³⁸ Therefore, the UK’s human rights obligations applied to its behaviour in that territory.

In 2003 the UK was an occupying power in Basra. It was alleged that during an operation the military killed five individuals and arrested a sixth. The UK refused to conduct an independent investigation into the circumstances of the deaths. It argued that the five individuals were shot outside its territory and therefore outside its jurisdiction and so the Convention did not apply.¹³⁹

The Court found that because the UK was exercising public powers on the territory, as it had assumed authority and responsibility for the maintenance of security in southeast Iraq, it had assumed jurisdiction. Therefore it was required to carry out an independent and effective investigation into these deaths.¹⁴⁰

The Court has also recognised that no-one can be deported or expelled to a country where there is a real risk that the person may face torture or ill-treatment, even when that person poses a threat to national security.¹⁴¹

¹³⁷ The Court has held that whenever the state has an ‘effective jurisdiction’ over a territory, it then has an obligation to secure the rights of the Convention. For example, in the case of *Loizidou v. Turkey* (1995), which relates to access to private property in occupied territory (in this case northern Cyprus) the Court made two significant decisions: 1) that the concept of jurisdiction under Article 1 ECHR is not restricted to the national territory of the High Contracting Parties; and 2) that responsibility may also arise as a consequence of military action a Contracting Party exercises effective control of an area outside its national territory.

¹³⁸ European Court of Human Rights, 2011. *Extra-territorial jurisdiction of ECHR States*. Available at: http://www.echr.coe.int/NR/rdonlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/3415038_Press_Unit_Factsheet__Extraterritorial_Jurisdiction.pdf. Accessed 06/12/2011.

¹³⁹ Britain did investigate the death of the 6th person, Baha Mousa: this is explained later in the chapter.

¹⁴⁰ *Al-Skeini v. the United Kingdom*, European Court of Human Rights Grand Chamber (55721/07). See *Chahal v. the United Kingdom* [1996] 23 EHRR 413; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161; *Saadi v. Italy* (37201/06), 28 February 2008.

¹⁴¹ This is in line with the principle of non-refoulement set out in the 1951 Convention Relating to the Status of Refugees and its Protocol as well as in Article 3 of the UN Convention Against Torture Convention, that protects refugees from being returned to places where their lives or freedoms may be threatened. For domestic cases see UK House of Lords decision in *Islam v. Secretary of State for the Home Department* and *R. v. IAT, ex parte Shah* (1999) 2 all ER 545 (1999) 2 WLR 1015.

The government has stated that it unreservedly condemns the use of torture and cruel, inhumane or degrading treatment or punishment as a matter of fundamental principle, and that it does not condone it, nor ask others to do it on its behalf. In parliament, the Prime Minister has stated ‘we have signed countless prohibitions against it [torture], we do not condone it anywhere in the world, and we should be clear that information derived from it is useless. We should also be clear that we should not deport people to be tortured elsewhere, but we should redouble our efforts... to ensure that we can have guarantees from other countries so that we can deport people to them knowing that they will not be tortured.’¹⁴²

Key issues

1. There have been allegations that the security and intelligence services were complicit in the ill-treatment of prisoners and civilians in counter-terrorism operations overseas in the immediate aftermath of the 9/11 attacks

There have been allegations that security and intelligence officials have been complicit in the torture and ill-treatment of more than 20 people in various countries including in Afghanistan, Egypt, Pakistan, Libya, Uganda and Guantanamo Bay in Cuba. The government denies that there is evidence of security service personnel torturing anyone directly or being complicit in torture. Cases have been reported by non-governmental organisations, the UN and UK domestic bodies like the JCHR.¹⁴³ There are allegations of officials being complicit in the torture or ill-treatment of at least 25 people, including three

¹⁴² Hansard HC col 180 (6 July 2010). Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm100706/debtext/100706-0001.htm>

¹⁴³ See Human Rights Watch, 2009. *Cruel Britannia. British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan*. Available at: <http://www.hrw.org/en/node/86690>; The Joint Committee on Human Rights 20th report session 2008-09 Allegations of UK Complicity in Torture; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearance. UN document number A/HRC/13/42 26 January 2010.

British citizens and four individuals who held legal residency in Britain who were being held in the Guantanamo Bay detention facility.¹⁴⁴

For example, in August 2008 the High Court found that British security services had provided information and questions for interviews conducted in Pakistan with Binyam Mohamed, who was resident in Britain. Mohamed alleges that he was tortured in Pakistan, Morocco and Afghanistan between 2002 and 2004, being beaten and scalded and having his penis slashed with a scalpel. Evidence from investigations into security and intelligence agents showed that British officials knew of at least some of the treatment he had suffered. A US court has also found there was 'credible' evidence that he was tortured in Pakistan and Morocco.¹⁴⁵

¹⁴⁴ For a non-exhaustive list of individuals see: Equality and Human Rights Commission. Letter to Rt. Hon. Sir Peter Gibson. 13 September 2010. See also: Human Rights Watch, 2009. *Cruel Britannia. British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan*. Available at: <http://www.hrw.org/en/node/86690> Accessed 22/11/2011; House of Commons, 2009. *The Joint Committee on Human Rights Twenty Third Report Allegations of UK Complicity in Torture*; United Nations, 2010. *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhumane or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearance*. UN document number A/HRC/13/42 26.

The Human Rights Watch report provides accounts of five UK citizens of Pakistani origin who alleged that they were tortured in Pakistan between 2004 and 2007 and that the UK government agencies knew about this treatment. The names of the individuals are: Salahuddin Amin, Zeeshan Siddiqui, Rangzieb Ahmed, Rashid Rauf and a fifth individual who wished to remain anonymous. The Joint Committee on Human Rights report discussed the following cases: in Pakistan: MSS, Rangzieb Ahmed, Zeeshan Siddiqui, Salahuddin Amin, Tariq Mahmood, Tahir Shah and Rashid Rauf; in Egypt: Azhar Khan, plus 3 possible others and Binyam Mohamed. The UN report looked at the allegations of Bisher Al-Rawi, Moazzam Begg, Omar Deghayes, Mohamed Ezzoueck, Maryam Kallis, Azhar Khan, Mohammed Saad Iqbal Madni, Binyam Mohamed, Abu Omar (alias).

¹⁴⁵ *R. (Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, 10 February 2010 [2010] EWCA Civ 65. Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2010/65.html> Accessed 22/11/2011; CPS decision on witness B. Available at: http://www.cps.gov.uk/news/press_releases/141_10/ Accessed 22/11/2011.

In November 2010 the UK government announced a settlement with 16 individuals in relation to their imprisonment in Guantanamo Bay, but this settlement is not an admission of culpability.¹⁴⁶ Other allegations have been made around the practice of ‘extraordinary rendition’. The terms rendition and extraordinary rendition are not legally defined in UK or in international law. According to the UK government:

‘Rendition has been used to describe informal transfers of individuals in a wide range of circumstances, including the transfer of terrorist suspects between countries. Extraordinary rendition has been used to describe “renditions” where it is alleged that there is a risk of torture or mistreatment.’¹⁴⁷

Article 3 is relevant to extraordinary rendition because it violates the prohibition not to expel a person to another state, or hand that person to the agents of another state, when there are substantial grounds for believing that he or she will be in danger of being subjected to torture.

¹⁴⁶ Hansard HC col 752 (16 November 2010). Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm101116/debtext/101116-0001.htm>. Accessed 22/11/2011.

¹⁴⁷ Foreign Commonwealth Office, 2006. *Human Rights Annual Report*. London. Page 181. Available at: http://collections.europarchive.org/tna/20080205132101/fco.gov.uk/Files/kfile/hr_report2006.pdf. Accessed 22/11/2011. See *Chahal v. the United Kingdom* [1996] 23 EHRR 413. *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161 *Saadi v. Italy* (37201/06) 28 February 2008. For domestic cases see: UK House of Lords decision in *Islam v. Secretary of State for the Home Department* and *R. v. IAT, ex parte Shah* [1999] 2 AC 629 [1999] 2 All ER 545 [1999] 2 WLR 1015. Furthermore, extraordinary rendition involves a transfer outside the transferor’s jurisdiction without lawful authority, and third states may become complicit in, and in turn also be in breach of their obligations under international law, either in assisting rendition or in being responsible for the ill-treatment of the transferees. Chatham House International Law Discussion Group meeting held on 27 March 2008. <http://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/il270308.pdf>. Accessed 22/11/2011.

There is little reliable information on the number of individuals who have been subject to extraordinary rendition. When allegations of British involvement in extraordinary renditions emerged in 2005, government ministers repeatedly stated that British airports and airspace were not being used for this purpose.¹⁴⁸ In 2008, the government accepted that there was a mistake in its statements and that in 2002 its airspace and territory had been used for extraordinary rendition flights. It had received information from Washington that two flights had stopped over at Diego Garcia, the British overseas territory in the Indian Ocean.¹⁴⁹ The government acknowledged that one of the detainees in question was subsequently held in Guantanamo Bay but it did not reveal the name of the individual.¹⁵⁰

In February 2009, the UK government said that in 2004 two individuals had been captured by British forces in and around Baghdad. They were rendered to US detention and subsequently moved to a US detention facility in Afghanistan.¹⁵¹ This detention facility is well known for its inhuman conditions.¹⁵² The UK government did not reveal their names. Reprieve found that the two people were Amanatullah Ali and Yunus Rahmatullah also known as ‘Salae Huddin’.¹⁵³

148 House of Commons, 2006. *Joint Committee on Human Rights. Nineteenth report of Session 2005-2006*. Para 148. Available at: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185-i.pdf>. Accessed 22/11/2011.

149 Statement made by the Secretary of State for Foreign and Commonwealth Affairs David Miliband. Hansard HC, col 547 (21 February 2008) at: <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080221/debtext/80221-0007.htm>. Accessed 22/11/2011.

150 Campaign group Reprieve believes that this person is Mohammed Saad Iqbal Madni. Reprieve, *Secret Prisons and Renditions*. Available at: <http://www.reprieve.org.uk/cases/muhammedsaadiqbalmadni/>. Accessed 22/11/2011.

151 Rt. Hon. John Hutton MP, Hansard HC col 394 (26 February 2009). Available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090226/debtext/90226-0008.htm#09022651000004> (accessed 22/11/2011) and Rt. Hon. Bob Ainsworth MP, Hansard HC col 549W (06 July 2009). Available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090706/text/90706w0010.htm#09070625001975>. Accessed 22/11/2011.

152 Ibid.

153 Reprieve. Available at: <http://www.reprieve.org.uk/cases/yunusrahmatullah/>. Accessed 22/11/2011.

The *Guardian* reported more allegations of rendition and torture in March 2011. Omar Awadh alleged he was abducted in Nairobi before being illegally rendered to Uganda and handed over to the Rapid Response Unit, which has been criticised by Human Rights Watch for its methods of interrogation and detention, including torture. Mr Awadh said that he was beaten and threatened with further rendition to Guantanamo Bay, before being interrogated by American and British individuals who identified themselves as FBI and security service officials.¹⁵⁴

The most recent allegation dates from September 2011, when Human Rights Watch reported that it had documents that appear to incriminate Britain's intelligence services in planning the 2004 capture and rendition of Abdel-Hakim Belhaj.¹⁵⁵ The government has since announced that criminal investigations will be carried out in relation to Belhaj's case and similar allegations made by another Libyan dissident Sami al Saadi.¹⁵⁶

There is evidence that the government's investigation of these alleged breaches has not been thorough enough to meet its Article 3 obligations. An Article 3 investigation must be independent, impartial, subject to public scrutiny, and include effective access to the process for victims. The people conducting the inquiry must act with diligence and promptness, and the investigation must be capable of establishing the facts and identifying those who are responsible for the violations.¹⁵⁷ Every effort must be made to seek and secure information

154 Freedom From Torture, 2011. *Uganda – fresh allegations of MI5 involvement in torture overseas*. Available at: <http://freedomfromtorture.org/news-events/news/3484>. Accessed 22/11/2011.

155 Human Rights Watch, 2011. *US/UK: Documents Reveal Libya Rendition Details*. Available at: <http://www.hrw.org/news/2011/09/08/usuk-documents-reveal-libya-rendition-details>. Accessed 22/11/2011.

156 Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service, 12 January 2012. Available at: http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service/. Accessed 24/01/12.

157 Letter from Liberty, The AIRE Centre, Amnesty International, British Irish Rights Watch, Cageprisoners, Justice, The Medical Foundation for the Care of Victims of Torture, Redress and Reprieve. To Rt. Hon. Sir Peter Gibson (Chair of the Inquiry) on 8 February 2010. Available at: http://www.justice.org.uk/data/files/resources/161/Submission_to_Detainee_Inquiry_NGOletter_8feb11.pdf. Accessed 22/11/2011/ Quoting: *Aksoy v. Turkey* (21987/93), para 98 (1996) 23 E.H.R.R. 553; *Aydin v. Turkey*, para 103 (1999) 28 E.H.R.R. 25; *Kurt v. Turkey* (24276/94), para 140 (1999) 27 E.H.R.R. 373; *Ergi v. Turkey* (23818/94), para 98 (2001) 32; E.H.R.R. 18, 28 July 1998; *Akkoç v. Turkey* (22947/93) and (22948/93), para 118, 10 October 2000; *Mikheyev v. Russia* (77617/01), paras 107-110; *Jordan v. the United Kingdom*, para 109.

regarding torture violations, including from other states that are unwilling to co-operate.¹⁵⁸

In July 2010 the Prime Minister, David Cameron, announced that an independent inquiry would examine whether, and to what extent (if at all) the UK government and its intelligence agencies were involved in improper treatment of detainees held by other countries in counter-terrorism operations overseas in the immediate aftermath of the attacks of 9/11, or were aware of improper treatment of detainees in operations in which Britain was involved. The inquiry was chaired by Rt. Hon. Sir Peter Gibson.

The government stated that the inquiry did not have to comply with Article 3 investigation requirements, as it had not been set up in order ‘to examine allegations of torture and other ill-treatment, which give rise to particular requirements under Article 3 ECHR’. The proposed inquiry was widely criticised by human rights groups and by the Commission.

There were concerns that the terms of reference and protocols of the inquiry set out that key hearings would be held in secret; and that the cabinet secretary would have veto over what information would be made public.¹⁵⁹

The Commission urged the chair of the inquiry and the government that it should be an effective investigation and compliant with international human rights obligations.¹⁶⁰ Lawyers acting for former detainees and 10 non-governmental organisations¹⁶¹ indicated that they would not participate in the inquiry, believing that the terms of reference and protocols would not establish the truth of the allegations or prevent the abuses from happening again.¹⁶²

158 For a complete reference to the discussion please see the letters from NGOs and responses from the chair of the inquiry. Available at: <http://www.justice.org.uk/resources.php/161/detainee-inquiry-justice-submission>. Accessed 22/11/2011.

159 The Detainee Inquiry, 2011. *Terms of Reference and Protocol published*. Available at: <http://www.detaineeinquiry.org.uk/2011/07/news-release-terms-of-reference-and-protocol-published/>. Accessed 22/11/2011.

160 Equality and Human Rights Commission. Letter to Rt. Hon. Sir Peter Gibson. 13 September 2010.

161 These organisations were: Liberty, Redress, Amnesty International, Cageprisoners, the AIRE Centre, Freedom from Torture, Human Rights Watch, Justice, Reprieve, and British Irish Rights Watch.

162 Liberty, Redress, Amnesty International, Cageprisoners, Address, the AIRE centre, Freedom from Torture, Human Rights Watch, Justice, Reprieve and British Irish Rights Watch letter to the chair of the inquiry. Available at: http://www.amnesty.org.uk/uploads/documents/doc_21711.pdf. Accessed 22/11/2011.

As further criminal investigations into rendition of individuals to Libya had recently been commenced, the government decided to conclude the inquiry in January 2012, but has committed itself to holding an independent judge-led inquiry at some point in the future.¹⁶³

2. Guidance for intelligence officers on detaining and interviewing detainees abroad breaches Article 3

Following the allegations detailed in the previous section, the UK government published guidance setting out the approach that British intelligence officers should take to obtaining information from individuals detained overseas.¹⁶⁴

The guidance sets out the steps which must be taken by intelligence officers before they interview detainees held by other states, seek intelligence from detainees in the custody of foreign countries or solicit the detention of a person by a foreign country.

The Commission and a victim of hooding in Iraq, Alaa' Nassif Jassim Al-Bazzouni, brought legal challenges against the guidance. In Al-Bazzouni's case the courts found that this guidance did not properly reflect international legal obligations. The Commission argued that to determine whether an individual officer or the state could be responsible for a breach of Article 3, the correct legal test is whether officers were aware or had reason to believe that there was a 'real risk' of torture. This would be the case according to both domestic criminal law and international human rights law. The guidance prohibits officers to act when there is a 'serious risk', which the Commission argued was a higher threshold and therefore legally incorrect. The judges found that the distinction between the two terms was 'elusive' and dismissed the claim. Mr Al-Bazzouni's claim was based on the contention that the guidance permitted hooding of detainees in certain circumstances when the UK's law and policy prohibit hooding at all times. His claim succeeded and the guidance will have to be amended.¹⁶⁵

¹⁶³ Statement made by the Lord Chancellor and Secretary of State for Justice (Mr Kenneth Clarke). Hansard HC, col 752 (18 January 2012). Available at: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120118/debtext/120118-0001.htm>. Accessed 20/01/2012.

¹⁶⁴ HM Government, 2010. *Consolidated guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*. London: Cabinet Office. Available at: <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1796.pdf>. Accessed 22/11/2011.

¹⁶⁵ *Equality and Human Rights Commission v. the Prime Minister & Ors and Alaa' Nassif Jassim Al Bazzouni v. the Prime Minister* [2011] EWHC 2401 (Admin).

3. There have been allegations that British military personnel have been involved in the torture and ill-treatment of civilians and detainees in Iraq. Some of these allegations have not been investigated thoroughly enough to meet Article 3 obligations

There have been numerous allegations that British military personnel have been involved in the torture and ill-treatment of civilians and detainees in Iraq.

There are no figures available on how many allegations of torture against civilians have been made. However, information has emerged from several inquiries and court cases between 2003 and 2010. One source of such information was the inquiry into the death of Baha Mousa which was reported in 2011. In 2003, soldiers from the Queen's Lancashire Regiment arrested 10 Iraqis, including Baha Mousa, and took them back to a temporary detention centre run by the regiment.¹⁶⁶ The inquiry heard that prisoners in the detention centre were hooded with hessian sacks, handcuffed, forced to adopt a 'stress position' (standing up with knees bent and arms outstretched) and deprived of sleep.¹⁶⁷ Witnesses also claimed that during their detention, the Iraqis were beaten and kicked by soldiers from the regiment who had been given the task of 'conditioning' the detainees for eventual 'tactical questioning' by military intelligence officers. Baha Mousa died while he was in custody. A post-mortem examination found that he suffered at least 93 injuries, including fractured ribs and a broken nose, which were 'in part' the cause of his death. In 2007, a court martial found that Corporal Payne was guilty of inhuman treatment and sentenced him to one year in prison.¹⁶⁸

¹⁶⁶ Rt. Hon. Sir William Gage, 2011. *The Baha Mousa Public Inquiry Report, Volume 1*. London: The Stationery Office. Para 1.24.

¹⁶⁷ Ibid. See for example, Liam Douglas Fredrick Felton Witness statement to the Baha Musa inquiry. Available at: http://www.bahamousainquiry.org/linkedfiles/baha_mousa/baha_mousa_inquiry_evidence/evidence_061009/bmio0830.pdf and statement from Lieutenant Colonel Gavin Davies to the Baha Mousa inquiry. Available at: http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/transcripts/2010-29-03-day75fullday.pdf. Accessed 22/11/2011.

¹⁶⁸ La Hague Justice Portal. Available at: <http://www.haguejusticeportal.net/eCache/DEF/12/136.html>. Accessed 22/11/2011. Transcript of the sentencing available at: <http://www.publications.parliament.uk/pa/ld200607/ldlwa/070327wa1.pdf>. Accessed 22/11/2011.

In relation to the detention facilities, the inquiry said that they were wholly inadequate and there was no meaningful custody record, or even a log of personnel visiting the facilities. It also found that there was a: lack of clear guidance about the prohibition on the use of hessian sacks, sleep, food and water deprivation; a lack of training and clear guidance on techniques that can be used to interrogate detainees and ‘tactical questioning’; and an absence of any medical policy.¹⁶⁹

After the Baha Mousa case a second legal challenge heard allegations that British soldiers unlawfully killed a number of Iraqi nationals at Camp Abu Naji and ill-treated five Iraqi nationals detained at the camp and subsequently at the divisional temporary detention facility at Shaibah Logistics Base. The Al-Sweady Inquiry has been set up to establish the facts of those allegations, and is likely to take years to report. Hearings are due to commence in April 2012.¹⁷⁰

In November 2010, during proceedings brought by Ali Zaki Mousa on behalf of over 100 civilians in Iraq, the High Court considered an application for judicial review into the Secretary of State’s decision not to order a public inquiry into allegations of ill-treatment of Iraqi detainees at the Divisional Temporary Facility near Basra at which the Joint Forces Interrogation Team worked. It was alleged that detainees were starved, deprived of sleep, subjected to sensory deprivation and threatened with execution; that detainees were beaten, forced to kneel in stressful positions for up to 30 hours at a time, and that some were subjected to electric shocks. Some of the prisoners also claimed that they were subjected to sexual humiliation by female soldiers, while others alleged that they were held for days in cells as small as one square metre.¹⁷¹

To investigate these allegations, the Ministry of Defence set up the Iraq Historic Allegations Team in 2010, which was due to complete its work in the autumn of 2012. The Ministry also established the Iraq Historic Allegations Panel to consider the results of the team’s investigations and identify any wider issues to be brought to the attention of the Ministry of Defence or of ministers personally.

169 W. Gage, 2011. *The Baha Mousa Public Inquiry Report, Volume 3*. London: The Stationery Office. Page 1287. Available at: http://www.bahamousainquiry.org/f_report/vol%20iii/Part%20XVIII/Part%20XVIII.pdf. Accessed 22/11/2011.

170 Al-Sweady Inquiry. Available at: <http://www.alsweadyinquiry.org/>. Accessed 22/11/2011.

171 *Ali Zaki Mousa and others v. Secretary of State for Defence* [2010] EWHC 3304 (Admin).

The Commission argued that a prompt response by the authorities in investigating allegations of ill-treatment has been regarded by the European Court of Human Rights as essential in maintaining public confidence in the state's adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.¹⁷² The Secretary of State had planned to wait until the Iraq Historic Allegations Team's investigation was concluded in 2012 before deciding whether an investigation into systematic abuses was necessary.¹⁷³ In practice, this would have meant that if systematic failures were found, allegations of ill-treatment that occurred in 2003 might only have been investigated nine years after their occurrence.¹⁷⁴

The Court of Appeal has now determined that these measures do not meet the requirements of an Article 3 investigation. The Court ruled that the investigation process set up by the UK government did not have the necessary degree of independence, and as such did not meet the requirements of the investigative duty in Article 3.¹⁷⁵ The Court found that because members of the Provost Branch (part of the British Army) were part of the investigation team, it compromised the institutional independence of the team. In light of that decision, the government's 'wait and see' approach to initiating a full public inquiry could not stand.¹⁷⁶ It is now for the government to decide how to meet the Article 3 investigative duty.

In another case, *Al-Skeini*, the UK government argued that it was not obliged to carry out an investigation into the involvement of the British Armed Forces in the deaths of five civilians in Iraq in 2003. The government claimed that its activities in Iraq were outside its jurisdiction, and so Article 3 did not apply. The European Court found that the UK had effective jurisdiction in Basra in Iraq, and had failed to carry out an effective investigation into the deaths and mistreatment of Iraqi civilians between 1 May 2003 and 28 June 2004.¹⁷⁷

¹⁷² See for example *Indelicato v. Italy* (31143/96) Judgment 18.10.2001.

¹⁷³ *Ali Zaki Mousa and others v. Secretary of State for Defence* [2010] EWHC 3304 (Admin) para 117.

¹⁷⁴ Equality and Human Rights intervention in *Ali Zaki Mousa and others v. Secretary of State for Defence* [2010] EWHC 3304 (Admin).

¹⁷⁵ *Mousa, R. (on the application of) v. Secretary of State for Defence & Anor* [2011] EWCA Civ 1334 (22 November 2011).

¹⁷⁶ *Mousa, R. (on the application of) v. Secretary of State for Defence & Anor* [2011] EWCA Civ 1334 (22 November 2011).

¹⁷⁷ The European Court resolved in July 2011, in the case of *Al-Skeini v. the United Kingdom*, that Britain had effective jurisdiction over Basra and therefore it had an obligation to secure the rights of the people in this part of the Iraqi territory.

The court found that the UK failed to investigate all but one death, that of Baha Mousa.¹⁷⁸ It is still unknown how the government is planning to fulfil its investigative obligation under Article 3 in that case.

4. Despite concerns as to their effectiveness in preventing torture, the government continues to rely on memoranda of understanding in order to deport people to places where they are at risk of torture and degrading treatment

The UK has an obligation to refrain from deporting or expelling a person to another state when there are substantial grounds for believing that they will be in danger of being subjected to torture or other ill-treatment by state authorities or private individuals in that country.¹⁷⁹

Memoranda of understanding and diplomatic assurances (in individual cases) are government records of an agreement or understanding between states, and have been used to facilitate the transfer of people from one territory to another. States use them to try to mitigate risks of torture and other ill-treatment that would otherwise prevent the transfer of people, in particular terrorist suspects.¹⁸⁰ However, it is unclear whether such memoranda are adequate in reducing the risk of torture potentially faced by expelled individuals.¹⁸¹ Similar concerns have been raised, including in our domestic courts, to memoranda which govern the transfer of detainees from the UK to other state authorities during periods of armed conflict.¹⁸²

¹⁷⁸ *Al-Skeini v. the United Kingdom*, *European Court of Human Rights Grand Chamber* (Application no. 55721/07).

¹⁷⁹ *Soering v. the United Kingdom* 11 EHRR 439 (14038/38) para 88 and *Chahal v. the United Kingdom* (1996) 23 EHRR 413.

¹⁸⁰ Redress, 2008. *The United Kingdom, torture and anti-terrorism: where the problems lie*. London: Redress. Page 51. Available at: <http://www.redress.org/downloads/publications/Where%20the%20ProblemsLie%2010%20Dec%2008A4.pdf>. Accessed 22/11/2011.

¹⁸¹ See for example, Manfred Nowak, ex UN special rapporteur on torture and other cruel, inhumane or degrading treatment or punishment. Torture and other cruel, inhumane or degrading treatment or punishment Note by the Secretary-General. UN document A/60/316.

¹⁸² *R. (on the application of Maya Evans) v. Secretary of State for Defence* [2010] EWHC 1445 (Admin) which held that restrictions must be placed on the transfer of detainees in Afghanistan by the UK Armed Forces to a particular Afghan-run detention facility due to allegations of abuse in that facility.

In 2006, the Joint Committee on Human Rights (JCHR) raised serious concerns about the UK's use of diplomatic assurances. According to the report,

‘those deported may face a real risk of torture or inhumane and degrading treatment, without any reliable means of address’.¹⁸³

The JCHR also found that the government's reliance on such memoranda undermined the absolute prohibition to abstain from deporting or expelling a person when there is a real risk that they may face torture, and threatened to place the UK in violation of its binding international obligations.¹⁸⁴

The government has argued that this policy demonstrates the UK's commitment to upholding its human rights obligations. Memoranda of understanding always specify that the recipient government should respect the basic rights of the person deported and provide for post-return monitoring mechanisms.¹⁸⁵

Three countries have signed memoranda of understanding and have had them tested in the Special Immigration Appeals Commission (SIAC): Jordan, Libya and Ethiopia.¹⁸⁶ In 2011 a further memorandum was agreed with Morocco, but this has not yet been tested in SIAC.¹⁸⁷ The UK government has also signed an exchange of letters with the Algerian president to deport individuals on a case-by-case basis and some of those agreements have been tested in SIAC. The agreements with Algeria and the memorandum with Jordan have been approved by the House of Lords.¹⁸⁸ The agreement with Libya was held to be invalid by

183 House of Commons, 2006. *Joint Committee on Human Rights – Nineteenth Report, Session 2005-06*. Available at: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/18502.htm>. Accessed 22/11/2011.

184 Ibid.

185 Ministry of Justice, 2011. *United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment: 5th Report by the United Kingdom of Great Britain and Northern Ireland*. Available at: <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1420.pdf>. Accessed 22/11/2011.

186 Britain has also signed a memorandum of understanding with Lebanon, but it has not been tested in SIAC. Algeria: Case of Y, case of BB, Case of G, Case of U, Case of Y, BB and U in the Court of Appeal; Jordan: Case of Othman, Case of VV; Libya: Cases of DD and AS.

187 The exchange of letters can be viewed on the FCO website. See Foreign and Commonwealth Office, ‘Targeting Terrorist Activity’. Available at: <http://www.fco.gov.uk/en/global-issues/counter-terrorism-policy/deportation-with-assurances/>. Accessed 22/11/2011.

188 *RB (Algeria) (FC) and another (Appellants) v. Secretary of State for the Home Department (Respondent) and OO (Jordan) (Original Respondent and Cross-appellant) v. Secretary of State for the Home Department (Original Appellant and Cross-respondent)*, [2009] UKHL 10.

the UK courts in 2008 and has not been relied on since then. According to the report submitted by the UK to the United Nations Committee Against Torture in 2011, nine people have been effectively deported from Britain following the receipt of diplomatic assurances. These were all to Algeria, a country with poor a human rights record.¹⁸⁹

In January 2012, the European Court of Human Rights approved the memorandum of understanding between the UK and Jordan, deciding that despite some room for improvement the agreement would ensure that Abu Qatada would not be exposed to a real risk of torture if he were deported. However, it held that his deportation would be in breach of Article 6 of the Convention (the right to a fair trial), in that evidence obtained through the use of torture would be admitted in his retrial in Jordan.¹⁹⁰

The UN Human Rights Committee, the Special Rapporteur and the UN Committee Against Torture have repeatedly asked the UK government to review the memorandum of understanding procedure.¹⁹¹ In spite of concerns related to the practice, the UK government has been unwilling to change the practice, as it maintains that those measures are sufficient to protect the individuals against torture.¹⁹²

The latest review on the use of these assurances took place in 2010 as part of the Home Office review of six key counter-terrorism and security powers. Once again, they rejected submissions from human rights organisations requesting the abolition of these assurances, and the government decided that the assurances should remain in place. Furthermore, in the annual report of the Foreign and Commonwealth Office, issued in March 2010, the UK government states that it will ‘continue to negotiate new memoranda of understanding in 2010’.¹⁹³

189 Ministry of Justice, 2011. *United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment: 5th Report by the United Kingdom of Great Britain and Northern Ireland*. Available at: <http://www.parliament.uk/deposits/depositedpapers/2011/DEP2011-1420.pdf>. Accessed 22/11/2011.

190 *Case of Othman (Abu Qatada) v. the United Kingdom* (Application no. 8139/09) 17 January 2012.

191 United Nations, 2008. *Human Rights Committee: Consideration of reports submitted by States parties under Article 40 of the Covenant*. Available at: <http://www.statewatch.org/news/2008/jul/uk-un-hr.pdf>. Accessed 22/11/2011.

192 Foreign and Commonwealth Office, 2010. *Annual Report on Human Rights 2009*. Page 45.

193 Ibid.

Case study:**Catherine's story****In 2005, Catherine was raped by a stranger who she had invited into her home.**

She has bipolar disorder, and on the day she was raped, she was experiencing a psychotic episode. "I thought it was the last judgement day and everyone had to look after each other. I made him a hot chocolate. He was asking me to kiss him and I said no. And then he moved me forcibly into the bedroom and I knew I was going to be raped," she says.

The day after the rape, Catherine was detained by the police when she was found stopping traffic, and sectioned under the Mental Health Act. It was from the hospital two months later, in December 2005, that she first reported the rape to police in her home town of Cambridge. In February 2006, she contacted the police to find out how the investigation was progressing. She discovered that nothing at all had been done, and that her allegation had not been recorded as a crime. Catherine believes her mental illness played a part in the police's failure to investigate.

"The officers thought that they could act with impunity, and considered the mentally ill as a lower class of citizen," she says. "The investigating officer herself treated me with contempt. She wanted an easy job, and was willing to lie about the evidence, rather than perform a proper investigation."

Potential leads were not pursued in time. Catherine had described how after the rape, her attacker had walked her to a bank and forced her to withdraw money. But, by the time detectives contacted the bank, the CCTV footage from that day had been wiped. The man who raped Catherine has never been caught.

Catherine said an officer had told her the cameras at the bank were 'dummy' and did not have film in them. When she discovered the footage had been lost, she decided to launch a formal complaint against the Cambridgeshire force. An internal investigation began. The sergeant who let paperwork lie on his desk denied that he had ignored the case because the woman making the complaint had mental health problems. He was given a superintendent's written warning. The female officer who had initially dealt with Catherine received words of advice.

“The officers thought they could act with impunity and viewed mentally ill people as lower class citizens”

Catherine was still not satisfied with the police response. She said:

“The superintending officer failed in two regards. Not only did he fail to allocate a crime number and put an investigating officer on the case, but he left the paperwork on his desk, untouched. I would describe his professional behaviour as characterised by neglect.”

Catherine found a solicitor who argued that there had been a breach of human rights law. Under Article 3, the state has a duty to investigate all cases where an individual has been subject to inhumane or degrading treatment. After legal action began, Cambridgeshire Police settled out of court and paid Catherine £3,500 in compensation. The force admitted no liability but issued a letter of apology.

“This victory is important, since it can begin to address this attitude that the police have towards the vulnerable,” Catherine says. “The Human Rights Act holds the police to account. I see my legal victory not as an end, but as a beginning, and I want it to be a message to both women and men who are disadvantaged, whether it is in terms of ethnicity, poverty, illness, or disability, that they have legal rights, and the state has obligations to fulfil these rights.”

Case study:**Northumbria Police
and domestic violence****Andrea Gartland is an independent domestic violence advisor based in a police station in Newcastle.**

Human rights legislation has had a direct impact on the women she advises, as she recalls in relation to one case, that of Mary (not her real name).

In 2008, Mary separated from her partner. He began stalking her and she was bombarded with threatening phone calls and text messages. He would turn up at her home uninvited. Paint was thrown at her door, and her car and garage door were damaged. Photographs and a kitchen knife were left on her front doorstep. Mary went to court but despite obtaining protective orders the harassment continued. On one occasion, she called the police in a highly distressed state after receiving a picture message on her mobile phone of two shot guns laid out on a bed. The image was accompanied by a caption that read, ‘spoilt for choice ha-ha’.

“Mary was very scared,” says Andrea. “This man was not going to give up and he had no fear of the police. She was having panic attacks as he lived nearby and she was scared to be alone in the house.”

Fortunately, Mary was a beneficiary of a new, human rights-based approach by Northumbria Police to tackling domestic violence. There was a robust response involving the police and other agencies, which looked at increasing her safety, protecting her child and managing the behaviour of the offender. Mary was also provided with practical support by Andrea and her team who, for example, arranged for security measures including a burglar alarm and intercom system to be installed at her home.

The new approach taken by Northumbria Police was influenced by the Human Rights Act, as Detective Chief Inspector Max Black explains. “During the early 2000s, the force reviewed how it dealt with domestic violence, with respect to human rights legislation. We found that although policy was well intentioned it was not adequate ... after the review we realised we had a positive obligation to intervene to protect those at risk of inhumane or degrading treatment with regards to domestic violence.”

“after the review we realised we had a positive obligation to intervene to protect those at risk of inhumane or degrading treatment with regards to domestic violence”

As a result, all officers are now trained in human rights so that they avoid dealing with domestic violence incidents as breaches of the peace and actively consider the need to protect the victim and their children from harm. A sophisticated new computer system collates and shares intelligence about perpetrators and all incidents are graded by specialist police officers using a risk assessment tool.

A ‘high’ risk assessment automatically triggers a conference involving several agencies, which put together a co-ordinated community response. An allocated domestic violence officer will continue to support ‘high risk’ victims until the risk is reduced or removed, even when the victim chooses to return to a relationship with the perpetrator or decides not to appear in court proceedings.

This has been complemented by training for officials in magistrates’ courts, and specialist domestic violence courts are available throughout the Northumbria force area. Independent domestic violence advisers are now located in some police stations.

According to DCI Black, “the Human Rights Act reinforces our duty to protect the public. As a police force, this approach means we get reassurance that victims are safe and it reduces the risk of re-offending. For victims, it means multi-agency support is available even if they do not want to bring charges against their alleged abuser, which often happens because of their personal circumstances.”

Three years later Mary is safe, and building a new life. Her housing provider helped by awarding Mary priority status which allowed her to move to another area unknown to her abuser. Her former partner was found guilty at trial and as part of the sentence he was made subject to an indefinite restraining order. There have been no further reported incidents.

“The last time I saw her, she was very relieved and moving forward,” says Gartland.

Case study:**Adele's story**

“I was unable to use the toilet or sleep in the bed,” says Adele Matthews. “I try not to think about what happened because if I do I get very upset.”

Adele is a disabled woman who used Article 3 of the Human Rights Act in a landmark case regarding her treatment in police custody and in prison.

Adele uses a wheelchair; due to damage by the drug Thalidomide she was born with shortened arms and legs. She also suffers from kidney problems. She was sent to prison in 1995, after she was taken to county court over a minor debt issue. During the case, she refused to answer questions about her financial position, and was sentenced to seven days in custody for contempt of court.

As it was not possible to take Adele to prison until the next day, she spent the night in a cell at Lincoln Police Station. The cell contained a wooden bed and a mattress but was not specially adapted for a disabled person. As a result, she was forced to sleep in her wheelchair and was unable to use the toilet. The emergency buttons and light switches in the cell were also out of her reach.

The police custody record showed that during the night, Adele complained of the cold every half hour, a serious problem for someone with recurring kidney problems. After she made several complaints, a doctor was called who noted Adele could not use the bed and could not leave her wheelchair. The doctor also said the cell was too cold and officers were told the facilities were not adapted to the needs of a disabled person. Despite the doctor's comments, no action was taken and Adele remained in the cell overnight.

The following day, Adele was moved to New Hall Women's Prison, Wakefield, where she was detained in the prison's Health Care Centre until the afternoon of 23 January 1995. Once again she had difficulty when using the toilet in her cell and felt humiliated when male prison officers were required to lift her on and off the toilet.

“I was sitting in my own faeces and urine in a wheelchair. No-one should be made to go through that experience”

“I was sitting in my own faeces and urine in a wheelchair. No-one should be made to go through that experience,” she says.

By the time of her release, Adele was suffering from health problems which continued for 10 weeks after she was released. On 30 January 1995, she consulted solicitors with a view to bringing an action in negligence against the Home Office.

On 10 July 2001, The European Court of Human Rights found in Adele’s favour and said there had been a violation of Article 3. The court said that to detain a severely disabled person in conditions where she is dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitutes degrading treatment.

Adele says: “I was very pleased at the decision but I should not have been sent to prison for such a minor offence ... The Human Rights Act helped me and I hope it makes a huge difference for other disabled people.”

Article 4: Freedom from slavery and forced labour

Article 4 of the European Convention on Human Rights provides that:

‘No one shall be held in slavery or servitude.’

‘No one shall be required to perform forced or compulsory labour.’

For the purpose of this Article the term ‘forced or compulsory labour’ shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service
- (c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community
- (d) any work or service which forms part of normal civic obligations.

Summary

Article 4 prohibits slavery or servitude and forced or compulsory labour. This includes forced and bonded labour, child servitude and trafficking of human beings. Article 4 is an absolute right, which imposes an obligation on the state to refrain from subjecting individuals to slavery, servitude or forced labour and to penalise and prosecute any such acts. This means that the state must have a legislative and administrative framework capable of enforcing this right. It must also investigate allegations of slavery, trafficking or forced labour.

The UK has a new and relatively strong legal framework to prevent slavery and forced labour in all their forms. There are also several agencies to monitor, investigate and prosecute cases. The issues discussed in this chapter are largely about the effectiveness of these mechanisms.

The key issues we address in this chapter are:

**Authorities sometimes fail to identify victims of trafficking.
Victims who are not identified remain unsupported**

Human trafficking is a contemporary form of slavery. Trafficking involves the recruitment, transfer or receipt of people, by use of force or coercion, for the purposes of exploitation. Exploitation can include prostitution or forced labour. The state has a positive obligation to put in place effective legislative and administrative measures to identify and protect individuals who are trafficked. Such individuals also have the right to be removed from that situation and given access to services to support them.

The review shows that:

- Authorities sometimes fail to recognise victims of trafficking, forced labour and domestic servitude, and there is little reliable information on the scale of these problems.
- Authorities sometimes fail to identify child victims of trafficking and give them adequate protection.
- Some trafficked children are not given the support they need because they have been assessed as adults.
- Victims of trafficking whose situation is not brought to the attention of the authorities may be criminalised or sent to immigration detention centres.

Some migrant workers remain vulnerable to forced labour

Article 4 protects workers from forced labour. This is especially important for migrant workers, who can be vulnerable to this type of exploitation. The state has a positive obligation to put in place effective legislative and administrative measures to protect them. In addition the state has an obligation to investigate and, if appropriate, prosecute allegations of forced labour.

The review shows that:

- There is evidence that forced labour exists in some sectors.
- Measures taken to curb the activities of gangmasters are not adequate to protect migrant workers.

Migrant domestic workers remain vulnerable to Article 4 breaches

Migrant domestic workers are particularly vulnerable to domestic servitude, forced labour and trafficking. The state has a positive obligation to put in place effective legislative and administrative measures to protect them. In addition, the state has an obligation to investigate and, if appropriate, prosecute allegations of forced labour in domestic servitude.

The review shows that:

- Some frontline agencies lack knowledge about domestic servitude, which can result in their failure to investigate allegations, and makes it difficult for domestic workers to get protection.
- Proposed changes in the visa requirements for migrant domestic workers may lead to Article 4 breaches.
- Visas for diplomats' domestic workers make them vulnerable to trafficking, forced labour and servitude, and potentially less likely to access justice.

Convictions for slavery, trafficking and forced labour are difficult

To assess whether the laws against slavery, trafficking and forced labour are effective in protecting individuals who are victims and penalising offenders, it is helpful to have a picture of the number of prosecutions and convictions.

The review shows that:

- The number of prosecutions and convictions for slavery, trafficking and forced labour are low.
- There is a risk that the new Coroners and Justice Act 2009 will not deter offenders or enable effective prosecutions.

The UK's obligations under Article 4

Article 4 prohibits slavery or servitude and forced or compulsory labour. This is an absolute right, which cannot be restricted in any circumstances.

Slavery

Slavery includes forced and bonded labour, the worst forms of child labour, and the trafficking of human beings.¹ Some kinds of work are exempt from this definition, such as work performed during lawful detention, in military service or service following conscientious objection, and as part of a response to an emergency or as part of normal civic obligations.

The European Court of Human Rights has referred to the definition of 'slavery' as set out in the 1926 Slavery Convention. This states that: 'slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.²

Trafficking

Human trafficking is a contemporary form of slavery. It is defined as the recruitment, transportation or receipt of people, using deception or coercion, for the purposes of exploitation. A person is moved from one place to another, and ends up in the hands of other individuals who have the capacity and power to exploit them. The exploitation may include prostitution or sexual exploitation, forced labour, slavery, servitude or the removal of organs.³

¹ For a more detailed explanation of practices that may amount to slavery see D. Weissbrodt and Anti-Slavery International, 2002. *Abolishing Slavery and its Contemporary Forms*. Office of the United Nations High Commissioner for Human Rights. HR/PUB/02/4. Available at: <http://www.ohchr.org/Documents/Publications/slaveryen.pdf>. Accessed 30/01/2012.

² 1926 Slavery Convention, Article 1.

³ The Council of Europe Convention on Action against Trafficking in Human Beings states that: 'Trafficking in human beings shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'

Victims may initially agree to go, as false promises have been made to them by the traffickers. In some cases, victims may even get permission to legally enter the destination country. If that person is subsequently enslaved, however, they should still be considered to have been trafficked, and the appropriate protection should be given to them. Consent provides no legal justification for enslaving someone or exploiting them in slave-like conditions.⁴

Forced labour

The European Court of Human Rights' definition of forced labour in Article 4 is derived from Article 2 of the International Labour Organisation (ILO) Convention 29.⁵ This defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

To differentiate forced labour from working in poor conditions, the ILO also states that it is likely to include threats or actual physical harm to the worker; restriction of movement and confinement to the workplace or to a limited area; debt bondage (where a worker works to pay off a debt or loan, and is not paid for his or her services, and the employer may provide food and accommodation at such inflated prices that the worker cannot escape the debt); withholding wages or excessive wage reductions that violate previously made agreements; retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status and threats of denunciation to the authorities, where the worker has an irregular immigration status.⁶

4 Protocol to Suppress, Punish and Prevent Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3. See also the Council of Europe Convention on Action against Trafficking in Human Beings, Article 3.

5 *Van der Musselle v. Belgium* [1983] 6 EHRR 163. Article 2 ILO C. 29.

6 See International Labour Organisation, 2005. *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislators and Law Enforcement*. Geneva: International Labour Organisation. Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_081999.pdf. Accessed 30/01/2012.

Servitude

‘Servitude’ is where a person is required to perform forced or compulsory labour and is also required to live on another person’s property. The victim will not have the option of changing his or her situation.

The European Court of Human Rights said that in ‘servitude’ no ownership of the person is claimed,⁷ and that in addition to the obligation to provide another person with certain services, the concept of servitude includes the obligation on the part of the ‘serf’ to live on another’s property and the fact that it is impossible for the serf to change his or her condition.⁸

In *Siliadin v. France* the European Court of Human Rights explained the differences between slavery, forced labour and servitude.

In *Siliadin v. France* [2005] a 15-year-old girl was brought to France from Togo to work with Mrs D., who promised she would regularise her immigration status and arrange for her education. In return, she was to do housework for Mrs D. until she had earned enough to pay her back for her air ticket. She became an unpaid servant to Mr and Mrs D. and her passport was confiscated.

She was then ‘lent’ to a couple of friends, Mr and Mrs B., who made her work for 15 hours a day with no days off, sleep in the children’s bedroom on a mattress on the floor, and she was never paid. The Court considered that Siliadin had, at the very least, been subjected to forced labour within the meaning of Article 4 of the Convention.

With regard to slavery, the Court held that although Siliadin had been deprived of her personal autonomy, the evidence did not suggest that she had been held in slavery in the proper sense because Mr and Mrs B. had not exercised a genuine right of ownership over her, thus reducing her to the status of an object.

As to servitude, the Court noted that she was forced to work almost 15 hours a day, seven days a week. She was entirely at Mr and Mrs B.’s mercy, since her papers had been confiscated, and the promised regularisation of her immigration status had never occurred. She had, therefore, been held in servitude within the meaning of Article 4.⁹

⁷ *Siliadin v. France* [2005].

⁸ *Van Droogenbroeck v. Belgium*, Case B44 (1980) Com Rep, para 79.

⁹ *Siliadin v. France* [2005].

Article 4 imposes four types of obligations upon the state:

- **a negative obligation** to refrain from subjecting individuals to slavery, servitude, forced or compulsory labour.
- **a positive obligation** to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude, or forced or compulsory labour.¹⁰ In order to comply with this obligation, the European Court of Human Rights has held that states are required to put in place a legislative and administrative framework, capable of identifying victims, and realistic enforcement, to prohibit and punish individuals who violate Article 4.¹¹
- **an obligation to protect victims.** In certain circumstances, where the state is, or should have been, aware that a person is at risk of trafficking, the state may have a positive obligation to take measures to protect that person and remove them from the risk.¹²
- **an obligation to effectively investigate** allegations of Article 4 breaches.¹³ For an investigation to be effective, it must be independent of those implicated in the events and lead to the identification and punishment of individuals responsible. An investigation should be prompt, and where possible the individual should be removed from the harmful situation.¹⁴ A victim has the right to participate in investigations and judicial processes against the person or people who held him or her in slavery or forced labour. The requirement to investigate does not depend on a complaint from the victim or next-of-kin: once the matter has come to the attention of the authorities they must act.¹⁵

10 *Siliadin v. France* [2005]. 20 BHRC 654.

11 *Siliadin v. France* [2005]. 20 BHRC 654. Para 89.

12 *Rantsev v. Cyprus and Russia* [2010]. Application no. 25965/04 at para 285.

13 *Rantsev v. Cyprus and Russia* [2010]. Application no. 25965/04 at para 288.

14 *Rantsev v. Cyprus and Russia* [2010]. Application no. 25965/04. Paras 285, 286, 287, 288.

15 *Rantsev v. Cyprus and Russia* [2010]. Application no. 25965/04. Paras 285, 286, 287, 288.

The development of Article 4 in Britain

In the 18th century, Britain was the site of one of the first large-scale human rights movements: the anti-slavery campaign, which led to parliament enacting laws to abolish slavery.¹⁶ Britain has ratified key international treaties abolishing slavery and its various forms. It is over the past 10 years, however, that a modern domestic legal framework has emerged in response to increased awareness of contemporary forms of slavery and of trafficking, in particular. This aims to meet the government's positive obligation to enforce Article 4 and punish those who breach the Article 4 rights of others.

Before April 2010, there was no specific criminal offence penalising servitude or forced labour in Britain. This was in clear breach of the government's positive obligations under Article 4. For that reason, the government enacted the Coroners and Justice Act 2009, which made it an offence to hold a person in slavery or servitude or to perform forced or compulsory labour.

Prior to this Britain had introduced legislation criminalising trafficking into prostitution in the Nationality, Immigration and Asylum Act 2002. This was amended by the Sexual Offences Act 2003 which criminalised trafficking for the purposes of sexual exploitation only. The Asylum and Immigration (treatment of claimants etc) Act 2004 introduced a new offence of trafficking people for exploitation, which covers all forms of trafficking for both sexual exploitation and other purposes including forced labour. The Gangmasters (Licensing) Act 2004 provided a compulsory licensing scheme for gangmasters and other agricultural agencies, in response to concerns about exploitation of workers.

The UK has ratified the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children (the Palermo Protocol). In ratifying this instrument Britain made a political commitment to prevent and combat trafficking in persons, protect and assist victims of trafficking, and promote co-operation amongst states in order to meet those objectives. In 2007, Britain ratified the Council of Europe Convention on Action against Trafficking in

16 A. Hochschild, 2006. *Bury the Chains: The British Struggle to Abolish Slavery*. London: Pan Books.

Human Beings. This seeks to prevent trafficking; to protect and assist victims and witnesses; to ensure effective investigation and prosecution of perpetrators; and to promote international co-operation on action against trafficking. It applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

To implement its commitments, the government has set up institutions to monitor and investigate trafficking.

- In 2005 a multi-agency unit, the UK Human Trafficking Centre, was established. The Centre works with stakeholders from government, including all British police forces and the UK Border Agency, and with inter-governmental and charitable organisations in Britain and abroad. In 2010, the UK Human Trafficking Centre became part of the Serious Organised Crime Agency.
- The Child Exploitation and Online Protection Centre (CEOP) was established in 2006 to eradicate child sexual abuse in Britain, and to improve practitioners' understanding of child trafficking. The CEOP works with police officers specialising in this area, as well as professionals from the wider child protection sector.
- After implementing the Council of Europe's Convention on Action against Trafficking in Human Beings in 2009, the government introduced a new procedure to meet its commitments under the Convention. This multi-agency framework was given the title of *National Referral Mechanism* (NRM). It is a framework for identifying victims of trafficking and ensuring they receive the support they need.
- In July 2011 the government launched a new strategy on human trafficking. It aimed to improve care arrangements for adult victims, enable public authorities to act earlier, and to improve co-ordination of law enforcement within Britain.¹⁷

The current domestic legislative framework to prohibit and criminalise trafficking and forced labour complies with the relevant human rights obligations to prohibit the practice. There are a number of institutions set up to help implement and enforce it. However, there is evidence that Britain may not be fully meeting its obligations in some areas. The issues discussed in this chapter are largely about how effective these mechanisms are in practice.

¹⁷ Home Office. Human trafficking strategy. Available at: <http://www.homeoffice.gov.uk/publications/crime/human-trafficking-strategy>. Accessed 30/01/2012.

Authorities sometimes fail to identify victims of trafficking. Victims who are not identified remain unsupported

How Article 4 protects victims of trafficking

Human traffickers prey on the most vulnerable individuals, primarily women and children, but also men, for profit. The trade in people is a significant criminal industry. According to the International Labour Organisation approximately 2.4 million men, women and children have been trafficked worldwide for the purposes of: commercial sexual exploitation; forced labour; domestic servitude and the removal of organs,¹⁸ of these 270,000 are in industrialized countries.¹⁹

One of the major issues in relation to trafficking is the immigration status of the victims. Trafficked people often cross borders illegally. Their illegal status means they are more vulnerable to exploitation, and less able or likely to seek help from the authorities. If trafficked people are to have their Article 4 rights protected, they must first be recognised as victims, entitled to protection regardless of their immigration status.

A person who has been enslaved is eligible for protection under Article 4, regardless of whether he or she has willingly entered into Britain. The state is obliged to identify, assist and protect victims, or potential victims, of trafficking and take all reasonable measures to remove them from harm. States are also required to provide relevant training for law enforcement and immigration

18 International Labour Organisation, 2008. *ILO Action Against Trafficking in Human Beings*. Geneva: International Labour Office. Page 1. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_090356.pdf. Accessed 30/01/2012.

19 International Labour Organization, 2005. *A Global Alliance against Forced Labour*. Geneva: International Labour Office.

officials.²⁰ Article 4 also entails a procedural obligation to investigate situations of potential trafficking. States are also subject to a duty in cross-border trafficking cases to co-operate effectively with the relevant authorities of other states.²¹

In Britain, the National Referral Mechanism (NRM) acts as a framework for identifying victims of trafficking and ensuring they receive the support they need. There are various bodies set up to protect Article 4 rights, including the United Kingdom Trafficking Centre, and the Child Exploitation and Online Protection Centre, both part of the Serious Organised Crime Agency. However, evidence suggests that these bodies are not always as effective as they should be.

Key issues

1. Authorities sometimes fail to recognise victims of trafficking, forced labour and domestic servitude, and there is little reliable information on the scale of these problems

Under the European Convention on Human Rights, the state is obliged to identify victims, or potential victims, of trafficking, forced labour and domestic servitude, and to take all reasonable measures to protect them.

In their 2009 report on human trafficking, the Home Affairs Committee found that: ‘Neither the [non-governmental organisations] nor government agencies were willing even to guess the total number of trafficking victims in the UK.’ Chief Constable Maxwell, Programme Director of the UK Human Trafficking Centre, one of whose main responsibilities is to obtain accurate information about the scale of the problem, admitted ‘at the minute I do not think we have got a real handle on what the figures are ... The nearest we came to an overall total was when we added up the results of these studies and suggested to Anti-Slavery International that they implied that there were more than 5,000 victims in the UK; Anti-Slavery International concurred.’²²

Since then, the UK government has introduced the National Referral Mechanism (NRM) to identify, assist and protect victims of trafficking and to

²⁰ *Rantesev v. Cyprus and Russia* [2010]. Application no. 25965/04. Paras 285, 286, 287, 288.

²¹ *Rantesev v. Cyprus and Russia* [2010]. Application no. 25965/04. Paras 285, 286, 287, 288.

²² House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

safeguard their rights. Although the NRM only reflects those who have come to the attention of the authorities, it is helping to improve understanding of the scale of the problem. Between April 2009 and June 2011, 1,664 potential victims of trafficking were referred.²³ The individuals came from 102 countries, with the majority coming from Nigeria (298 people), China (177 people), Vietnam (160), Romania (87) and the Czech Republic (74). Over 70 per cent of the potential victims were women (1,192) and 74 per cent were adults (1,226). 575 adults were identified as potential victims of trafficking for sexual exploitation, 368 for labour exploitation, 226 for domestic servitude and for 57 the reason for exploitation was not recorded. In the case of children, 438 were referred to the NRM, with most coming from Vietnam (118); 132 being referred as potential victims of sexual exploitation, 154 for labour exploitation, 57 for domestic servitude and for 95 the exploitation was not recorded. Of the cases concluded, 73 per cent (375/516) went on to be conclusively identified as victims of trafficking. The data suggest that potential victims with UK nationality or from European Union countries are more likely to be conclusively identified as victims of trafficking than those from countries outside the European Union.²⁴

However it is likely that only a small proportion of trafficked individuals are referred to the NRM. Voluntary sector organisations specialising in immigration and trafficking cases state that in their experience, victims of trafficking may be unwilling to disclose that they have been trafficked because they fear retribution from traffickers or are too traumatised by the experience.²⁵ They may also be reluctant to approach authorities because of their illegal immigration status. In addition, solicitors and legal representatives for victims of trafficking cannot make a referral to the NRM and an individual cannot self-refer, except by attempting to claim asylum and hoping that he or she is identified as a victim of trafficking. Unless the individual can access the services of the Salvation Army (or other designated non-governmental organisations such as the Poppy Project or National Society for the Prevention of Cruelty to Children), adult victims must either identify themselves to the police or the UK Borders Agency, and children to social services.²⁶ To increase the number of victims referred to the NRM, the government should continue to make it as accessible as possible to victims through awareness raising and extending the list of those who are able to refer.

23 National Referral Mechanism Data. Available at: <http://www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism/statistics>. Accessed 30/01/2012.

24 National Referral Mechanism Data. Available at: <http://www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism/statistics>. Accessed 30/01/2012.

25 See for example: Immigration Law Practitioners Association (ILPA) and the Anti-Trafficking Legal Project (ATLeP). Consultation on the CPS Public Policy Statement on Prosecuting Cases of Human Trafficking July 2010. Available at: <http://www.ilpa.org.uk/data/resources/13010/10.10.504.pdf>.

26 Zofia Duszynska, 2009. *Protection not enforcement – The role of the National Referral Mechanism for Victims of Trafficking in the Asylum Process*. Asylum Aid.

Beyond the NRM, there are some other sources of information that indicate the scale and nature of this problem. Between 2008 and 2009, the Association of Chief Police Officers carried out research into the extent of trafficking for sexual exploitation in Britain. The research involved specially-trained police officers conducting interviews with a sample of over 200 women involved in prostitution to determine each woman's individual circumstances. The results and findings were considered in consultation with experts from law enforcement, support services and academia. The study estimated that there are about 17,000 migrant women involved in 'off-street' prostitution (this does not include prostitutes who solicit clients on the streets) in England and Wales. Of those, 2,600 were thought to be trafficked and 9,200 were considered vulnerable migrants.²⁷

Two small-scale studies by the Trades Union Congress and Anti-Slavery International documented 46 (in 2005)²⁸ and 27 (in 2006) individuals who had been trafficked for forced labour.²⁹ The research methodology involved a questionnaire as well as direct interviews with individuals in particular industries. Victims of trafficking were found working in agriculture, construction, domestic work, food processing and packaging, care and nursing, hospitality and the restaurant trade.³⁰

The lack of more comprehensive data on this issue matters because the state is under an obligation to identify, prevent and punish trafficking as well as to protect victims. The information gap is particularly troubling in the area of forced labour, as some steps have already been taken to combat trafficking of children and adults for sexual exploitation. In contrast, other than the picture built up through cases referred to the NRM, very little research has been carried out to understand or prevent trafficking or forced labour for other reasons.

²⁷ The trafficking of migrant women in the England and Wales off-street prostitution sector. ACPO migration and associated matters. Report of October 2010 available at: <http://www.traffickingproject.org/2010/08/setting-record-straight.html>. Accessed 30/01/2012. For a critique of these figures, see the response from the POPPY project available at: <http://www.eaves4women.co.uk/Documents/Press%20releases/Project%20Acumen%20release%2017%20Aug%202010.pdf>. Accessed 30/01/2012.

²⁸ B. Anderson and B. Rogaly, 2005. *Forced labour and migration to the UK*. London: TUC.

²⁹ K. Skrivánková, 2006. *Trafficking for forced labour. UK country report*. London: Anti-slavery international. Available at: http://www.antislavery.org/includes/documents/cm_docs/2009/t/trafficking_for_forced_labour_uk_country_report.pdf. Accessed 30/01/2012.

³⁰ K. Skrivánková, 2006. *Trafficking for forced labour. UK country report*. London: Anti-slavery international. Available at: http://www.antislavery.org/includes/documents/cm_docs/2009/t/trafficking_for_forced_labour_uk_country_report.pdf. Accessed 30/01/2012.

2. Authorities sometimes fail to identify child victims of trafficking and give them adequate protection

In Britain, local authorities are responsible for identifying and protecting child victims of trafficking.³¹ The Children's Act 2004 and 1989 require local authorities to safeguard and promote the welfare of all children and young people regardless of their immigration status or nationality. Once a public authority becomes aware that a child may have been trafficked it is obliged to take measures to protect that child, using a child sensitive approach.³² However, research suggests that some local authorities find it difficult to identify children and young people who have been trafficked and so may not provide them with adequate protection.³³ Although there is now some local authority expertise on trafficking for sexual exploitation, other types of trafficking, for example for cannabis cultivation or domestic servitude, are often overlooked.³⁴

Between April 2009 and June 2011, 438 cases of child trafficking were referred to the NRM. In over half of these cases (251) the young person was between 16 and 17 years old when they were trafficked.³⁵ The Anti-Trafficking Convention requires states to ensure that 'a legal guardian, organisation or authority' is appointed as soon as a trafficked child or young person is identified, but some non-governmental organisations have questioned the extent to which this requirement has been implemented in Britain.³⁶ According to the Anti-Trafficking Monitoring Group, local authorities' children's services usually allocate social workers to children of 16 or younger, whereas young people over

31 The Children Acts of 1989 and 2004 established the child-safeguarding framework in the UK, which should ensure all children in the UK receive care and protection regardless of whether they are UK citizens or not. This legislation is supplemented by a range of guidance, such as *Safeguarding children who may have been trafficked* (December 2007) (England, Wales, Scotland versions) and *Working Together to Safeguard Children* (2010). Other relevant guidance includes *Safeguarding children and young people from sexual exploitation, missing children and private fostering*.

32 Council of Europe Convention on Action against Trafficking in Human Beings, Article 5.3.

33 House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume 1. Page 56. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

J. Pearce, P. Hynes and S. Bovarnick, 2009. *Breaking the walls of silence. Practitioners' responses to trafficked children and young people*. NSPCC. Available at: http://www.nspcc.org.uk/Inform/research/findings/breaking_the_wall_of_silence_report_wdf66135.pdf. Accessed 30/01/2012. Additionally, ECPAT, 2010. *Child trafficking in the UK: a snapshot*. Available at: http://www.ecpat.org.uk/sites/default/files/child_trafficking_in_the_uk_a_snapshot.pdf. Accessed 30/01/2012.

34 ECPAT, 2010. *Child trafficking in the UK: a snapshot*. Available at: http://www.ecpat.org.uk/sites/default/files/child_trafficking_in_the_uk_a_snapshot.pdf. Accessed 30/01/2012.

35 Serious Organised Crime Agency. The UK Human Trafficking Centre. National Referral Mechanism Data April 2009 – March 2011. Available at: <http://www.soca.gov.uk/about-soca/about-the-ukhtc/national-referral-mechanism/statistics>. Accessed 30/01/2012. Figures are based on the age at the date of referral.

36 ECPAT UK, 2011. *Watch over me: A system of guardianship for child victims of trafficking*. Available at: http://www.ecpat.org.uk/sites/default/files/watch_over_me.pdf.

16 may be assigned a key worker. A key worker's contact with the child tends to be more limited than a social worker's.³⁷ Research has found that social workers' understanding and experience on trafficking remains patchy, suggesting that the level and quality of support provided to children is often inadequate.³⁸

Government is improving the situation with greater awareness of trafficking and better tools to identify trafficked children with, for example:

- The introduction of the London Safeguarding Children Board's trafficking toolkit and guidance in February 2011.
- The Department for Education and the Home Office's revised guidance on *Safeguarding children who may have been trafficked* in October 2011, to include further guidance to agencies on identification and safeguarding.

The relevant authorities do not always provide trafficked children with adequate protection, as some go missing from social services accommodation and return to their traffickers.³⁹ The Child Exploitation and Online Protection Centre (CEOP) Strategic Threat Assessment 2010 estimated that 18 per cent (53 of 287) of the children identified as trafficked victims were recorded as having gone missing from care at some point.⁴⁰ This supports an earlier study on missing children published in 2007, which found that 48 out of 80 children reported or suspected to have been trafficked had gone missing.⁴¹ Known care homes may be targeted by traffickers and may not be sufficiently safe; foster carers may not have specialist training or the accommodation may be insufficiently supervised and so provide the trafficker with opportunities to persuade or coerce the children to leave.⁴²

37 The Anti-Trafficking Monitoring Group, 2010. *The wrong kind of victim?. One year on: an analysis of UK measures to protect trafficked persons*. Page 47. Available at: http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf. Accessed 30/01/2012.

38 J. Pearce, P. Hynes and S. Bovarnick, 2009. *Breaking the walls of silence. Practitioners' responses to trafficked children and young people*. NSPCC. Page 37. Available at: http://www.nspcc.org.uk/inform/research/findings/breaking_the_wall_of_silence_report_wdf66135.pdf. Accessed 30/01/2012.

39 HM Government, 2007. *Safeguarding children who may have been trafficked*. Page 41. Available at: http://www.ecpat.org.uk/sites/default/files/guidance/safeguarding_children_who_may_have_been_trafficked_dcsf_guidance.pdf. Accessed 30/01/2012.

40 Child Exploitation and Online Protection Centre, 2010. *Strategic Threat Assessment Child Trafficking in the UK*. Available at: http://ceop.police.uk/Documents/ceopdocs/Child_Trafficking_Strategic_Threat_Assessment_2010_NPM_Final.pdf. Accessed 30/01/2012.

41 C. Beddoe, 2007. *Missing out: a study of child trafficking in the North-West, North-East and West Midlands*. London: ECPAT UK. Available at: www.ecpat.org.uk/downloads/ECPAT_UK_Missing_Out_2007.pdf.

42 Home Affairs Committee. *The trade in Human Beings: Human Trafficking. Sixth report of session 2008/2009*. Volume I. Page 56. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

However, there are some examples where supportive care has prevented children from returning to their traffickers (see case study ‘Safeguarding Trafficked Children Guidance’). For example, Hillingdon social services successfully introduced stronger processes which have been successful in reducing the number of trafficked children who go missing from local authority care. These include: banning visitors to the child’s accommodation; allowing no access to phones or the internet; ensuring staff are well-trained and that children are well supervised at all times.⁴³

3. Some trafficked children are not given the support they need because they have been assessed as adults

Children who have been trafficked have the right to protection, regardless of their immigration status. If a child is alone in Britain and seeking asylum, the local authority in which the child is living or found is likely to have a duty to accommodate and maintain the child.⁴⁴

The age assessment of an individual is critical to determining if they are under 18, and so what level of protection they receive from a local authority. There is evidence to suggest that some trafficked children and young people are incorrectly assessed as adults.⁴⁵ If this happens a child may be detained in an immigration detention centre, and their support from the local authority may be withdrawn until the court’s decision over their claim.⁴⁶ This would be a clear case of a failure to uphold that child’s rights under Article 4.

Age can be difficult to assess, as trafficked children often lack identification documents, they may have false documents or may have been instructed by

43 Child Exploitation and Online Protection Centre, 2010. *Strategic Threat Assessment Child Trafficking in the UK*. Available at: http://ceop.police.uk/Documents/ceopdocs/Child_Trafficking_Strategic_Threat_Assessment_2010_NPM_Final.pdf. Accessed 30/01/2012.

44 Section 20 of the Children Act 1989.

45 Child Exploitation and Online Protection Centre, 2010. *Strategic Threat Assessment Child Trafficking in the UK*. Available at: http://ceop.police.uk/Documents/ceopdocs/Child_Trafficking_Strategic_Threat_Assessment_2010_NPM_Final.pdf. Accessed 30/01/2012.

NSPCC, 2008. *NSPCC Policy Summary: Children who are Asylum Seekers or Refugees*. Available at: http://www.nspcc.org.uk/Inform/policyandpublicaffairs/policysummaries/AsylumSeekers_wdf57476.pdf. Accessed 30/01/2012.

Solace Study Group, 2009. *The role of local authorities in addressing human trafficking*. Available at: http://www.solace.org.uk/downloads/SOLACE_on_trafficking.pdf. Accessed 30/01/2012.

ECPAT, 2010. *Child Trafficking in the UK: A snapshot*. Available at: http://www.ecpat.org.uk/sites/default/files/child_trafficking_in_the_uk_a_snapshot.pdf. Accessed 30/01/2012.

Welsh Refugee Council, 2011. *Young Lives in Limbo: The protection of age disputed young people in Wales*. Available at: <http://www.dianafund.co.uk/document.asp?id=1669&pageno>. Accessed 30/01/2012.

46 *R. (on the application of Y.) v. the London Borough of Hillingdon* [2011] EWHC 1477 (Admin) Liberty’s submission to the Review into Ending the Detention of Children for Immigration Purposes. (2010). Paras 19- 24. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-review-into-ending-immigration-detention-for-child.pdf>.

their traffickers to lie about their age.⁴⁷ When there is a dispute about the age of a person, an age assessment is undertaken to establish if the local authority has a duty to assist or look after the young person and to determine whether they should be subjected to adult or child asylum procedures. Currently there is no statutory procedure or guidance issued to local authorities on how to conduct an age assessment. The courts have, however, provided some general guidance to local authorities in a case involving Merton Council.⁴⁸ Local authorities and courts rely on dental assessments to help establish proof of age, but courts have recognised that these are not conclusive and involve a ‘widely accepted margin of error’⁴⁹ as young people mature at different rates.

In the case of *Y. v. the London Borough of Hillingdon* the local authority withheld the support and accommodation of Y after she was erroneously assessed as an adult, until the court decided that she was a child entitled to support.

In June 2011, the High Court found that the decision of the London Borough of Hillingdon to withhold the accommodation and support of Y following her age assessment was unlawful. Y arrived in the UK when she was five years old and was kept in domestic service for 10 years. Y escaped and was taken to the London Borough of Hillingdon for support. The Local Authority initially accepted that Y was a child and placed her in foster care and enrolled her in school. After about eight months the local authority disputed her age, stating she did not have documents to prove her date of birth and that a dental assessment concluded she was older than she had claimed. They concluded at an age assessment that she was three years older than her claimed age of 16 at the time and was therefore an adult. Y was told her foster placement would be terminated and she would no longer be entitled to any support or accommodation from the local authority children’s services. Y challenged the Local Authority’s age assessment and the case went to the High Court which concluded that Y had been a child of 16 at the time of the age assessment.⁵⁰

The difficulty around age assessments has been tabled at the Association of Chief of Police Officers Plenary on Child Protection and Abuse Investigation which has also provided guidance on age assessments.⁵¹

47 ECPAT, 2010. *Child Trafficking in the UK: A snapshot*. Available at: http://www.ecpat.org.uk/sites/default/files/child_trafficking_in_the_uk_a_snapshot.pdf. Accessed 30/01/2012.

48 *B. v. the London Borough of Merton* [2003] EWHC 1689 (Admin).

49 *R. (on the application of Y.) v. the London Borough of Hillingdon* [2011] EWHC 1477 (Admin).

50 *R. (on the application of Y.) v. the London Borough of Hillingdon* [2011] EWHC 1477 (Admin).

51 Child Exploitation and Online Protection Centre, 2010. *Strategic Threat Assessment Child Trafficking in the UK*. Page 26. Available at: http://ceop.police.uk/Documents/ceopdocs/Child_Trafficking_Strategic_Threat_Assessment_2010_NPM_Final.pdf. Accessed 30/01/2012.

4. Victims of trafficking whose situation is not brought to the attention of the authorities may be criminalised or sent to immigration detention centres

People should not be penalised for actions undertaken as a result of trafficking.⁵² The Immigration Law Practitioners' Association and the Anti-Trafficking Legal Project state that, in their experience, criminal cases related to cultivation of cannabis are often seen by the police, prosecutor, defence counsel and court as a clear case of illicit criminal activity, where the trafficked person is charged, advised to plead guilty and sentenced to prison.⁵³

A freedom of information request made by the Immigration Law Practitioners' Association in January 2010 revealed that at the time of referral to the NRM, 34 individuals were held in immigration detention centres. In nearly half of these cases the authorities found that there were reasonable grounds to believe that the individuals concerned were victims of trafficking and those in immigration detention were released for this reason. The same information request found that 22 individuals were held in prisons or young offenders' institutions.⁵⁴

The government has stated that the NRM has helped to tackle this problem and that genuine victims of trafficking who are formally identified as such are only held in immigration detention in exceptional circumstances or for periods before their formal identification.

In July 2011, the Crown Prosecution Service updated its guidance on trafficking to help tackle this problem. It clearly states that if a trafficked victim has been compelled to commit a crime (for example having false documents or working in an illegal industry such as cannabis farming or sex work), and there is credible evidence of coercion, then careful consideration should be given to whether or not it is in the public interest to continue prosecution.⁵⁵

⁵² Council of Europe Convention on Action Against Trafficking in Human Beings, Article 26. Available at: <http://conventions.coe.int/treaty/en/treaties/html/197.htm>. Accessed 30/01/2012.

⁵³ See for example: Immigration Law Practitioners Association and the Anti-Trafficking Legal Project consultation on the CPS Public Policy Statement on Prosecuting cases of Human Trafficking July 2010. Available at: <http://www.ilpa.org.uk/data/resources/13010/10.10.504.pdf>.

⁵⁴ The Anti-Trafficking Monitoring Group, 2010. *The wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*. Page 54. Quoting Freedom of Information request 20100021 submitted by ILPA. Available at: http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf. Accessed 30/01/2012.

⁵⁵ *LM, MB, DG, Betti Tabot & Yutunde Tijani v. The Queen* [2010] EWCA Crim 2327. Para 13.

Some migrant workers remain vulnerable to forced labour

How Article 4 protects victims of forced labour

The European Court of Human Rights' definition of forced labour in Article 4 is derived from Article 2 of the International Labour Organisation (ILO) Convention 29.⁵⁶ This defines forced labour as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.

A number of factors may point to forced or compulsory labour. They include violence or threats of violence by the employer or the employer's representative; threats against the worker's family; threats to report the worker to the authorities, for example because of the worker's immigration status or offences they may have committed in the past; the person's documents, such as a passport or other identification being withheld by the employer; debt bondage, where the victim is unable to pay off the debt; and not paying agreed wages.

Migrant workers are particularly vulnerable to experiencing forced labour in formal and informal paid work.⁵⁷ In many cases, they do not speak English and have little choice about the type of employment to accept, and they may find it difficult to navigate the labour market. They may also have uncertain or illegal immigration status, and therefore fear to complain in case of repercussions.⁵⁸

⁵⁶ *Van der Musselle v. Belgium* [1983] 6 EHRR 163. Article 2 ILO C. 29.

⁵⁷ See for example, Y. Evans, J. Herbert, K. Datta, J. May, C. McIlwaine and J. Wills, 2005. *Making the City Work: Low Paid Employment in London*. London: Queen Mary University of London. Available at: <http://www.geog.qmul.ac.uk/globalcities/Report2.pdf>. Accessed 30/01/2012 or S. McKay and A. Winkelmann-Gleed, 2005. *Migrant workers in the East of England*. London: London Metropolitan University.

⁵⁸ Citizens Advice Bureau, 2006. *Nowhere to turn – CAB evidence on the exploitation of migrant workers*.

Key issues

1. There is evidence that forced labour exists in some sectors

A study by Oxfam in 2009 looked at abuses in the construction, hospitality and care sectors. The study found severe and systematic violations of health and safety procedures in the construction industry, and repeated threats of dismissal if workers raised concerns. In the hospitality sector, cleaners were paid by the room, rather than the hour, and were expected to clean so many rooms they were effectively paid less than the minimum wage. In the care sector, excessive hours of work were common, with some individuals working nearly 100 hours per week. Debt bondage made it difficult for workers to seek alternative employment.⁵⁹ Not all of these reports of exploitative working conditions would have been bad enough to be defined as forced labour. However, they showed conditions in which forced labour might well be occurring.

In October 2008, the Equality and Human Rights Commission began a statutory inquiry into working conditions in the meat processing sector. The inquiry found cases in which the treatment appeared to qualify as forced labour:

‘In one instance a criminal gang charged migrant agency workers £250 for a placement at a local poultry firm. Agency workers were then subjected to demands for increasing amounts of money and to severe beatings if they were not able to keep up with escalating payments. Hundreds of workers were affected and suffered in silence.

The police inspector who led this investigation said that similar exploitation of migrant agency workers had also been found in 12 other police forces across England and Wales.’⁶⁰

2. Measures taken to curb the activities of gangmasters are not adequate to protect migrant workers

‘Gangmaster’ is a term from the agriculture and horticulture industries, which have used gangs of casual workers to meet irregular demand for labour since the early 19th century. The term gangmaster was traditionally used to describe the

⁵⁹ Oxfam, 2009. *Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay*. Available at: http://www.oxfam.org.uk/resources/policy/trade/downloads/bp_ukpp_gla.pdf. Accessed 30/01/2012.

⁶⁰ Equality and Human Rights Commission, 2010. *Inquiry into recruitment and employment in the meat and poultry processing sector: report of the findings and recommendations*. Page 19; Annex 3. Available at: <http://www.equalityhumanrights.com/legal-and-policy/formal-inquiries/inquiry-into-the-meat-and-poultry-processing-sectors/>. Accessed 30/01/2012.

self-appointed manager who took charge of a ‘gang of workers’. Today the term continues to be used to describe an individual who supplies casual labour to a particular industry.⁶¹

The Gangmasters (Licensing) Act was introduced in 2004 to regulate specific sectors in which it was believed abuse was occurring, and to curb exploitative and fraudulent activities by gangmasters. This established the Gangmasters Licensing Authority (GLA), covering the agricultural, forestry, horticultural, shellfish gathering and food processing and packaging industries.⁶² The GLA investigates breaches of licensing regulations and illegal operators in these industries. If it finds evidence of forced labour it should pass this on for further investigation to the police.

However, the limited power of the GLA, which is primarily a regulator of employers, and the limited sectors it covers, restricts its effectiveness.⁶³ Evidence given to the Joint Committee on Human Rights’ inquiry on trafficking suggested that gangmasters who have had their licences revoked, or who have been the subject of enforcement action, may move to less regulated sectors.⁶⁴ The Home Office Affairs Committee concluded in 2009 that:

‘...outside the Gangmasters Licensing Authority’s sectors, enforcement is at best patchy and at worst non-existent’.⁶⁵

61 House of Commons, 2003. *Environment, Food and Rural Affairs Committee. Fourteenth Report. Session 2002-03*. London: The Stationery Office. Available at: <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmenvfru/691/691.pdf>.

62 Gangmasters (Licensing) Act 2004. Available at: <http://www.legislation.gov.uk/ukpga/2004/11/contents>. Accessed 30/01/2012.

63 House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Pages 20-27. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012. In the case of the construction industry see for example Secretary of State for the Home Department, 2009. Government reply to the sixth report, From the home affairs committee Session 2008-09. *The Trade in Human Beings: Human Trafficking in the UK*. Page 3. Available at: <http://www.official-documents.gov.uk/document/cm76/7693/7693.pdf>. Accessed 30/01/2012.

64 Oxfam, 2009. *Turning the Tide: How to best protect workers employed by gangmasters, five years after Morecambe Bay*. Available at: http://www.oxfam.org.uk/resources/policy/trade/downloads/bp_ukpp_gla.pdf. Accessed 30/01/2012.

Trades Union Congress, 2007. *Agency Workers: Counting the cost of flexibility*. Available at: <http://www.tuc.org.uk/extras/sectorreport.pdf>. Accessed 30/01/2012.

Evidence submitted to the Home Affairs Committee into human trafficking by UCAAT- Ev 222, paras 3, 5 and 7, House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*, Volume II. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23ii.pdf>. Accessed 30/01/2012.

65 House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume I. Page 25. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

Migrant domestic workers remain vulnerable to Article 4 breaches

How Article 4 protects victims of domestic servitude

Domestic servitude occurs when a domestic worker is forced to work and has lost his or her liberty to leave that abusive situation. Domestic workers are particularly vulnerable to servitude, because they rely on one employer for both work and accommodation. If they have come from abroad, they may not speak English and may not know their rights.

In Britain, the domestic worker visa category allows foreign employers to bring their domestic workers with them when visiting or moving to the country. Domestic workers in private households can include cleaners, chauffeurs, gardeners, cooks, nannies and carers. They are granted a visa for between six and 12 months, depending on the length of stay of their employer, and the visa can be extended. Once domestic workers gain entry to Britain they may change jobs as long as they continue to work as domestic workers in a private household.

Domestic servitude may happen following recruitment by a seemingly legitimate employment agency. Agents recruiting domestic workers become traffickers if they deliberately deceive their clients about the conditions of work or engage in illegal practices of control, such as the withholding of passports.⁶⁶

⁶⁶ Protocol to Suppress, Punish and Prevent Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3. See also the Council of Europe Convention on Action against Trafficking in Human Beings, Article 4.

Key issues

1. Some frontline agencies lack knowledge about domestic servitude, which can result in their failure to investigate allegations, and makes it difficult for domestic workers to get protection

An evaluation of the National Referral Mechanism (NRM) by the Anti-Trafficking Monitoring Group suggests that some frontline agencies may not have sufficient knowledge to identify victims of trafficking for domestic servitude.⁶⁷ The level of misunderstanding of the law comes across in comments by a law enforcement official quoted in a report on trafficking by the Anti-Trafficking Monitoring Group:

‘Sometimes domestic workers are brought here on false pretences, but they are not illegal. No domestic worker is a trafficked victim, because they are legal. They may be victims of many crimes, abuse, locked in exploitation, but none had been forced, nor were brought over under force. Until they come here they don’t run away. They run away here because they want to live a Western life, it is more attractive, more freedom.’⁶⁸

In fact, it is not necessary to enter into the country illegally to be a victim of trafficking. Trafficking is simply recruitment or transportation of a person, by means of coercion, or deception, for the purposes of exploitation.

There are a number of cases in which authorities have failed to investigate allegations of domestic servitude. The case of Elisabeth Kawongo is pending in the European Court of Human Rights. Elisabeth was allegedly subjected to domestic forced labour and when she went to the authorities they allegedly failed to adequately investigate and prosecute their offenders.⁶⁹

67 The Anti-Trafficking Monitoring Group, 2010. *The wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*. Available at: http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf. Accessed 30/01/2012.

68 The Anti-Trafficking Monitoring Group, 2010. *The wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*. Page 35. Available at: http://www.antislavery.org/includes/documents/cm_docs/2010/a/1_atmg_report_for_web.pdf. Accessed 30/01/2012.

69 *Elisabeth Kawongo v. the United Kingdom*. Application no. 56921/09.

Elisabeth arrived in Britain in 2006 on a domestic worker's visa. She worked every day from 7 am until 10.30 pm, slept on a mattress on the kitchen floor, and was not allowed to use the same eating utensils as her employer. She was never paid any wages. On 20 May 2007 Elisabeth escaped and a month later she went to the police for help. The police decided not to investigate her complaint because they considered it was not a crime but a civil matter. She repeatedly contacted the police, but they refused to investigate. The third time she sought help, the police opened a criminal investigation but the Crown Prosecution Service decided that there was insufficient evidence to suggest any criminality and the case was closed. Elisabeth is asking the European Court of Human Rights to decide whether the British authorities failed to fulfil their investigative duties under Article 4.

There are other cases in which the authorities have failed to investigate allegations of domestic servitude. In early 2000, four children aged between 11 and 15 were trafficked into the UK from Nigeria and forced to work as unpaid servants for families in north London (see case study 'Trafficked Nigerian Children'). They were subjected to serious physical and emotional abuse. The victims approached the police a number of times to make complaints about the treatment but the police did not investigate their claims. In 2011, using the Human Rights Act, they won a landmark legal battle to recognise their rights to access to an effective remedy. A High Court Judge declared that the Metropolitan Police Service (MPS) violated the childrens' human rights by failing to investigate the alleged perpetrators when asked to do so. The judge found that the police had a duty to investigate credible allegations of ongoing or past servitude. In failing to investigate, the court found the MPS to have breached the victims' rights under Articles 3 and 4 of the European Convention on Human Rights.⁷⁰

⁷⁰ *O.O.O, O.O.A, M.T.K and R.T.F. v. The Commissioner of Police for the Metropolis* [2011] EWHC 1246.

2. Proposed changes in the visa requirements for migrant domestic workers may lead to Article 4 breaches

The current visa system allows migrant domestic workers to change employers. This has been recommended as best practice in preventing trafficking by the International Labour Organisation⁷¹ and by the UK's Home Affairs Select Committee in their 2008/9 inquiry on trafficking.⁷² However, in September 2011 the UK Border Agency held a consultation to examine whether the domestic workers' visas should be removed completely or the right to change employers should be abolished.⁷³ If these changes are introduced it will be a retrogression on the rights of domestic workers.⁷⁴ Domestic workers may have to remain in abusive situations in which their Article 4 rights are being breached. These changes may breach the state's positive obligation to prevent Article 4 violations.⁷⁵

3. Visas for diplomats' domestic workers make them vulnerable to trafficking, forced labour and servitude, and potentially less likely to access justice

There is very little information available about domestic workers working for diplomats and claims of trafficking or forced labour. We know from the NRM that between April 2009 and June 2011, 48 individuals who originally entered the UK on overseas domestic workers visas, were referred as potential victims of trafficking.⁷⁶ The vulnerability of migrant domestic workers working for diplomats is recognised internationally.⁷⁷

71 International Labour Organisation, 2005. *Draft ILO Multilateral Framework on Labour Migration Non-binding principles and guidelines for a rights-based approach to labour migration*. Geneva: International Labour Organisation. Annex II 'Examples of best practise, VI Prevention of and protection against abusive migration practises', pt 82.

72 House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume 1, Page 26. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

73 Consultation closed 9 September 2011. Employment Related Settlement, Tier 5 and Overseas Domestic Workers: A Consultation. UKBA. June 2011. Available at: <http://www.migrantsrights.org.uk/news/2011/government-publishes-consultation-settlement-and-overseas-domestic-workers>. Accessed 30/01/2012.

74 Kalayaan, 2011. *Government proposes return to slavery for migrant domestic workers in the UK*. Available at: <http://www.kalayaan.org.uk/documents/Kalayaan%20briefing%20-%20Government%20proposals%20for%20MDWs%20-%20June%202011.pdf>. Accessed 30/01/2012.

75 Kalayaan, 2011. *Kalayaan response to consultation – questions on MDWs 5 August 2011*. Available at: [http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20\(final\).pdf](http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20(final).pdf). Accessed 30/01/2012.

76 Hansard HL, Col WA273 (2 November 2011). Available at: <http://www.publications.parliament.uk/pa/ld201011/ldhansrd/text/111102w0001.htm#11110299000383>. Accessed 30/01/2012.

77 See for example, United Nations, 2010. *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, Gulnara Shahinian*. Available at: http://www2.ohchr.org/english/issues/slavery/rapporteur/docs/A.HRC.15.20_EN.pdf. Accessed 30/01/2012. Also, A. Kartusch, 2011. *Domestic Workers in Diplomats' Households: Rights Violations and Access to Justice in the Context of Diplomatic Immunity*. Berlin: German Institute for Human Rights. Available at: http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Studie/domestic_workers_in_diplomats_households.pdf. Accessed 30/01/2012.

Diplomats are allowed to bring migrant workers with them to Britain for domestic work on a special visa. These workers are particularly vulnerable because although they are allowed to change employer, they must remain within the same diplomatic mission. If migrants try to flee exploitative or abusive employment they become undocumented migrants and may face homelessness, destitution and deportation as they become ‘illegal’.⁷⁸

Under Article 41(1) of the Vienna Convention on Diplomatic Relations members of diplomatic missions entitled to immunity are expected to respect the laws and regulations of the UK. The Diplomatic Protection Group in the Metropolitan Police Force will investigate allegations that the law has been broken by persons entitled to immunity and report the results of the investigation to the Foreign and Commonwealth Office (FCO). The FCO will liaise with the diplomatic mission and the UK Borders Agency, and can request a waiver of immunity for the mission, and if this is not provided, then a request to the mission to withdraw the diplomat. However Kalayaan, an advice and advocacy charity for migrant domestic workers, is concerned that the waiver of immunity is not always easily granted.⁷⁹

⁷⁸ The government is consulting on changes in visas for domestic workers. The consultation finishes in August 2011. Concerns about the consultation can be found here: *Kalayaan, 2011. Kalayaan response to consultation – questions on MDWs 5 August 2011*. Available at: [http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20\(final\).pdf](http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20(final).pdf). Accessed 30/01/2012.

⁷⁹ Kalayaan, 2011. *Kalayaan response to consultation – questions on MDWs 5 August 2011*. Available at: [http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20\(final\).pdf](http://www.kalayaan.org.uk/documents/Kalayaan%20full%20response%20to%20consultation%20(final).pdf). Accessed 30/01/2012.

Convictions for slavery, trafficking and forced labour are difficult

The European Court of Human Rights has emphasised that the state has a positive obligation to enact legislation to punish cases of slavery and forced labour, and that the legislation should be effective.⁸⁰

By its very nature, identifying the victims and perpetrators of slavery and related offences is difficult. Nevertheless, where cases are identified it should be possible for victims to seek legal remedy. By the end of January 2011, there had been 166 conviction for trafficking of which 153 were for trafficking under the Sexual Offences Act (since May 2004), and 13 convictions for labour trafficking under the Asylum and Immigration Act (since December 2004).⁸¹

There are several reasons why the number of convictions is so low. In 2009, the House of Commons Home Affairs Select Committee noted that in the case of people trafficked for domestic servitude, for example, the individuals are scattered and unlikely to come to the attention of the authorities. They are also unlikely to be aware of help and advice available from non-governmental organisations.⁸² This situation is likely to have improved since the introduction of the National Referral Mechanism (NRM), but may still be the case for some trafficked victims. The conflicting aims of immigration policy, which sets

⁸⁰ *Siliadin v. France* [2005]. Application no. 73316/01.

⁸¹ Home Office, 2011. *United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) United Kingdom's Seventh Periodic Report*. Available at: <http://www.homeoffice.gov.uk/publications/equalities/international-equality/7th-cedaw-report?view=Binary>. Accessed 30/01/2012.

⁸² Evidence submitted to the Home Affairs Committee by Anti-Slavery International. See House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume II. Ev 97, para 4.5. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23ii.pdf>. Accessed 30/01/2012.

deportation targets, and policies on preventing trafficking, may also be a factor.⁸³ It can be difficult for the police and the Crown Prosecution Service (CPS) to find enough convincing evidence to prove trafficking, as the elements that make up an offence of trafficking can be complex. As a result, they may resort to charges for other relevant offences such as rape, sexual assault, blackmail, coercion, violence, false documentation and money laundering.⁸⁴ They may also be tried outside the UK, with assistance from British law enforcement and prosecutors. Also, victims may find it difficult to give credible evidence about very traumatic events in court.⁸⁵

Prosecuting cases of forced labour, and trafficking for forced labour, is similarly challenging. It can be very difficult to distinguish between bad conditions of work and a situation which actually constitutes forced labour. Therefore, when agencies come across bad conditions they may not know whether the situation should be dealt with in an employment tribunal or by a criminal prosecution. The people subjected to forced labour may be similarly unclear about whom to report it to.

The Coroners and Justice Act which outlawed slavery and forced labour has not helped to clarify this distinction. All it says is that it is an offence to 'require another person to perform forced or compulsory labour' – it does not define these terms. There is, therefore, a risk that the Act will not deter perpetrators or lead to effective prosecutions. While formally reflecting Article 4, it does not facilitate investigation and prosecution of trafficking offences. Guidance has been issued to judges and prosecutors by the Ministry of Justice and the CPS but the statute itself should be open to clear and consistent interpretation.⁸⁶

⁸³ Evidence submitted to the Home Affairs Committee by Anti-Slavery International. See House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume II. Ev 97, para 4.5. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23ii.pdf>. Accessed 30/01/2012. The legal status of the individual should not influence the authorities decision as to whether the person was trafficked. The European Court of Human Rights has made clear that if a person sent back to their country of origin is likely to be re-trafficked, the state would be failing to protect that individual.

⁸⁴ Oral evidence given to the Home Affairs Committee into human trafficking by Metropolitan Police Questions 457 and 458, Europol Question 325 and UKHTC Questions 240 and 262. See House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume II. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23ii.pdf>. Accessed 30/01/2012. Children and Young People Now, 2010. *Concerns raised over low number convictions for child trafficking*. Available at: http://www.cypnow.co.uk/Youth_Justice/article/1026371/Concerns-raised-low-number-convictions-child-trafficking/. Accessed 30/01/2012.

⁸⁵ House of Commons, 2009. *Home Affairs Committee – Sixth Report. The Trade in Human Beings: Human Trafficking in the UK*. Volume I. Page 61. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/23/23i.pdf>. Accessed 30/01/2012.

⁸⁶ *C. N. v. the United Kingdom*. Application no. 4239/08. Submission by the Equality and Human Rights Commission.

Case study:**Guidance on safeguarding trafficked children**

Za, 14, came to the attention of Harrow Council and the London Safeguarding Children Board when he appeared in court following a police raid on a cannabis farm.

Staff at the young offenders' institute where he was being held suspected the boy may have been trafficked. Za was referred to the council's unaccompanied minors team.

Za told the team that he had been 'befriended' by people he had met while sleeping rough in Kent. These people offered him accommodation and food. In return, he was expected to work for them in cannabis factories. He was often moved around from house to house and was beaten if he refused to carry out any tasks. On one occasion, his 'boss' held his face over a gas cooker because he refused to move house, and he required hospital treatment. Za was very vague about the details of how he arrived in Britain from Vietnam, and his interviewers concluded there were grounds to suspect that he had been trafficked.

In early 2009, the London Safeguarding Children Board piloted new guidance to help social workers, teachers, police, health workers and other professionals to identify and support trafficked children. This aimed to bring agencies together more effectively, and to enable them to act swiftly in cases of suspected trafficking.

Previously, a local authority had to prove 'exploitation' had occurred before a child could be treated as a victim of trafficking. Under the new guidance, authorities can act if they suspect that a child has been trafficked – even if they can't prove it. Philip Ishola, of Harrow Council and the London Safeguarding Children Board, explains:

**“The legislation lifted a weight off our shoulders ...
It puts children’s human rights at the heart of our
approach”**

“It was a phenomenal shift, absolutely huge ... [the legislation] lifted a weight off our shoulders and allowed us to act swiftly ... It puts children’s human rights at the heart of our approach.”

As a result of the new approach, Harrow Council were able to remove Za from the traffickers and take him into care. Za had been charged with the cultivation of cannabis and remanded at a young offenders’ institute. After he was confirmed as a victim of trafficking the charges were dropped.

The project was successfully piloted across 12 local authority areas for 18 months. During the pilot phase 56 child victims of trafficking were safeguarded. The project is now being rolled out nationally, with support from the Department for Education.

Case study:**Trafficked Nigerian children**

On 20 May 2011, four victims of trafficking won a landmark human rights case when a judge ruled that the Metropolitan Police Service (MPS) had breached their human rights by failing to investigate their claims that they had been subjected to domestic slavery.

The girls were all aged 15 or less when they were illegally trafficked to Britain from Nigeria. The traffickers, who brought the girls into the country between 1997 and 2002, had told their parents that the move would help them with their studies.

When the victims arrived in the country, however, they were put to work looking after the children of African families living in north London. Some of them were forbidden to talk to anyone and prevented from leaving the house. Others were spied on by their guardians and physically and emotionally abused.

From 2004 onwards, the girls tried unsuccessfully to get support from social services and also police officers working with a specialist child trafficking unit called Operation Paladin. The victims cannot be named for legal reasons, but after the case they issued a statement through their lawyers. One said: “It took all the courage I had to walk into Southgate police station and Enfield Social Services to ask for help in 2004 but they sent me back to my abusers and then blamed me.”

Another said: “When I got away from my abusers, I went to Walworth Road police station in 2007. I told a police officer that I had been beaten unconscious but he did nothing.”

By the time they escaped their abusers the victims were young adults. In 2007, they received help from the charity Africans Unite Against Child Abuse (Afruca), which led to their claim against the police. The MPS denied failing to investigate allegations of slavery. It argued that there was no legal duty to investigate such allegations unless the claims were reported while the situation was ongoing.

“It took all the courage I had to ... ask for help in 2004 but they sent me back to my abusers and then blamed me”

In a written judgment, Mr Justice Wyn Williams found there had been a “failure to investigate” on the part of the MPS over a significant period of time. The police have a duty under the Human Rights Act to investigate credible allegations of ongoing or past servitude, and in failing to investigate, the court found the MPS to have breached the victims’ rights under Articles 3 and 4.

This case took place prior to the introduction of the National Referral Mechanism in 2009, which aims to improve the identification and protection of victims of trafficking.

Debbie Ariyo, founder and executive director of Afruca, said: “For years our work has been hampered because many young people have not been believed by the authorities when reporting allegations of slavery and trafficking. This has meant we have been unable to secure justice for people in many cases ... now that we have this precedent, young people who have been trafficked can report their experiences to the police knowing they have an obligation to investigate.”

The victims were awarded a total of £20,000 (£5000 each) plus costs for the distress caused to them.

Article 5:

The right to liberty and security

Article 5 of the European Convention on Human Rights provides that:

Everyone has the right to liberty and security of person.

1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.¹

Summary

Article 5 provides that everyone has the right to liberty and security. The right set out by Article 5(1) is limited, which means there are some circumstances set out in the Article and in domestic law, in which deprivation of liberty is lawful. Any such deprivation of liberty must be necessary and proportionate and should not continue for longer than necessary. It must also be in accordance with the relevant provisions of Article 5(2) to 5(5).

Protection from arbitrary detention has been part of Britain's common law framework since the 13th century. Today, the circumstances in which arrest and/or detention are permitted are set out in a number of Acts of Parliament and associated Codes of Practice. The UK has also ratified a number of international treaties supporting the right to liberty and security. The legality of any deprivation of liberty may be reviewed and challenged through the domestic courts. Britain has also ratified a number of international treaties supporting the right to liberty and security.

The key issues we address in this chapter are:

Counter-terrorism legislation allows for substantial restrictions on the liberty of people who have not necessarily been convicted of any crime

Article 5 requires that any deprivation of liberty must be lawful, proportionate, and continue for no longer than is necessary. Under current legislation, terror suspects can be held in pre-charge detention for longer than other suspects. Control orders and their replacement Terrorism Prevention and Investigation Measures impose significant restrictions on the liberty of persons who have not necessarily been convicted of any offence.

¹ 'Liberty and security' for the purposes of Article 5 means physical liberty and security such as is interfered with by arrest and detention. This concept does not include personal liberty or democratic ideals as are protected by rights to freedom of thought, expression, religion or the right to marry and found a family: see EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental rights of the European Union*, June 2006, pp. 67-68.

The review shows that:

- Extended periods of pre-charge detention for those suspected of or reasonably believed to be involved in terrorism-related offences are longer than usually allowed under criminal law.
- Control orders allowed considerable restriction on the liberty of people who were reasonably suspected of involvement in terrorism-related activity but had not necessarily been convicted of any criminal offence. They risked breaching not only Article 5, but also Article 8, the right to a private and family life, and Article 6, the right to a fair hearing.
- The Terrorism Prevention and Investigation Measures (TPIM) regime, which replaced control orders in 2011, still allows significant restrictions to be placed on people who are reasonably believed to be involved in terrorism-related activity, but have not necessarily been convicted of any offence. TPIMs risk breaching Articles 5, 6 and 8.

Stop and search powers may not be compatible with Article 5, 8 and 14

A person can be lawfully detained under Article 5(1)(c) on reasonable suspicion of having committed an offence. The Police and Criminal Evidence Act (PACE) allows stop and search when there are reasonable grounds to suspect that a person has stolen items, prohibited items or an offensive weapon. However, under domestic counter-terror powers, and section 60 of the Criminal Justice and Public Order Act 1994, people can be stopped and searched without reasonable suspicion. This risks breaching Article 5 rights and Article 8 rights, and potentially breaching Article 14, as people of certain ethnic and religious backgrounds are disproportionately likely to be detained under these powers.

The review shows that:

- The current proposals to replace section 44 stop and search powers risk breaching Articles 5, 8 and 14.
- The power to stop and search at ports and airports under Schedule 7 of the Terrorism Act risks breaching Articles 5, 8 and 14.
- Stop and search under section 60 of the Criminal Justice and Public Order Act and section 1 of PACE risk breaching Articles 5, 8 and 14.

The detention of people for immigration reasons is not always done with sufficient regard to Article 5 rights

Article 5 specifically provides that a person can be detained ‘to prevent his effecting an unauthorised entry into the country’ or when action is being taken to deport or extradite someone. Any such detention must, however, be lawful,

necessary and proportionate. There are various issues raised by the current system of immigration detention, particularly in relation to the treatment of children and vulnerable people, including victims of torture; flaws in the ‘fast track’ process; the excessive length of detention of some asylum seekers; and difficulties in obtaining bail.

The review shows that:

- Children continue to be detained for immigration purposes, which may breach their Article 5 rights.
- The increased use of the ‘fast track’ system for processing asylum applications risks breaching Article 5.
- Contrary to government policy, UK Border Agency staff at detention centres do not always follow the correct procedures to safeguard vulnerable individuals and remove them from detention. This has led to Article 5 breaches and, in some cases, a breach of Article 3.
- Many immigrants have been detained for lengthy periods without certain release dates, which can be unlawful under Article 5.
- Under Article 5, anyone deprived of their liberty must have the opportunity to challenge their detention. However, the bail process remains inaccessible to many immigration detainees, including those unlawfully detained.

The UK's obligations under Article 5

Article 5 provides for the right to liberty and security, protecting people from arbitrary detention by the state.² This is a limited right. The Article sets out a range of circumstances where it may be lawful for a person to be detained. They include:

- following conviction by a criminal court
- failure to obey a court order or fulfil a legal obligation, such as failing to pay a fine
- in order to bring someone to court when there is a reasonable suspicion that the person has committed a crime; if it is reasonably necessary to prevent the person committing a crime; or if the person is likely to abscond after having committed a crime
- to ensure that a child receives educational supervision or attends court
- to prevent the spreading of infectious diseases or to detain someone on mental health grounds or because they are an alcoholic, a drug addict or a vagrant
- to prevent unauthorised entry into the country or in relation to a person against whom action is being taken with a view to deportation or extradition.

The presumption is that everyone has the right to liberty. The onus therefore falls on the state to explain why detention in each case is justified, not on detainees to explain why they should not lose their liberty.

For deprivation of liberty to be lawful, the state must show that it falls within one of the circumstances listed in Article 5(1). The procedure for any deprivation of liberty must also be set out in domestic law and the state must show that detention is necessary and proportionate to the aim that it wishes to achieve, and that it continues for no longer than necessary. So, for example, it would not

² 'Liberty and security' under Article 5 means an individual's physical liberty and security that could be interfered with by arrest and detention. The concept does not include personal liberty or democratic ideals which are protected by rights to freedom of thought, expression, religion or the right to marry and found a family: see EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental rights of the European Union*, June 2006, pp. 67-68.

be proportionate or legitimate to detain someone for failing to obey a court order when there are no arrangements to bring them to court, or to detain someone with a view to deportation when there are no plans in place to deport them.³

Article 5 imposes:

- **a positive duty** that requires public authorities to take steps to guarantee people's right to liberty and security.
- **a negative duty** requiring the state not to detain anyone arbitrarily for reasons not contained in domestic law and as set out in Article 5.

Article 5 also offers procedural guarantees to prevent arbitrary detention. Article 5(2) requires the state promptly to explain to those detained the reasons for their detention in a language that they understand. Those detained must also be brought promptly before a court and have the lawfulness of their detention reviewed by an independent party.

Relation to other articles

Article 5 is closely linked to Article 6, the right to a fair trial, because in many cases the deprivation of liberty will be determined by the courts.

The deprivation of a person's liberty is likely to have an adverse impact on their enjoyment of many other rights, such as the right to a family and private life under Article 8. It can also place a detainee in a vulnerable position, which increases the risk of being subject to torture or inhuman and degrading treatment, in breach of Article 3. Disproportionate use of powers against particular ethnic group may also breach Article 14.

³ See for example, *Winterwerp v. Netherlands*. Application No. 6301/73 (1979) ECHR 4 and *Zamir v. the United Kingdom*. Application No. 9174/80, 40 DR 42 (1983).

The development of Article 5 in Britain

Depriving someone of their liberty is one of the most serious actions that a state can take. For centuries, people in Britain have enjoyed the right to liberty.⁴

The 1215 Magna Carta set out:

‘No man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled ... except by the lawful judgement of his equals or by the law of the land.’

The procedure of habeus corpus, which protects citizens from arbitrary detention, originated in the English legal system in medieval times. Unjustified imprisonment is still recognised as both a crime and an actionable civil wrong.

As discussed above, Article 5 sets out limited circumstances that permit the deprivation of liberty. These largely follow English common law principles and may well have been inspired by British negotiators who developed the European Convention on Human Rights. These common law principles of liberty are now also supported by domestic legislation such as the Human Rights Act 1998; the Police and Criminal Evidence Act 1984 (PACE), which sets out police powers of arrest and detention; the Mental Health Act 1983 (as amended), which allows detention in relation to the care and treatment of people with mental health disorders; and the Mental Capacity Act 2005, which provides protections for those who lack mental capacity and may be deprived of their liberty.

The UK has agreed to international standards which further support the right to liberty, including the Universal Declaration of Human Rights, the Refugee Convention, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the EU Qualification Directive.

There are a number of laws, processes and bodies in the UK which ensure that people are not unlawfully detained, and that detention is reviewed. The courts usually review and challenge the legality of detention, including detention under

4 Bingham, T., 2011. *The Rule of Law*, Penguin Books. Page 72.

criminal law, under the Mental Health Act and under immigration-related powers. In addition, there are provisions in PACE for the review of the legality of detention by the police, and provisions for police bail. People who lack mental capacity and are detained in hospital or care home settings must have their deprivation of liberty regularly reviewed, and have the right to challenge it in court.⁵

Despite this strong legal and institutional framework, our evidence suggests the UK is not fully meeting its Article 5 obligations in some areas. The issues we address in this chapter demonstrate the restrictions imposed on the liberties of certain groups, such as immigrants and people suspected of involvement in terrorism.

⁵ Mental Capacity Act 2005.

Counter-terrorism legislation allows for substantial restrictions on the liberty of people who have not necessarily been convicted of any crime

How Article 5 protects people's rights during periods of heightened national security

Article 5 helps ensure that deprivation of liberty by the state is not arbitrary and is lawful, necessary and proportionate. It provides that everyone, including anyone suspected of an offence, has the right to liberty. Lord Bingham explained the importance of this principle in relation to terror suspects:

‘There are doubtless those who would wish to lock up all those suspected of terrorist and other serious offences and, in the time-honoured phrase, throw away the key. But a suspect is by definition a person against whom no offence has been proved. Suspicions, even if reasonably entertained, may prove to be misplaced, as a series of tragic miscarriages of justice has demonstrated. Police officers and security officials can be wrong. It is a gross injustice to deprive of his liberty for significant periods someone who has committed no crime and does not intend to do so. No civilized country should be willing to tolerate such injustices.’⁶

Britain continues to face a substantial threat from terrorism.⁷ Government figures indicate that, in 2007, security services had concerns about at least 2,000 individuals, while 228 individuals deemed to be at risk of violent radicalisation had been referred to intervention programmes.⁸ Since the

⁶ Bingham, T., 2011. *The Rule of Law*, Penguin Books. Page 73.

⁷ The Joint Terrorism Analysis Centre uses a five point scale for setting the threat level the UK faces from international terrorism: [1] low, an attack is unlikely; [2] moderate, an attack is possible but not likely; [3] substantial, an attack is a strong possibility; [4] severe, an attack is highly likely, and [5] critical, an attack is expected imminently. Available at: <http://www.homeoffice.gov.uk/counter-terrorism/current-threat-level/>. Accessed 09/02/12.

⁸ Choudhury, T. and Fenwick, H., 2011. *The impact of counter-terrorism measures on Muslim communities*. Equality and Human Rights Commission Research Report no. 72. Page vi.

atrocities in the USA on 11 September 2001, the British authorities have arrested 1,963 people for terrorism offences, and convicted 246 people for terrorism-related offences. 13 people were still awaiting prosecution at 31 March 2011.⁹

Article 2 of the Convention places a positive obligation on the government to protect the right to life. Since 2000, the UK has introduced several laws in response to the threat to life from terrorism. The Terrorism Act 2000 used a broad definition of ‘terrorism’ (see the chapter on Article 10) and permits extended periods of pre-charge detention, and the power to stop and search without reasonable suspicion. The Prevention of Terrorism Act 2005, which uses the same definition of terrorism, permitted the use of control orders. In December 2011, control orders were replaced by Terrorism Prevention and Investigation Measures (TPIMs) which are broadly similar.¹⁰ The powers provided by the 2000 and 2005 Acts and by the Terrorism

Prevention and Investigation Measures Act 2011 go beyond those usually provided to the state within the criminal justice system to deal with people suspected of criminal offences.

The Convention recognises that, in extreme circumstances, it may not be possible for states to comply with Article 5. In times of public emergency, governments may derogate from Article 5 and certain other provisions of the Convention ‘to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law’.¹¹ In late 2001, the UK derogated from Article 5 to permit the detention of foreign nationals suspected of terrorist involvement, who at that time could not be tried or deported.¹² However, in *A. v. S.S.H.D.* [2004] (‘the Belmarsh case’) the House of Lords quashed the derogation. It ruled that this legalisation was incompatible with Articles 5 and 14, because it allowed for the detention of foreign nationals suspected of international terrorism in a way that did not apply to British citizens. In addition, the Lords ruled that the detention powers were not strictly required.¹³ The European Court of Human

9 *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches, 2010/11 Great Britain*, Home Office. HOSB 15/11.

10 Control Orders in place at that date lapsed on 26 January 2012 if not revoked by that date.

11 Article 15(1) ECHR.

12 The UK derogated in relation to Part 4 of the Anti-terrorism Crime and Security Act 2001 (‘the 2001 Act’). Part 4 allowed the detention pending deportation of foreign nationals, even if removal was not currently possible, if the Secretary of State reasonably believed that the person’s presence in the UK was a risk to national security, and reasonably suspected that the person was involved with international terrorism linked with international terrorism.

13 *A.(F.C.) and others (F.C.) v. Secretary State Home Department* [2004] UKHL 56, [2005] 2 AC 68.

Rights subsequently agreed that the legislation breached Articles 14 and 5.¹⁴ In response to the House of Lords judgement, the government introduced the control order system, which is discussed below.

Successive governments have repeatedly argued that the counter-terrorism powers are necessary to protect the public. They have sought, wherever possible, to create powers that comply with the Convention. Yet the powers continue to attract widespread criticism and have been subject to a number of adverse findings by the courts. Counter-terrorism measures raise particular issues regarding their compliance with Article 5, as well as with Articles 3, 6, 8 and 14. The review also looks at the impact of counter-terrorism legislation on the rights to freedom of expression and freedom of association in the chapters on Articles 10 and 11.

The courts have found counter-terrorism powers to be unlawful in a number of cases discussed below and, in 2010, further to the Coalition agreement, the Home Office reviewed some key measures. The introduction to the report, *Review of Counter-Terrorism and Security Powers; Review Findings and Recommendations*, stated that:

‘We must ... correct the imbalance that has developed between the State’s security powers and civil liberties, restoring those liberties wherever possible and focusing those powers where necessary.’¹⁵

The review made several recommendations about counter-terror measures, and some of the powers have been, or are likely to be, amended by legislation. We consider these proposals later in this chapter.

¹⁴ *A. v. the United Kingdom* [2009] EHRR 301.

¹⁵ HM Government, January 2011. *Review of Counter-Terrorism and Security Powers, Review Findings and Recommendations*. Cm 8004. Available at: www.official-documents.gov.uk/document/cm80/8004/8004.pdf. Accessed 13/01/12.

Key issues

1. Extended periods of pre-charge detention for people suspected of terrorism-related offences are longer than usually allowed under criminal law

Since 2000, the maximum period for pre-charge detention for terrorism-related offences has gradually been extended. Under usual criminal law people can be held, subject to judicial authorisation, for up to 96 hours (four days) before they are charged. The Terrorism Act 2000 continued to allow for a maximum seven-day period of pre-charge detention for terrorist suspects, but provided for judicial authorisation. The Criminal Justice Act 2003 increased the maximum pre-charge detention period to 14 days and the Terrorism Act 2006 further extended it to 28 days. In 2008, proposals to increase the maximum pre-charge detention period to 42 days were strongly opposed by the Joint Committee on Human Rights, the Equality and Human Rights Commission,¹⁶ many parliamentarians and various civil society organisations. Critics argued that the step would potentially breach Article 5, and other rights such as those prohibiting torture, inhuman or degrading treatment or punishment under Article 3, the right to a fair trial under Article 6, and the prohibition of discrimination under Article 14. The House of Lords rejected the proposals.

In January 2011 the statutory period of 28 days pre-charge detention lapsed and the maximum period reverted to the previous 14-day limit. The Protection of Freedoms Bill currently before parliament proposes retaining the 14-day limit for terrorism suspects, with judicial authorisation. The Equality and Human Rights Commission welcomes this improvement on the previous regime, yet it is still significantly longer than the usual criminal process. It is also significantly longer than pre-charge detention periods in other countries, such as the US (2 days), Canada (1 day), Germany (2 days) and Spain (5 days).¹⁷ Furthermore, the bill allows the Home Secretary limited power in an emergency when parliament is not sitting to extend pre-charge detention to 28 days.¹⁸

¹⁶ The Equality and Human Rights Commission obtained advice from Rabinder Singh QC that analysed how extended periods of detention risked breaching Articles 3, 5, 6 and 14 of the Convention, and stated that detention for up to 42 days would be likely to breach Articles 5, 6 and 14 of the Convention, and might also breach Article 3. Available at: <http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/crime-security-policing-and-counter-terrorism-bill-briefings/counter-terrorism-bill-including-proposals-to-allow-detention-for-up-to-42-days/>. Accessed 09/02/12.

¹⁷ Liberty, July 2010. *Terrorism pre-charge detention comparative law study*. It should be noted that direct comparisons of periods of detention

¹⁸ Protection of Freedoms Bill, Clause 58.

The domestic courts recently ruled that a period of up to 14 days detention is compatible with the Convention.¹⁹ In light of this decision, the Joint Committee on Human Rights and others have recommended that the legislation be made clearer to ensure that the regime for extended detention is compatible with Article 5.²⁰ The Equality and Human Rights Commission has argued that the maximum period of pre-charge detention in terrorism cases should be four days, the same as under general criminal law. Extended pre-charge detention should only be used where strictly necessary,²¹ and should be accompanied by stringent checks and balances.²² The Equality and Human Rights Commission and other organisations consider any extension to 28 days, even in an emergency, would risk breaching Article 5 and potentially other Convention articles.²³ Both the UN Human Rights Committee and the UN Human Rights Council have expressed concerns about the extended pre-charge detention periods.²⁴ They recommend strict time limits, strengthened guarantees and that, on arrest, terrorist suspects should be promptly informed of any charge against them, and tried within a reasonable time or released.²⁵

2. Control orders allowed considerable restrictions on the liberty of people who were reasonably suspected of involvement in terrorism-related activity but had not necessarily been convicted of any criminal offence. They risked breaching Articles 5, 6 and 8

Following the terrorist attacks of 2001 the government introduced a regime to enable the detention of foreign nationals suspected of terrorist involvement,

19 *In the matter of an application for judicial review by Colin Duffy and others (No. 2)* [2011] NIQB 16.

20 Joint Committee on Human Rights, September 2011. Legislative Scrutiny: Protection of Freedoms Bill. Eighteenth Report of Session 2010-12.

21 Schedule 8, paragraph 32 Terrorism Act 2006 provides that: A judicial authority may issue a warrant of further detention only if satisfied that— (a) there are reasonable grounds for believing that the further detention of the person to whom the application relates is necessary and (b) the investigation in connection with which the person is detained is being conducted diligently and expeditiously.

22 Equality and Human Rights Commission submission on the *Review of Counter Terrorism and Security Powers*, September 2010. Available at: www.equalityhumanrights.com/legal-and-policy/consultation-responses/ehrc-submission-review-of-counter-terrorism-and-security-powers. Accessed 13/01/12.

23 JUSTICE, December 2011. *Protection of Freedoms Bill, Briefing for the House of Lords Grand Committee Stage*. Available at: <http://www.justice.org.uk/data/files/resources/137/JUSTICE-Brief-Lords-Grand-Committee-December-2011.pdf>. Accessed 09/02/12.

24 ICCPR Concluding Observations – 93rd Session UK review, 30 July 2008. Available at: <http://www2.ohchr.org/english/bodies/hrc/hrcs93.htm>. Accessed 13/01/12.

25 UN Human Rights Council Universal Period Review, 7-18 April 2008. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/Go8/112/65/PDF/Go811265.pdf?OpenElement>. Accessed 13/01/12. ICCPR concluding observations – 93rd Session UK review, 30 July 2008. Available at: <http://www2.ohchr.org/english/bodies/hrc/hrcs93.htm>. Accessed 13/01/12.

who for various reasons could not be tried or otherwise deported.²⁶ However, following the House of Lords judgment in the *Belmarsh* case,²⁷ the government was no longer able to hold these individuals in what some critics described as ‘indefinite detention’. In response, the government introduced a new regime of control orders in 2005 for both foreign and domestic terrorist suspects.²⁸ Control orders were intended to be used against the small number of people who the government believed were a threat to Britain’s security, but whom it was not able to prosecute, or in the case of foreign nationals, deport. Rather than allowing for detention, control orders permitted strict conditions to be imposed on individuals, without going through the criminal justice system. These included curfews, electronic tagging, regular home searches and strict limits on interpersonal communication.

Control orders departed from the usual system of criminal justice, where restrictions on liberty can only be imposed by the police or the courts following arrest, prosecution and conviction. The Secretary of State, who imposed the orders, needed only to show,

‘...reasonable grounds for suspecting the individual is or has been involved in a terrorist related activity’ [and that] ‘it is necessary, for purposes connected with protecting members of the public from a risk of terrorism.’²⁹

This set an extremely low threshold, below even the standard of proof in deciding civil cases (on the balance of probabilities) and far lower than the standard of proof of beyond reasonable doubt that applies in criminal cases. Furthermore, the courts had limited grounds for reviewing the imposition of a control order.³⁰ In 2005, the Joint Committee on Human Rights, among others, recommended that the threshold should be raised, that the order should be made by the courts and not the Home Secretary and questioned the compatibility of the closed evidence regime with Article 6.³¹

²⁶ Part 4 of the Anti-terrorism Crime and Security Act 2001.

²⁷ *A.(F.C.) and others (F.C.) v. Secretary of State for the Home Department* [2004] UKHL 56. The European Court of Human Rights also found that the legislation breached Articles 14 and 5. *A v. the United Kingdom* [2009] EHRR 301.

²⁸ The power to impose control orders was provided by the Prevention of Terrorism Act 2005 (PTA) which was replaced, on 15 December 2011, by the Terrorism Prevention and Investigation Measures Act 2011.

²⁹ S.2 Prevention Terrorism Act 2005.

³⁰ The role of the courts in reviewing control orders was clarified by a number of cases which in effect now provide that the court should conduct a full merits review into the imposition of a control order. The role of the courts is dealt with in more detail in Chapter 6.

³¹ Joint Committee on Human Rights, February 2006. *Counter-Terrorism and Human Rights*. 12th report of 2005.

Fifty-two people have been made subject to a control order since they were introduced. As of December 2011, nine people, all British citizens, were under control orders, including four who had been under the regime for between two and five years.³² In 2005, the independent reviewer of terrorism legislation, Lord Carlile, concluded that control orders were necessary to protect Britain from terrorist threats.³³ The Home Office also recently argued that preventative measures for people who pose a threat but cannot be prosecuted continue to be necessary to protect the public.³⁴ It added that control orders have been effective in preventing and disrupting terrorist-related activity.³⁵ However, critics have questioned the government's position, not least because seven controlees have absconded, albeit none since June 2007.³⁶

In his independent oversight of the government's review of counter-terrorism measures, Lord MacDonald questioned whether the effect of control orders had been to hinder, rather than aid, the detection and prosecution of those involved in terrorist offences. He noted that control orders can place an individual,

‘...under curfews for up to 16 hours a day, they can forbid suspects from meeting and speaking with other named individuals, from travelling to particular places, and from using telephones and the internet. In other words, controls may be imposed that precisely prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment.’³⁷

Successive governments have faced domestic and international criticism for their use of control orders. The restrictions imposed by control orders had been described as amounting to virtual house arrest. In one case the House of Lords

32 Control Order Powers Home Department Written answers and statements, 19 December 2011.

33 See for example the *Fifth report of the Independent reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, 1 February 2010. Available at: <http://www.official-documents.gov.uk/document/other/9781849871518/9781849871518.asp>. Accessed 09/02/12.

34 Home Office press release 14 December 2011. *New powers to deal with suspected terrorists*. Available at: <http://www.homeoffice.gov.uk/media-centre/news/tpims-oyal-ssent>. Accessed 09/02/12.

35 Home Office, February 2010. Post-Legislative Assessment of the Prevention of Terrorism Act 2005 (Cm 7797). Paragraph 55.

36 Home Office, January 2011. Review of Counter-Terrorism and Security Powers. Summary of Responses to the Consultation Cm 8005 Available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/sum-responses-to-cons?view=Binary>. Accessed 09/02/12.

37 Lord MacDonald, January 2011. *Review of Counter-terrorism and Security Powers; A Report by Lord MacDonald of River Glaven QC*, Cm 8003. Page 9. Available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>. Accessed 09/02/12.

equated a control order to solitary confinement that was more restrictive than the conditions placed on a prisoner in an open prison.³⁸ In 2009, the Institute of Race Relations reported that control orders had a severe impact on the individuals and families involved, contributing towards mental health problems and suicide attempts.³⁹

In 2008, the United Nations Human Rights Committee highlighted how control orders placed significant restrictions on the liberty of an individual who had not been charged with a criminal offence. It also questioned the nature of the judicial process applicable to control orders.⁴⁰ The Joint Committee on Human Rights concluded in 2010 that the regime was no longer sustainable, in light of its impact on individuals and concerns about the fairness of the procedures.⁴¹

Successful challenges against control orders have been made in the domestic and European courts on the grounds that the regime is inconsistent with Articles 5, 6 (the right to a fair trial) and 8 (the right to private and family life). For example, in 2007, the House of Lords found breaches of Article 5 in a challenge brought by a number of individuals whose control orders, among other restrictions, imposed an 18-hour curfew per day and prohibited social contact between them and anyone not authorised by the Home Office.⁴² In another case in 2010, the Supreme Court found breaches of Articles 5 and 8 in the case of a man whose control order confined him to a flat more than 150 miles away from his family for 16 hours a day.⁴³

The government has amended the operation of the regime in light of these judgments and in other more recent cases the courts have found control orders to be compliant with Convention rights. In July 2011, for example, the Administrative Court ruled that a control order requiring an individual to relocate from London to the Midlands was a proportionate interference with Article 8 rights.⁴⁴ And in *A.M. v. S.S.H.D.* [2011] the High Court upheld control order conditions that included bans on any internet access at the individual's home and on the use of USB memory sticks to transfer any data from his home to his university; restrictions on his access to the internet at university and when

38 Liberty, August 2010. *From War to Law; S.S.H.D. v. J. J.* [2007] HL 45, [2008] 1 AC 385.

39 Liberty, August 2010. *From War to Law*, citing Brittan, V. and Begg, M., *Besieged in Britain* (2009: Institute of Race Relations). Page 17.

40 ICCPR Concluding Observations – 93rd Session UK Review, 30 July 2008. Available at: <http://www2.ohchr.org/english/bodies/hrc/hrcs93.htm>. Accessed 13/01/12.

41 JCHR, *Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2010* (Ninth Report of 2009-10): www.publications.parliament.uk/pa/jt/jtrights.htm.

42 *S.S.H.D. v. J. J.* [2007] HL 45, [2008] 1 AC 385.

43 *S.S.H.D. v. A.P.* [2010] UKSC 24, [2011] 2 AC 1.

44 *C.D. v. S.S.H.D.* [2011] EWHC 1273 (Admin), [2011] All ER (D) 203.

he visited his parents; and a requirement to make a phone call every day to a monitoring company. The judge ruled that these conditions were a necessary and proportionate interference with his rights in order to protect the public from terrorism-related activities.⁴⁵

Separately, the courts have found that the process by which control orders are granted, which involves the use of closed material, could breach Article 6, the right to a fair trial.⁴⁶ This issue is discussed further in the chapter on Article 6.

3. The Terrorism Prevention and Investigation Measures regime, which replaced control orders in 2011, still allows significant restrictions to be placed on people who are reasonably believed to be involved in terrorism-related activity, but have not necessarily been convicted of any offence. TPIMs risk breaching Articles 5, 6 and 8.

In December 2011, Terrorism Prevention Investigation Measures (TPIMs) replaced control orders, with the last orders expiring on 26 January 2012.⁴⁷ The government has stated that preventative measures for people who pose a threat but cannot be prosecuted remain necessary to protect the public, and that the new regime will meet human rights obligations:

‘The restrictions that may be placed on individuals under the new system are less stringent than those available under control orders. The new system also has a greater range of safeguards, including a time limit and a higher threshold for imposing the restrictions. The control order regime operated compatibly with the European Convention on Human Rights. The TPIM regime, with its greater safeguards, will also be compatible with the European Convention on Human Rights and indeed TPIMs will be less intrusive on the human rights of the individuals subject to them than control orders are.’⁴⁸

The new TPIM Act 2011 replaces curfews with overnight residence requirements and removes provisions for relocation to another part of the UK.⁴⁹ The Act allows the Home Secretary to impose restrictive measures on individuals

45 *A.M. v. S.S.H.D.* [2011] EWHC 2486 (Admin), [2011] All ER (D) 14.

46 *S.S.H.D. v. A.F. & Ors* [2009] UKHL 28, [2010] 2 AC 269.

47 Terrorism Prevention and Investigation Measures Act 2011 (TPIMA).

48 ECHR Memorandum submitted by the Home Office, 24 May 2011. Contained within the Joint Committee on Human Rights. July 2011. Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill, Sixteenth Report of Session 2010-12

49 Draft legislation has been published but will not be introduced to parliament until necessary allowing more restrictive measures including relocation, lengthy curfews, and further restrictions on communications, association and movement. Home Office press release. 14 December 2011. *New powers to deal with suspected terrorist*. Available at: <http://www.homeoffice.gov.uk/media-centre/news/tpims-oyal-sent>. Accessed 09/02/12.

including requirements to stay overnight at specified addresses, to report to a police station daily, not to enter specific places or areas, not to contact particular individuals and not to travel overseas. Other measures include electronic tagging, restrictions on work, and on access to property and financial services. The Act does permit individuals subject to TPIMs restricted access to the internet.

The TPIM regime is potentially less onerous than control orders, yet nevertheless replicates many of its predecessor's features. TPIMs continue to allow significant restrictions on individuals' liberty based on the threat they are considered to pose rather than for the purposes of investigating or punishing criminal activity.⁵⁰

TPIMs, like control orders, may be imposed by the Home Secretary, though only with judicial permission except where she 'reasonably considers that the urgency of the case requires terrorism prevention and investigation measures to be imposed without obtaining such permission'. TPIMs must be based on 'reasonable belief' in the threat posed by the individual concerned. This is slightly more onerous than the control order threshold of 'reasonable grounds for suspecting', but still significantly below the standard of proof required in civil or criminal matters. Court procedures for reviewing TPIMs, like control orders, will involve the use of closed material (see the chapter on Article 6).

In his independent review, Lord MacDonald recommended that any replacement for control orders should aim to facilitate the prosecution and conviction of terrorist suspects.⁵¹ However, critics have questioned whether TPIMs will be any more effective in achieving this goal than control orders.⁵²

⁵⁰ The government states that the purpose of the TPIM regime is to enable investigation leading to prosecution of a crime. However, many critics of the regime question whether it will enable this to occur.

⁵¹ Lord MacDonald, January 2011. *Review of Counter-terrorism and Security Powers; A Report by Lord MacDonald of River Glaven QC*, Cm 8003. Page 9. Available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>. Accessed 09/02/12.

⁵² Lord MacDonald, January 2011. *Review of Counter-terrorism and Security Powers; A Report by Lord MacDonald of River Glaven QC*, Cm 8003. Page 9. Available at: <http://www.homeoffice.gov.uk/publications/counter-terrorism/review-of-ct-security-powers/report-by-lord-mcdonald?view=Binary>. Accessed 09/02/12.

Liberty, June 2011. Liberty's Committee Stage Briefing on the Terrorism Prevention and Investigation Measures Bill in the House of Commons. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-committee-stage-briefing-on-the-tpims-bill-june-2011-.pdf>. Accessed 09/02/12.

The government has not adopted alternatives, such as enhanced surveillance techniques⁵³ or allowing intercept evidence to be used in court⁵⁴ which would allow suspects to be prosecuted under the normal criminal justice system, and either convicted or acquitted.⁵⁵

The Joint Committee on Human Rights has criticised the proposed TPIM regime and its compliance with human rights. It recommends that the Home Secretary should apply to the court, which should then consider whether the order should be made, rather than merely having an oversight role. The committee also proposed that the standard of proof for TPIMs should be raised to the 'balance of probabilities'. In addition, the committee recommended that the court should fully review the imposition of TPIMs, with guarantees to ensure that the individual concerned can properly challenge the evidence and have a fair hearing.⁵⁶

In the discussions preceding the adoption of the TPIM Act the Equality and Human Rights Commission welcomed attempts to create a more proportionate regime.⁵⁷ However, it considers that this regime still lacks the necessary safeguards to protect human rights, and that it might result in breaches of Articles 5, 6, 8 and 14. It also argues that TPIMs violate long-held principles of civil liberties, including the prohibition on punishment for what people might do rather than what they have done. The legislation received royal assent on 14 December 2011, and the TPIM regime entered into force the following day.

⁵³ Ibid. The Equality and Human Rights Commission has suggested that the availability of intercept evidence should be considered, as well as the use of surveillance. Equality and Human Rights Commission, September 2010. *Equality and Human Rights Commission submission to Review of Counter Terrorism and Security Powers*. Available at: <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/ehrc-submission-review-of-counter-terrorism-and-security-powers/> Accessed 09/02/12.

⁵⁴ Home Office, January 2011. *Review of Counter-Terrorism and Security Powers*, Cm8004. Page 37.

⁵⁵ Ibid.

⁵⁶ Joint Committee on Human Rights, October 2011. *Legislative Scrutiny: Terrorism Prevention and Investigation Measures Bill* (second report). Twentieth Report of 2010-12.

⁵⁷ Equality and Human Rights Commission, 7 June 2011. Parliamentary briefing: Terrorism Prevention and Investigation Measures Bill, Second Reading, House of Commons. Available at: www.equalityhumanrights.com/uploaded.../tpimsbill2rcommons762011.doc. Accessed 20/01/12.

Stop and search powers may not be compatible with Articles 5, 8 and 14

How Articles 5, 8 and 14 protect people when they are stopped and searched

Articles 5 and 8 both give people the right to enjoy their liberty and private life without the arbitrary interference of the state.

A person can be lawfully detained under Article 5(1)(c) in order to be brought before a court on the reasonable suspicion of having committed an offence, or when it is reasonably considered necessary to prevent them from committing an offence. A range of statutory measures have been put in place over time to govern the police use of stop and search powers. Stop and search powers provided under the Police and Criminal Evidence Act (PACE), the Misuse of Drugs Act 1971, the Firearms Act 1968 and the Road Traffic Act 1988 all require a reasonable suspicion that the person stopped is in possession of prohibited goods or has committed an offence. By contrast, stop and search powers provided under section 60 of the Criminal Justice and Public Order Act 1994 and section 44 and Schedule 7 of the Terrorism Act 2000 do not require that a person is suspected of anything.⁵⁸

Article 8 protects people from arbitrary interference in their family and private life, home and correspondence. The act of being subject to a search, which may take place in public, and may include a search of a person, their clothing or personal belongings will interfere with Article 8 rights.⁵⁹

Article 8 is a qualified right, and Article 8(2) provides exceptions enabling interference with the right, for example in the interests of national security, or the prevention of crime. Any interference with a person's Article 8 rights will need to come within one of the exceptions allowed under Article 8(2), and be in accordance with the law, necessary and proportionate.

⁵⁸ Section 44 of the Terrorism Act is currently being amended under the Protection of Freedoms Bill.

⁵⁹ *Gillan & Quinton v. the United Kingdom*. Application No. 4158/05 (2010) 50 EHRR 45.

In addition, Article 14 allows people to enjoy the Convention rights without discrimination. In relation to stop and search, this means people must not be stopped or searched purely because of their race or religion.

Stop and search powers are an important means of tackling crime, but are only compatible with human rights if they are used legitimately and proportionately. Evidence shows that stop and search powers that do not require reasonable suspicion, as well as those under PACE, may be used in a way that is discriminatory because certain ethnic communities are more likely to experience stop and search than others.

Key issues

1. The current proposals to replace section 44 stop and search powers risk breaching Articles 5, 8 and 14

Section 44 of the Terrorism Act 2000 allowed a police officer to stop anyone within an ‘authorised area’ to search for articles connected with terrorism. A senior officer issued the authorisation of such areas, subject to confirmation within 48 hours by the Home Secretary. Authorisations could last for up to 28 days but could be renewed; between 2001 and June 2010 the whole of greater London was subject to a continual rolling section 44 authorisation.

In 2010 the European Court of Human Rights found in *Gillan v. the United Kingdom* [2010] that the use of stop and search powers under section 44 breached Article 8.⁶⁰ The applicants, a peace protester and a journalist, had been stopped under section 44 powers at an arms trade fair. The Court ruled that the power was arbitrary and that it lacked sufficient legal certainty to conform with Article 8. It made a number of criticisms of the power and stated that the Terrorism Act 2000 contained insufficient safeguards ‘to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference’.

The Court did not give separate consideration to claims for breach of Articles 5, 10, 11 or 14. However, it suggested that the fact an individual could be arrested and charged with an offence for refusing to be stopped and searched under section 44 indicated that such powers could involve a deprivation of liberty under Article 5. The Court added there was ‘a risk that such a widely framed power could be misused against demonstrators and protestors in breach of Article 10 and/or 11 of the Convention’ and noted it could be used in a discriminatory way, contrary to Article 14.

⁶⁰ *Gillan & Quinton v. the United Kingdom*. Application No. 4158/05 (2010) 50 EHRR 45.

Following this case the government suspended use of these powers, and proposed replacement powers in the Protection of Freedoms Bill which is currently before parliament. Meanwhile, the Home Secretary has implemented interim stop and search powers by means of a remedial order.⁶¹

The new powers envisaged in the bill will continue to allow stop and search without reasonable suspicion, but will provide greater safeguards than before under section 44. Just as before, the authorisation can be granted by a senior police officer subject to confirmation by the Home Secretary. However, if the bill is passed in its present form, the senior officer making the authorisation must reasonably suspect that an act of terrorism will take place, and reasonably consider that it is necessary to prevent such an act. Moreover, the duration of authorisation and the specified area must be no longer than necessary to prevent such an act. This test is considerably more onerous than that applied under section 44.

The government has argued that the replacement powers are compatible with Convention rights and a necessary and proportionate response to the threat from terrorism. In this context, it points to the additional safeguards and restrictions on their use that have been put in place.⁶²

The Joint Committee on Human Rights (JCHR), which has reviewed the proposed legislation, accepts there may be a need for a power of stop and search without reasonable suspicion in certain circumstances. Yet the Committee criticised the proposed legalisation as insufficient to satisfy the decision of the European Court in *Gillan* and risked breaching Convention rights. Some of the issues raised by the JCHR are now reflected in the Bill; notably, that the officer authorising the power must have a reasonable basis for believing use of the power is necessary. The government has not adopted other recommendations by the JCHR; in particular, that use of the power should require prior judicial authorisation. The JCHR further recommended strengthening the code of practice and the role of the independent reviewer of counter-terrorism legislation, and drew attention to the removal of a safeguard which required searches to be conducted by a person of the same sex.⁶³

61 Ministerial Statement on Terrorism Stop and Search Powers – Remedial Order. Available at: <http://homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/terrorism-remedial-order/?view=Standard&pubID=867761>. Accessed 10/02/12.

62 Protection of Freedoms Bill, European Convention on Human Rights Memorandum by the Home Office. Available at: <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/human-rights-memorandum?view=Binary>. Accessed 10/02/12.

63 Joint Committee on Human Rights, October 2011. *Legislative Scrutiny: Protection of Freedoms Bill* Eighteenth Report of Session 2010-12.

In evidence submitted to parliament, the Equality and Human Rights Commission argues that the new powers risk breaching Article 5 as well as Articles 8, 10, 11 and 14. The Commission recognises that stop and search without reasonable suspicion may sometimes be necessary: for instance, to prevent an immediate act of terrorism or to search for perpetrators or weapons following a serious incident. It welcomes the additional safeguards proposed by the government but notes that the powers may be used in an arbitrary and discriminatory way without a requirement of reasonable suspicion that the individual has committed a crime.⁶⁴ The Commission has recommended further safeguards to the use of the power, including prior judicial authorisation.

2. The power to stop and search in airports under Schedule 7 of the Terrorism Act risks breaching Articles 5, 8 and 14

Schedule 7 of the Terrorism Act 2000 provides the power to stop and search at ports and airports without reasonable suspicion. It gives ‘examining officers’ the power to stop, search and examine individuals to determine whether or not they are involved in commissioning, preparing or instigating a terrorist act. The examining officer does not need to have any reasonable suspicion, and people may be detained for up to nine hours under the power. However, such lengthy examinations are rare.

It is unclear how many people have been stopped under Schedule 7 powers because, until recently, published data only covered stops lasting over one hour. In 2010/11, 65,684 examinations took place at border entry points to Britain, of which 2,288 lasted for more than one hour,⁶⁵ and 913 people were detained. These figures do not include those only asked screening questions. Home Office data further record that Schedule 7 examinations between 2004 and 2009 resulted in 99 arrests, with 17 people charged under the Terrorism Act, and 31 people charged under other terrorism-related offences; and in 43 convictions.⁶⁶

⁶⁴ Equality and Human Rights Commission, 17 March 2011. Briefing: Protection of Freedoms Bill. Available at: <http://www.equalityhumanrights.com/legal-and-policy/parliamentary-briefings/briefing-protection-of-freedoms-bill>. Accessed 10/02/12.

⁶⁵ Home Office, June 2011. Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop & searches, 2010/11 Great Britain, HOSB 15/11. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/counter-terrorism-statistics/hosb1511/hosb1511snr?view=Binary>. Accessed 10/02/12.

⁶⁶ This does not mean that 43 individuals have been convicted, as some individuals may have been convicted of more than one charge. See Choudhury, T. and Fenwick, H., 2011. *The impact of counter-terrorism measures on Muslim communities*. Equality and Human Rights Commission Research Report no. 72. This figure only relates to arrests immediately after the examination and will therefore not include any arrests that may take place at a later time or date.

There is a risk that Schedule 7 stop and search may breach Articles 5, 8 and 14, as the power can be exercised without reasonable suspicion and be arbitrary and discriminatory. The Equality and Human Rights Commission's research on the impact of counter-terrorism measures on the Muslim community found that there were worries among Muslim participants in the study that Schedule 7 stop and search was based on religious profiling as individuals reported being questioned about their religious beliefs and practices.⁶⁷ The codes of practice state that a search cannot be conducted solely because of a person's religious or ethnic background, and must not involve unlawful discrimination. However, the risk remains that Schedule 7 powers may be discriminatory and there is a need for better information, greater transparency, and more accountability about their use.

The government is now reviewing these powers, following the Commission's report and the recommendation of the Independent Reviewer of Terrorism Legislation.⁶⁸

3. Stop and search under section 60 of the Criminal Justice and Public Order Act risks breaching Articles 5, 8 and 14

Section 60 of the Criminal Justice and Public Order Act 1994 enables a senior police officer to authorise police searches in a defined area for up to 24 hours if he or she reasonably believes that serious violence may occur; or that a person is carrying a dangerous object or offensive weapon; or that a person in the area is carrying such a weapon or instrument following an incident. Stops and searches under section 60 do not require 'reasonable suspicion' that an individual is about to commit a crime or is carrying a weapon. There is increasing evidence that section 60 is being used as a 'catch-all' power in response to low-level disorder.

Section 60 was originally introduced to tackle football hooliganism and the threat of serious violence at football games. In 1997 and in 1998, responding to an increase in urban gang and knife crime, the government extended section 60 powers to cover situations where senior officers making authorisations believed that individuals were carrying 'dangerous instruments or offensive weapons'. The extension also allowed officers to remove or seize items hiding a persons' identity, whether or not weapons were found and permitted the initial 24-hour authorisation period to be extended for a further 24 hours.

⁶⁷ Ibid. The research on Muslim communities was based on four focus groups consisting of 96 individuals in total and 60 semi-structured interviews.

⁶⁸ David Anderson QC, July 2011. *Report on the Operation in 2010 of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006*.

Many of the problems identified by critics in relation to section 44 apply to section 60 stops and searches: arbitrariness, misuse, lack of monitoring and safeguards, and a disproportionate impact on ethnic minorities.

In *Gillan v. the United Kingdom* [2010] the European Court of Human Rights held that ‘the use of the coercive powers conferred by the legislation to require an individual to submit to a detailed search of his person, his clothing and his personal belongings amounts to a clear interference with the right to respect for private life’.⁶⁹ Under section 60, an individual who fails to stop when ordered is liable to be imprisoned. Further, PACE Code A makes clear that police officers can forcibly search an individual when he does not consent to be examined. Section 60 searches, like those under sections 44 and 45 of the Terrorism Act 2000, permits an officer to conduct any search as he sees fit. Following *Gillan v. the United Kingdom* [2010], a court would therefore have to conclude that such section 60 powers breach Article 8(1) of the Convention. The Court also noted that being subject to coercive stop and search powers for such a long time indicated a deprivation of liberty. It can therefore be argued that similar section 60 powers do not comply with Article 5(1).

Furthermore, Article 14 is engaged where there is discrimination on grounds of a relevant status, including race, in the enjoyment of a Convention right. Any discriminatory use of section 60 stop and search powers can also violate Article 14, when read in conjunction with Articles 8 or 5.

Government statistics show a sharp increase in the use of section 60 powers and a consistent ethnic disproportionality in individuals who are being stopped and searched. The number of actions under this power increased from 7,970 in 1997/98 to 118,112 in 2009/10.⁷⁰ Black and Asian people are far more likely to be stopped and searched, even though they make up only 8.7 per cent of the population. In 2009/10, 32.9 per cent of all those stopped were black and 16.1 per cent were Asian, even though neither group was more likely to be arrested for an offence after examination.⁷¹

⁶⁹ *Gillan & Quinton v. the United Kingdom*. Application No. 4158/05 (2010) 50 EHRR 45.

⁷⁰ MoJ, October 2007. *Arrests for Recorded Crime (Notifiable Offences) and the Operation of Certain Police Powers under PACE England and Wales, 2005/06*. Statistical Bulletin. Page 13; MoJ. October 2011. *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991*. Page 14.

⁷¹ In 2009/10, only 2.7 per cent of stops and searches of white people under section 60 CJPOA 1994 resulted in arrests, while only 2.5 per cent of stops and searches of black people, 1.4 per cent of stops and searches of Asian people and 2.7 per cent of stops and searches of people of mixed ethnicity resulted in arrests for an offence. (MoJ, October 2007. *Arrests for Recorded Crime (Notifiable Offences) and the Operation of Certain Police Powers under PACE England and Wales, 2005/06*. Statistical Bulletin. Page 42).

In December 2011, the Home Secretary announced she had commissioned a review of best practice of how police use stop and search powers. The same month, the Equality and Human Rights Commission wrote to the Home Secretary and the Metropolitan Police and three other forces stating it would take legal action if they could not explain what legitimate aim is served by the use of section 60, and explain and justify the disproportionate use of these powers against ethnic minorities, especially black people. In January 2012, the Metropolitan Police announced new measures intended to make stop and search more effective, reduce the number of section 60 authorisations, and increase the number of arrests.⁷²

4. The use of stop and search under PACE risks breaching Articles 5, 8 and 14

Under the Police and Criminal Evidence Act (PACE), officers can stop and search a person when they have ‘reasonable suspicion’ that the individual is in possession of stolen or prohibited articles.⁷³ For police, stop and search offers a means to confirm or allay suspicions about individuals without arresting them.⁷⁴ The majority of stops and searches are conducted under PACE, with 1,141,839 stops and searches in 2009/10, 20 per cent more than in 2006.⁷⁵

The PACE requirement of reasonable suspicion means the power is less likely to breach Articles 5 and 8, unless used arbitrarily. A breach of Article 14 is possible if the police treat a group of people differently from other groups in similar situations, and cannot justify their action objectively and reasonably.

Since 1995, the police have monitored stops and searches by ethnicity. In 2009/10, there were just over 1.1 million stops and searches⁷⁶ with black people 7 times more likely than white people per thousand of the population to be examined, and Asians 2.2 times more likely. Asians accounted for the greatest percentage rise between 2006/07 and 2009/10, with an increase of 62 per cent, followed by mixed and Chinese/other ethnic groups (both 54 per cent) and the black group (50 per cent).

72 Metropolitan Police Press Release, 12 January 2012. Available at: <http://content.met.police.uk/News/New-measures-announced-to-increase-effectiveness-of-stop-and-search/1400005915133/1257246745756>. Accessed 02/02/12.

73 Equality and Human Rights Commission, 2010. *Stop and Think: A critical review of the use of stop and search powers in England and Wales*. Page 15.

74 Ibid. Page 10.

75 MoJ, October 2011. *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991*. Page 34.

76 Ibid. Page 37.

There are various explanations for the disproportionate use of stop and search against ethnic minorities.⁷⁷ While these might explain some of the difference, they do not account for the extent of the differential impact of stop and search on ethnic minority communities. Arrest rates help measure crime rates, but are not a useful way to compare the likelihood that different racial groups will commit offences, and do not indicate that a person is guilty of an offence. In any case, stops and searches must be carried out on the basis of ‘reasonable suspicion’, rather than generalised arguments about particular groups.

The Equality and Human Rights Commission has noted considerable race disproportionality in demographically similar areas, suggesting differences in police practice.⁷⁸ Furthermore, it is estimated that stops and searches only reduce the number of disruptable crimes by 0.2 per cent which adds to the question whether the use of stop and search is justifiable.⁷⁹

Many domestic and international reports have drawn attention to the discriminatory use of stop and search.⁸⁰ For example, the Scarman report identified stops and searches of black people as contributing to the Brixton riots in 1981.⁸¹ The Stephen Lawrence inquiry report in 1999 found that the powers were used disproportionately against black people, with low arrest and conviction rates, and were not the best use of police resources.⁸² In 2011, the UN committee which monitors the Convention on the Elimination of Racial Discrimination (CERD) recommended that the government should review the impact of stop and search powers on ethnic minority groups, and report within one year.⁸³

77 The Equality and Human Rights Commission, 2010. *Stop and Think: A critical review of the use of stop and search powers in England and Wales*.

78 The Equality and Human Rights Commission, 2010. *Stop and Think: A critical review of the use of stop and search powers in England and Wales*.

79 Miller, J., Bland, N. and Quinton, P., 2000. *The Impact of Stops and Searches on Crime and the Community*, Police Research Series Paper 127. London: Home Office.

80 See an analysis of the issues in Bowling, B. and Phillips, C. *Disproportionate and discriminatory: Reviewing the evidence on police stop and search*. *Modern Law Review* (2007) 70(6), pp.936-961.

81 Lord Scarman, 1981. *The Brixton Disorders April 10-12 1981: Report of an inquiry*. London:HMSO.

82 Macpherson, W., 1999. *The Stephen Lawrence Inquiry, Report of an inquiry by Sir William Macpherson of Cluny*. London: Home Office.

83 CERD, 14 September 2011. Committee on the Elimination of Racial Discrimination Seventy-ninth session. CERD/C/GBR/CO/18-20. Para 18. Available at: <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.GBR.CO.18-20.pdf>. Accessed 15/02/12.

The government, through the National Policing Improvement Agency, introduced a 'Next Steps' programme in 2009 to improve stop and search practice.⁸⁴ However, only three police forces have so far introduced the programme. Separately, the Commission has reached binding agreements with two forces about using stop and search appropriately.⁸⁵

84 BBC, 2010. *Police stop and search powers 'target minorities'*. Available at: <http://news.bbc.co.uk/1/hi/uk/8567528.stm>. Accessed 10/02/12.

85 Equality and Human Rights Commission, 10 May 2011. *Commission and police forces sign agreement on stop and search*. Available at: <http://www.equalityhumanrights.com/news/2011/may/commission-and-police-forces-sign-agreement-on-stop-and-search/>. Accessed 10/02/12.

The detention of people for immigration purposes may not show sufficient regard to Article 5 rights

How Article 5 relates to people detained for immigration purposes

Detaining individuals for immigration purposes is not meant to be a punishment. People are typically detained while their identity, or their claim for admission to Britain, is established. Detention can also be used where there is reason to believe the person will fail to comply with any conditions attached to the grant of temporary admission or release, or to facilitate removal.⁸⁶

Article 5(1)(f) allows for the detention of non-nationals for the purposes of removal and border control, 'to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition'. However, to be lawful the government must ensure that detention complies with the whole of Article 5 prohibiting arbitrary detention and requiring that detention is proportionate and complies with domestic law. Detention must therefore comply with published policy if it is to comply with Article 5.⁸⁷

Many overlapping categories of people can be detained under Immigration Act 1971 powers.⁸⁸ Detainees may include people who lack documentation such as a student visa or a work permit; are waiting for an immigration officer to determine their right to enter the country; are waiting for their fast track asylum application or have been refused admission and are awaiting removal.

86 UKBA, *Enforcement Instructions and Guidance*, 55.1.1. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/>. Accessed 10/02/12.

87 *Lumba (W.L.) v. S.S.H.D.* [2011] UKSC 12, [2011] 2 WLR 671 and *Kambadzi v. S.S.H.D.* [2011] UKSC 23 [2011] 1 WLR 1299. The Supreme Court reaffirmed that the UK Border Agency must have a published policy on detention, which it is obliged to follow.

88 Silverman, S.J., March 2011. Briefing: *Immigration Detention in the UK*, The Migration Observatory. Page 4.

Individuals can also be detained because they fail to leave the UK voluntarily when their visa expires or do not comply with their terms of admission. Others are held because officials believe they will fail to comply with conditions attached to their temporary admission or release. Foreign nationals who have served prison sentences can be detained by the UK Border Agency (UKBA) if there are plans to deport them and officials consider that they may reoffend or harm the public.

In 2010, 25,935 people were detained solely under Immigration Act powers, of whom 64 per cent entered IRCs and 36 per cent entered short-term holding facilities.⁸⁹

Key issues

1. Children continue to be detained for immigration purposes, which may breach their Article 5 rights

Article 5 does not prohibit the detention of children for immigration purposes. However, children are also protected by the United Nations Convention on the Rights of the Child (UNCRC), which provides that ‘the best interests of the child shall be a primary consideration’. Under the Convention, no child should be deprived of liberty unlawfully or arbitrarily and detention should be ‘used only as a measure of last resort and for the shortest appropriate period of time’.⁹⁰ The need to safeguard and promote the welfare of the child must be the primary consideration of the decision-maker unless compelling reasons exist for a different approach.⁹¹

Section 55 of the Borders, Citizenship and Immigration Act 2009, and the UKBA’s associated Enforcement and Instructions Guidance require the UKBA to carry out its functions while having regard to safeguarding and promoting the welfare of children. Nonetheless, detaining children for immigration purposes

⁸⁹ Short-term holding facilities (STHF) are designed to detain people for short periods before removal or after arrival in the UK but they can also hold people awaiting transportation to a longer-term place of detention. Most are non-residential and are not intended to hold people for longer than 12 hours. Residential STHF can hold people for up to 7 days. STHFs are usually located at ports of entry or next to immigration reporting centres.

⁹⁰ UNCRC, Articles 3 and 37.

⁹¹ *R. (T.S.) v. S.S.H.D.* [2010] EWHC 2614 (Admin), [2010] All ER (D) 275 (Oct). Paras 24-36; *Suppiah & Ors v. S.S.H.D.* [2011] EWHC 2 (Admin), [2011] 04 LS Gaz R 18. Para 148. See also UNCRC Article 3(1) and Article 37.

has been widely criticised for appearing to punish and imprison children who have not been accused – let alone convicted – of any crime.⁹² In 2010, 405 children entered immigration detention, of whom 74 per cent were asylum detainees.⁹³ The medical profession has also highlighted the potentially harmful impact of detention on children's mental and physical wellbeing⁹⁴ and the Children's Commissioner for England has stated:

'While I fully acknowledge the Government's right to determine who is allowed to stay in this country, my contention remains that detention is harmful to children and therefore never likely to be in their best interests.'⁹⁵

In June 2010, the government announced it would end the detention of children for immigration purposes⁹⁶ and in December 2010 published its review on the subject, as it closed the family unit at Yarl's Wood IRC.⁹⁷ This was an important and significant step in reducing the number of children in detention and the length of time they spend there. Yet there are still circumstances in which children and families are held in immigration detention. The government's review set out a new family returns process where, 'as a last resort', families with children could be referred to new 'pre-departure accommodation' for up to 72 hours, or up to one week with ministerial approval.⁹⁸ The government

92 See, for example, the speech by the Deputy Prime Minister, June 2010: 'We are setting out, for the first time, how we are ending the detention of children for immigration purposes in the UK. How we are ending the shameful practice that last year alone saw over 1000 children – 1000 innocent children imprisoned.' Available at: <http://www.dpm.cabinetoffice.gov.uk/news/child-detention-speech>. Accessed 10/02/12.

93 Home Office, February 2011. Control of Immigration: Quarterly Statistical Summary, Quarter 4 (October–December). Page 27. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/control-immigration-q4-2010/control-immigration-q4-2010?view=Binary>. Accessed 13/02/12.

94 See, for example, Medical Justice's written response to the government's *Review into ending the detention of children for immigration purposes*, December 2010. Available at: <http://www.ukba.homeoffice.gov.uk/policyandlaw/consultations/closed/>. Accessed 10/02/12. See also Home Affairs Select Committee, *The detention of children in the immigration system* (First Report of 2009-10, HC 73). Para 11: 'it must be remembered that Yarl's Wood remains essentially a prison. There is a limit to how family-friendly such a facility can be; and while we accept that conditions have improved, we still regret that such a facility is needed in the first place.'

95 Children's Commissioner for England, 2010. *The Children's Commissioner for England's follow up report to: The arrest and detention of children subject to immigration control*. Page 2.

96 Deputy PM's speech on children and families, June 2010. Available at: <http://www.dpm.cabinetoffice.gov.uk/news/deputy-pms-speech-children-and-families>. Accessed 10/02/12.

97 Home Office, December 2010. *Review into Ending the Detention of Children for Immigration Purposes*.

98 Home Office, December 2010. *Review into Ending the Detention of Children for Immigration Purposes*. Page 21.

considers this facility more family-friendly than an IRC.⁹⁹ It has also set up an independent family returns panel to advise the UKBA on methods of deportation which take into account the need to protect and promote child welfare.¹⁰⁰

Meanwhile, the government has contracted the children's charity Barnardo's to work with children and families held at the pre-departure accommodation. Barnardo's recognises the criticisms surrounding the continued practice of placing children in immigration-related detention¹⁰¹ and has stated that 'if policy and practice fall short of safeguarding the welfare, dignity and respect of families, then Barnardo's will raise concerns, will speak out and ultimately, if we have to, we will withdraw our services'.¹⁰²

Children can also be detained when they arrive in the country. In response to a freedom of information request by the Children's Society, the government reported that 697 children were held at Greater London and South East ports between May and the end of August 2011, one-third of whom were unaccompanied.¹⁰³ Furthermore, the Children's Commissioner for England found that contrary to government policy, unaccompanied children arriving at Dover were not being held for the 'shortest appropriate period of time'. Instead, they were 'detained whilst significant interviews took place that will inevitably bear on their prospects of being granted permission to stay in the UK'.¹⁰⁴ In the cases she considered, the Commissioner found that the local authority was informed several hours after the child's arrival and well into the interview

99 Children can also be held with their families in Tinsley House on arrival in the UK. The Refugee Consortium has questioned why they cannot be held in the new family returns facility which ought to be more appropriate. (Refugee Consortium, Briefing on Immigration Detention of Children, September 2011).

100 UKBA, March 2011. *Family Returns Fact Sheets: Fact Sheet: Independent Family Returns Panel*. Page 1. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/296503/family-returns-fact-sheets>. Accessed 10/02/12.

101 See, for example, Gentleman, A., 18 October 2011. '*Child detention: has the government broken its promise to end it?*' The *Guardian*. Available at: <http://www.guardian.co.uk/uk/2011/oct/17/child-detention-government-broken-promise>. Accessed 10/02/12.

102 Morris, N., 1 August 2011. *Barnardo's gives ultimatum to Coalition over asylum-seeker deal*, The Independent, 1 August 2011, quoting Anne Marie Carrie, Barnardo's Chief Executive. Available at: <http://www.independent.co.uk/news/uk/politics/barnardos-gives-ultimatum-to-coalition-over-asylumseeker-deal-2329701.html>. Accessed 13/02/12.

103 The Children's Society. Press release: *Almost 700 children detained in four months*. Available at: <http://www.childrenssociety.org.uk/news-views/press-release/almost-700-children-detained-three-months>. Accessed 13/02/12.

104 Matthew A., January 2012. *Landing in Dover: The immigration process undergone by unaccompanied children arriving in Kent*. Children's Commissioner for England. Page 7.

process. She concluded that interviewing a child in depth, immediately after a long journey, was unnecessary and unlikely to be in their best interest.¹⁰⁵

Some unaccompanied children are also detained with adults because their age is disputed either by the UKBA officials or by social services. This means that they are inappropriately detained without the increased safety provisions that a children's setting affords. This is incompatible with their rights under UNCRC. This may happen either because they have had insufficient opportunity to confirm their age before detention, or because they have been wrongly assessed as adults.¹⁰⁶ Between October 2009 and March 2011, 24 children were held as adults and later released due to doubts about their age¹⁰⁷ and in February 2012, the Guardian reported that over £1 million had been paid in compensation to 40 children who had been unlawfully detained as adults.¹⁰⁸

2. The increased use of the 'fast track' system for processing asylum applications risks breaching Article 5

Asylum seekers, like everyone else, have rights to liberty and security under Article 5. The Refugee Convention and other international laws provide that, if someone is at risk of persecution in their own country, the government must consider their request for asylum.¹⁰⁹ Under the International Covenant on Civil and Political Rights (ICCPR) and connected case law, refugees have additional rights. Once a person has presented an application for asylum, they are considered to be 'lawfully within the territory'.¹¹⁰ A similar approach is taken

¹⁰⁵ Ibid. Pp. 5 and 7.

¹⁰⁶ Immigration Law Practitioners Association (ILPA), 2010. Written response to Home Office Review into ending the detention of children for immigration purposes. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/consultations/26-end-child-detention/>. Accessed 13/02/12.

¹⁰⁷ 10 October 2011, HC Reps, Col 82W. Available at: www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111010/text/111010w0003.htm#1110114002099. Accessed 13/02/12.

¹⁰⁸ Taylor, D., 17 February 2012. *£2m paid out over child asylum seekers illegally detained as adults*. The *Guardian*. Available at: <http://www.guardian.co.uk/uk/2012/feb/17/home-office-payout-child-asylum-seekers>. Accessed 20/02/12.

¹⁰⁹ In addition to the 1951 UN Convention, its Optional Protocol of 1967 states that a person who claims that his or her removal would breach Article 3 of the European Convention on Human Rights may have their application assessed without making any claim under the Refugee Convention. Such a person may have made a claim for subsidiary protection under the EU Qualification Directive Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted: Official Journal L 304, 30/09/2004 P. 0012- 0023.

¹¹⁰ International Covenant on Civil and Political Rights, Articles 9 and 12. *Saadi v. the United Kingdom*. Application No. 13229/03, (2008) 47 EHRR 17, joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyeve, Spielmann and Hirvelä.

by the Refugee Convention, which also demands that the movements of refugees should be restricted only in very limited circumstances.¹¹¹

A proportion of all asylum seekers in Britain are detained through the fast track procedure, where the applicant is held in order to resolve their application quickly. The UKBA's instruction on who is eligible states that:

'any asylum claim, whatever the nationality or country of origin of the claimant, may be considered suitable for [the detained fast track process] where it appears, after screening (and absent of suitability exclusion factors), to be one where a quick decision may be made. This assessment must be made on a case by case basis.'¹¹²

In the case of *Saadi*, the House of Lords and the European Court of Human Rights both accepted that the fast track procedure was compatible under Article 5,¹¹³ despite the fact that the applicants presented themselves for asylum upon arrival at the UK, posed no absconding risk and had committed no criminal offences. Both courts accepted that fast track detention amounted to detention for the purposes of preventing unauthorised entry, which is permitted under Article 5(1)(f) and which imposes no test of necessity for detention. The problem with this interpretation is that it does not differentiate between asylum seekers, who are seeking protection under the Refugee Convention, and any other migrants entering the country.

111 Geneva, 1951: Refugee Convention, Article 31. Article 18 of the Charter of Fundamental Rights of the EU also provides that, 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.' (2000/C 364/01).

112 Home Office, *DFT & DNSA – Intake Selection (AIU Instruction)*. Para 2.2. Available at: <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/detention/guidance/dftanddnsaintakeselection?view=Binary>. Accessed 30/08/12.

113 *Saadi v. the United Kingdom* [2008] 47 EHRR 17. Dr Saadi fled 'Iraq, when, in the course of his duties as a hospital doctor, he treated and facilitated the escape of three fellow member of the Iraqi Workers' Communist Party who had been injured in an attack'. On 30 December 2000 he immediately applied for asylum on landing at Heathrow airport and was granted temporary admission before being placed on the DFT. He was released following an initial refusal of his claim for asylum, against which he appealed. Finally, following various appeals, he was granted asylum in January 2003: Algar, T. and Phelps, J., 2011. *Fast Track to Despair*. Detention Action. Page 14.

However, the use of the fast track procedure may no longer conform with the Convention as interpreted in *Saadi*. Since 2001, when Mr Saadi was detained, the government has increasingly used the detained fast track to assess asylum applications. This approach has been heavily criticised for depriving applicants of their liberty for administrative ease rather than as a last resort.¹¹⁴ In 2010, for example, 2,571 people were routed into fast track, an increase of 21.7 per cent on the previous year.¹¹⁵ This increase was despite the number of asylum claims dropping, from 71,027 at its 2002 peak to 17,916 in 2010.¹¹⁶

In the *Saadi* case, the European Court of Human Rights accepted that a short period of seven to 10 days detention was not excessive when the government had to deal with a sudden increase in asylum seekers arriving in Britain. However, asylum seekers are now detained for longer than the period considered acceptable in the *Saadi* case. Asylum seekers may be detained before officially entering the fast track process. In 2007, the Joint Committee on Human Rights stated that:

‘although fast track detention for anything more than a short, tightly controlled period of time is unlawful, some asylum seekers find themselves detained at the beginning of the asylum process for periods in excess of this.’¹¹⁷

In February 2012, the Independent Chief Inspector of the UKBA found that, on average, in 114 cases he sampled, people waited in detention for 11 days before they were interviewed about their asylum case and another two days before a decision was made. This is longer than the UKBA’s indicative timescales of 2 days in detention before interview and a further 1 day before a decision.¹¹⁸

114 See, for example, UNHCR, November 2011. *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report – Universal Periodic Review: United Kingdom*. Available at: <http://www.unhcr.org/refworld/county,,,GBR,4562d8b62,4ecb7ec02,0.html>. Accessed 13/02/12.

115 Home Office, Asylum data tables Immigration Statistics April–June 2011 Volume 3, table 12. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q2-2011v2/asylum3-q2-11-tabs>. Accessed 13/02/12.

116 Home Office, *Asylum data tables Immigration Statistics April – June 2011 Volume 1*. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q2-2011v2/asylum1-q2-11-tabs>. Accessed 09/02/12.

117 JCHR, March 2007. *The Treatment of Asylum Seekers* (Tenth Report of Session 2006–07). Page 74.

118 Independent Chief Inspector of the UK Border Agency. February 2012. *Asylum: A thematic inspection of the Detained Fast Track*. Page 22.

The lawfulness of detention depends on the length of time spent in detention before an asylum decision is made and the requirement for flexibility to address individual circumstances to support fairness in the process.¹¹⁹ The Chief Inspector noted that information explaining why the indicative time scales were not met was absent in most of the cases they examined.¹²⁰ Unsuccessful applicants may subsequently wait for months in detention because they appeal their cases,¹²¹ or because the government is unable to remove them from Britain. In a sample of 55 cases, the Chief Inspector found that the average length of time people spent in detention from arrival to removal was 88 days, although in one case a person remained in detention for 355 days before being removed.¹²² Detention under the fast track process therefore often extends for far longer periods than set out in the guidance or considered by the European Court of Human Rights in *Saadi*.

In *Saadi*, the European Court ruled that detention in conditions that were not prison-like was acceptable for administrative convenience. Government emphasised the ‘relaxed regime with minimal physical security’ in the fast track detention centre in the Saadi case. Both the House of Lords and the European Court emphasised that this was relevant to their decisions that fast track detention did not breach Article 5:

‘If conditions in the centre were less acceptable ... there might be more room for doubt ... the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country.’¹²³

119 *R. (Refugee Legal Centre) v. Secretary of State for the Home Department* [2004] EWCA Civ 1481 [2005] 1 WLR 2219.

120 Independent Chief Inspector of the UK Border Agency. February 2012. *Asylum: A thematic inspection of the Detained Fast Track*. Page 23.

121 Government notes that if for reasons of fairness the court allows adjournments for additional evidence to be obtained, this may occasionally extend timescales and that this would very rarely extend for over a month.

122 Independent Chief Inspector of the UK Border Agency. February 2012. *Asylum: A thematic inspection of the Detained Fast Track*. Page 25. Similar findings were provided by voluntary sector organisations. See also: BID, March 2008. *Briefing paper on the detained fast track*. Page 2. Available at: <http://www.biduk.org/266/briefing-papers/2009-bid-briefing-paper-on-the-detained-fast-track.html>, page 2; Algar, T. and Phelps, J., 2011. *Fast Track to Despair*. Detention Action. Pp. 21-22.

123 *Saadi v. the United Kingdom* [2008] 47 EHRR 17. Paras 24 and 74.

The conditions of detention considered by the courts in *Saadi* are very different from those at Harmondsworth detention centre, where the majority of fast track detainees are now held. In June 2010, capacity at Harmondsworth was increased from 251 to 615.¹²⁴ All of the new buildings are high security (category B standard) prison-style accommodation. At any one time, 30-40 per cent of Harmondsworth detainees will be held in such category B conditions. Government states that the regime is more relaxed than in a prison, but the HM Chief Inspector of Prisons still noted the 'prison type accommodation, in small and somewhat oppressive cells'.¹²⁵

The UNHCR has long held that the detention of asylum seekers is undesirable, should only be considered as a last resort, and that accelerated procedures should only be used where adequate safeguards guarantee fairness of procedure and quality of decision-making.¹²⁶ The speed of the fast track process is to resolve asylum applications quickly to the benefit of both the asylum applicant and the UKBA. Yet its rapidity risks making the process unfair. The UNHCR found that there are inadequate screening processes which lead to complex cases and vulnerable applicants entering the fast track system.¹²⁷ While acknowledging recent improvements, it found that the UKBA did not always follow the appropriate methodology for assessing each element of an asylum applicant's case.¹²⁸ In particular, there were inadequate safeguards to ensure that asylum seekers were able to present their case sufficiently, and inappropriate burdens were placed on applicants to prove their claims when they were detained.

¹²⁴ Independent Monitoring Board, Harmondsworth Immigration Removal Centre, May 2011. *Annual Report 2010*. Page 8. Available at: <http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2010/harmondsworth-2010.pdf>. Accessed 13/02/12.

¹²⁵ HM Chief Inspector of Prisons, 2010. *Report on an announced inspection of Harmondsworth Immigration Removal Centre, 11–15 January 2010*. Pp. 5-6.

¹²⁶ UNHCR, August 2010. *Quality Integration Project, Key Observations and Recommendations*. Page 1. Available at: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/First_Quality_Integration_Project_Report_Key_Findings_and_Rec_01.pdf. Accessed 13/02/12.

¹²⁷ Ibid. Page 4.

¹²⁸ Ibid. Page 2.

The UNHCR also noted that, while applicants and their legal representatives can ask for more time to present their claim properly, there were ‘instances where flexibility was requested by the legal representative but refused for reasons which did not appear justified.’¹²⁹ The UKBA has since introduced a policy which states that ‘the fact that an individual is in [fast track] should not bear on the decision whether to wait for further evidence.’¹³⁰ It adds that while delays will not be appropriate in most circumstances, minor delays can be authorised in the interests of fairness.

3. Contrary to government policy, UK Border Agency staff at detention centres do not always follow the correct procedures to safeguard vulnerable individuals and remove them from detention. This has led to Article 5 breaches and, in some cases, a breach of Article 3

Article 5 does not explicitly forbid the detention of vulnerable foreigners in immigration detention. Yet detention can have an impact on the mental health of individuals who flee to Britain because they have been tortured, or who already have mental health conditions. The impact of detention on such individuals may be sufficient to engage rights to psychological integrity which fall within the right to private life (Article 8), and even the prohibition of inhuman and degrading treatment (Article 3) and the right to life (Article 2).

The UKBA is subject to guidance intended to identify victims of torture and people with mental health conditions and to avoid their detention where it could exacerbate their distress, and where there are no exceptional factors to justify detention. Where such policies are not followed, this can lead to unlawful deprivation of liberty. Rule 34 of the Detention Centre Rules 2001 requires that anyone detained is examined by a qualified GP within 24 hours of arriving in a detention centre.¹³¹ Rule 35 requires that doctors, ‘report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention’.¹³² Such individuals would include those whose mental health condition or disability cannot be

¹²⁹ UNHCR, August 2010. *Quality Integration Project, Key Observations and Recommendations*. Page 5. Available at: http://www.unhcr.org.uk/fileadmin/user_upload/pdf/First_Quality_Integration_Project_Report_Key_Findings_and_Rec_01.pdf. Accessed 13/02/12. In 2008, 1,172 asylum applicants on the fast track process had their initial asylum application turned down. 22 were granted asylum. In 2009 these figures were 1,149 and 24 respectively, in 2010 1,748 and 46 respectively (Home Office, Asylum data tables Immigration Statistics April–June 2011 Volume 3, table 12. Available at: <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-q2-2011>. Accessed 13/02/12).

¹³⁰ Home Office, *Detained Fast Track Processes – Timetable Flexibility*, Sections 6 and 8.

¹³¹ ‘Medical practitioner’ is defined in Rule 33 of the Detention Centre Rules (SI 2001/238 as amended) as someone ‘vocationally trained as a general practitioner’.

¹³² Detention Centre Rules 2001.

‘satisfactorily managed’ in detention.¹³³ Rule 35(3) also requires doctors to report to case managers any detained persons who may have been the victims of torture, who must notify the Home Office without delay.

The UKBA’s Enforcement Instructions and Guidance for 2008 provided that people suffering from mental illness could be detained in only very exceptional circumstances.¹³⁴ The presumption was in favour of release. In contrast, the current 2010 Enforcement Instructions and Guidance allows for the detention of people with mental illness unless their mental illness is so serious it cannot be managed in detention. In such cases, exceptional reasons will be needed to justify their detention. This appears to reverse the presumption in the previous guidance.¹³⁵ The government states that there has been no change in policy, but that this clarifies the 2008 policy.¹³⁶

Mentally ill people are inappropriately detained. In *R. (S.) v. S.S.H.D.* [2011], for example, the High Court found that the detention of a seriously mentally ill man at Harmondsworth detention centre in 2010 amounted to inhuman or degrading treatment, contrary to Article 3.¹³⁷ A similar finding was made a few months later in *R. (B.A.) v. S.S.H.D.* in relation to the detention of another man at Harmondsworth in 2011.¹³⁸

In *R. (D. and K.) v. S.S.H.D.* [2006], the High Court ruled that the medical examination and subsequent report on a detainee must at least provide independent evidence of torture for the Home Office to decide that further detention is necessary.¹³⁹ The UKBA guidance notes that independent evidence of torture should weigh strongly in favour of release.¹⁴⁰ However, an unsupported torture claim does not automatically prevent detention.

¹³³ UKBA, Enforcement Instructions and Guidance. Para 55.10.

¹³⁴ Ibid. See *R. (B.A.) v. S.S.H.D.* [2011] EWHC 2748 (Admin), [2011] All ER (D) 219 para 179.

¹³⁵ Ibid. See *R. (B.A.) v. S.S.H.D.* [2011] EWHC 2748 (Admin), [2011] All ER (D) 219 para 179.

¹³⁶ Government comments on the Equality and Human Rights Commission’s draft Human Rights Review, December 2011.

¹³⁷ *R. (S.) v. S.S.H.D.* [2011] EWHC 2120 (Admin), [2011] EWHC 2120 (Admin), 175 CL&J 551.

¹³⁸ *R. (B.A.) v. S.S.H.D.* [2011] EWHC 2748 (Admin), [2011] All ER (D) 219.

¹³⁹ *R. (D. & K.) v. S.S.H.D.* [2006] EWHC 980 (Admin), 150 Sol Jo LB 743, cited with approval in the Supreme Court in *Kambadzi*.

¹⁴⁰ UKBA, *DFT and DNSA – Intake Selection (AIU Instruction)*, para 2.3.

Evidence indicates that the UKBA often does not follow its rules when assessing whether individuals are torture victims. Her Majesty's Chief Inspector of Prisons (HMCIP) has repeatedly found breaches of Home Office policy and Detention Centre Rules in the failure to maintain proper systems to establish whether detainees bear signs of torture, such as scarring or post-traumatic stress disorder.¹⁴¹ Medical Justice and other organisations have emphasised that the Rule 35 safeguard is dangerously ineffective, as demonstrated by a case reported by Channel 4 in September 2010.¹⁴² A woman who claimed asylum on the basis of having been repeatedly raped in a West African prison, including by state officials, was detained at Yarl's Wood without proper medical examination, as required by Rule 35. Instead of alerting the Home Office promptly about her claims, as required under Rule 35, the Judge said the UKBA sent a 'pathetic apology' of a report which took over a week to arrive, with.

'...no indication that anyone took it into account at all... it is difficult to imagine a breach which more closely affects somebody who has been the victim of torture and in this case the omission is quite unforgivable'.

The Judge added that total failure to comply with Rule 35 in this case constituted outrageous conduct. She was eventually released from detention and compensated.

In February 2011, following longstanding criticisms of the Rule 35 mechanism, the UKBA published an audit to 'address the perception among some NGOs that the UK Border Agency fails to comply with ... policy and detains thousands of torture victims every year.'¹⁴³ The audit found that in a two month sample, officials responded in just 35 per cent of cases within the two working-day time limit required by the policy. NGOs in the sector were critical

¹⁴¹ See, for example, HM Chief Inspector of Prisons reports on Harmondsworth IRC (11-15 January 2010), Brook House IRC (15-19 March 2010), Colnbrook IRC and short-term holding facility (16-27 August 2010), Tinsley House IRC (7-11 February 2011), Campsfield House IRC (16-18 May 2011) and Haslar IRC (31 May- 3 June 2011).

¹⁴² Channel 4 News, 24 September 2010. Judge condemns treatment of torture victim. Available at: <http://www.channel4.com/news/judge-condemns-treatment-of-torture-victim>. Accessed 15/02/12.

¹⁴³ UK Border Agency, Detention Centre Rule 35 Audit, 4 February 2011. Available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/detention-centre-rule-35-audit/>.

that this analysis only looked at timescales and failed to examine content of the reports, the quality of the detention review, the assessment of medical evidence or the reasons to maintain detention in 91 per cent of the cases it examined.¹⁴⁴

The UKBA has told the Equality and Human Rights Commission that ‘a forthcoming audit will look at progress made in improving the administrative process, and will also examine qualitative issues relating to Rule 35 report issuances and consideration’.¹⁴⁵ The government also notes that it implemented measures in early 2011 to improve important administrative aspects of the Rule 35 process. At the same time, work began to improve qualitative elements which will be introduced in 2012.

Routing asylum seekers who claim to be survivors of torture into fast track detention is inappropriate, because the process is designed to deal with cases that can be resolved quickly.¹⁴⁶ However, torture survivors may enter the system because the information needed to assess suitability for fast track is usually only available at the asylum interview which takes place once the person is in detention. Prior to this, asylum seekers undergo an initial screening process to assess whether they are suitable for the fast track process. At this screening, asylum seekers are not initially asked whether they have been tortured, but whether they have any medical conditions or disabilities, which torture survivors may not equate with their experience.¹⁴⁷ Torture survivors are unlikely to realise that they will need to produce ‘independent evidence of torture’ at the screening interview to avoid being routed into the fast track process, or in order to establish their protection claim. The majority will have arrived in Britain following a long journey and will not have received legal advice, or sought independent evidence of torture before the interview.

¹⁴⁴ See, for example, Medical Justice, March 2011. *Ignored detention centre medical reports means torture survivors left to rot*. Page 4. Available at: <http://www.medicaljustice.org.uk/mj-reports,-submissions,-etc./responses/1716-ignored-detention-centre-medical-reports-means-torture-survivors-left-to-rot-040311.html>. Accessed 15/02/12. The Refugee Council, 2 March 2011: Refugee Council still concerned for vulnerable detainees following review. Available at: http://www.refugeecouncil.org.uk/news/archive/press/2011/march/020311_Concerns_vulnerable_detainees_following_UKBA_review. Accessed 24/02/12.

¹⁴⁵ Government comments on the Equality and Human Rights Commission draft report of the Human Rights Review.

¹⁴⁶ Human Rights Watch, 2010. *Fast-Track Unfairness Detention and Denial of Women Asylum Seekers in the UK*. Page 34.

¹⁴⁷ Other criticisms of the screening stage include the fact that the interviews are not private and that many torture survivors are likely to find it difficult to disclose information to officials due to a lack of trust or feelings of shame about what has happened to them. Screening officers are also not trained to identify torture survivors and decisions to route someone into the fast track process are taken by staff in the fast track Intake Unit who do not meet the applicant.

Human Rights Watch conducted research on the detention of women in the fast-track process which included interviews with women with direct experience of the fast track process and with solicitors, barristers who provide legal advice and assistance to women on the fast-track process.¹⁴⁸ One case in particular highlights how the screening process can fail to prevent a vulnerable individual from entering the system. In June 2009, 'Laura', an asylum seeker from Sierra Leone, was placed in the fast-track detention system despite having witnessed her father's beheading, been raped several times, imprisoned, forced to have an abortion by having her stomach cut open, and trafficked into Britain. The screening interview was not designed to elicit such information, and did not do so. 'Laura' was only released from detention and granted refugee status after significant interventions by NGOs.¹⁴⁹

In 2006, the Home Office acknowledged that the fast track procedure was not sufficiently robust to identify complex claims.¹⁵⁰ In 2008, the UN Refugee Agency reported that many unsuitable cases were fast tracked due to a lack of clear guidance about which cases could be 'decided quickly'.¹⁵¹ The Council of Europe's Commissioner for Human Rights has suggested that these problems could be mitigated through precise legislation that ensures no complex cases or vulnerable groups, including victims of torture, are routed through the fast track system.¹⁵² Such clarification would help to protect vulnerable individuals from inappropriate detention, as well as provide greater transparency about the process for all detainees and decision-makers. It would also help reduce the risk of arbitrary and unlawful detention.

The UKBA has a policy under which applicants with confirmed pre-assessment appointments with Freedom from Torture (formerly the Medical Foundation for the Care of Victims of Torture) or the Helen Bamber Foundation will be released from detained fast track. Freedom from Torture states that it is not aware of any instances where a decision has been made to keep a client in the fast track after Freedom from Torture has offered an assessment appointment, though

148 Human Rights Watch, 2010. *Fast-Track Unfairness Detention and Denial of Women Asylum Seekers in the UK*.

149 Human Rights Watch, 2010. *Fast-Track Unfairness Detention and Denial of Women Asylum Seekers in the UK*. Page 35.

150 Human Rights Watch, 2010. *Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK*. Page 2.

151 Human Rights Watch, 2010. *Fast-Track Unfairness: Detention and Denial of Women Asylum Seekers in the UK*. Page 39 quoting from UNHCR, 'Quality Initiative Project, Fifth Report to the Minister', March 2008. Pp. 22-23.

152 Council of Europe, 18 September 2008. *Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe*, following his visits to the United Kingdom on 5-8 February and 31 March–2 April 2008, CommDH (2008) 23 Strasbourg.

sometimes clients may not be released from detention. Freedom from Torture confirms that, between January and November 2011, it received 177 referrals from legal representatives who believed there were strong grounds why the individuals concerned should not have been referred to the fast track process. The organisation argues that this high level of referrals is not sensitive enough to identify torture survivors.

The government has reported that:

‘new recording methods have been implemented, with a view to providing a more accurate description of DFT [detained fast track] releases, and of providing better analysis to inform DFT entry decisions, but it is clear that to operate a fair and responsive process, releases from the processes will continue in the future.’¹⁵³

4. Many immigrants have been detained for lengthy periods without a certain release date, which can be unlawful under Article 5

Domestic courts have strongly criticised government for depriving many people of their right to liberty for months and even years at a time with no reasonable prospect of prompt removal.¹⁵⁴ Between March and June 2011, for example, 217 people had been held for over a year in immigration detention with no idea when they would be released.¹⁵⁵ Of those, 47 had been held for two years or longer. *R. (Sino) v. S.S.H.D.* [2011] concerned an Algerian man detained for just under five years.¹⁵⁶

Detention for immigration purposes must comply with the law restricting the use of administrative detention. This includes the *Hardial Singh* principles, which prohibit the use of administrative detention except to facilitate deportation or removal, and detention for an unreasonable length of time without realistic prospect of deportation in a reasonable period.¹⁵⁷ It also requires the Home Office to act with reasonable diligence and speed in effecting removal.¹⁵⁸

¹⁵³ Government comments on the Equality and Human Rights Commission’s draft Human Rights Review, December 2011.

¹⁵⁴ For example, see: *R. (Abdi) v. S.S.H.D.* [2008] EWHC 3166 (Admin), [2008] All ER (D) 247 (Dec). *Lumba*, concerned a mentally ill foreign national former offender who had been detained administratively for over four years after the completion of his criminal custodial term.

¹⁵⁵ Home Office, *Detention data tables Immigration Statistics April–June 2011* (August 2011): <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/immigration-asylum-research/immigration-tabs-q2-2011v2/detention-q2-11-tabs-table-dt.07.q>.

¹⁵⁶ *R. (Sino) v. S.S.H.D.* [2011] EWHC 2249 (Admin), [2011] All ER (D) 128 (Aug).

¹⁵⁷ *R. v. Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704. Any Article 5 breach is normally because the *Hardial Singh* principles have been breached.

¹⁵⁸ *Ibid.*

The UK is alone among members of the European Union in detaining people for such lengthy periods. Unlike most European countries, and contrary to the 1998 recommendation of the UN Working group on Arbitrary Detention, the UK has rejected setting a legal limit on the time that a person may be held in immigration detention.¹⁵⁹ Deprivation of liberty for extended periods can have a significant impact on the mental and physical health of those detained, who must live with the daily uncertainty of not knowing if they are about to be deported or released. This can manifest itself in high levels of symptoms for anxiety, depression, post-traumatic stress disorder, self-harm and suicide attempts.¹⁶⁰ It is also costly. In 2005-06, the annual cost of detaining one person in Colnbrook immigration detention centre was about £70,000.¹⁶¹ Paying compensation when people have been wrongly detained is also expensive: in 2009-10, £12 million was paid in compensation and legal costs for unlawful detention cases.¹⁶²

Delays in detention often occur because it is difficult to get the necessary paperwork from certain countries of origin whose embassies routinely refuse to recognise their undocumented nationals.¹⁶³ Detainees themselves may also not cooperate with the removal process by refusing to provide accurate and timely information about their nationality and identity to secure travel documentation. In other cases, the courts have suspended removals to particular countries due to fears for the safety of those intended for deportation. Where people are fighting extradition orders, this may also lead to extended periods of detention.¹⁶⁴ Yet such administrative issues do not justify detention being

159 Independent Asylum Commission, 27 March 2008. *Fit for Purpose yet? The Independent Asylum Commission's Interim Findings*. Page 55.

160 See, for example, Phelps, J. et al. 2009. Detained Lives, Detention Action. Steel, Z., Silove, D., Brooks, R., Momartin, S., Alzuhairi, B. and Susljik, I., 2006. *Impact of Immigration Detention and temporary protection on the mental health of refugees*. The British Journal of Psychiatry.

161 Home Office, response to a request under the Freedom of Information Act, January 2007, quoted by Information Centre about Asylum Seekers and Refugees, *Detention of Asylum Seekers in the UK* (2007). Available at: <http://www.icar.org.uk/11797/briefings/detention-of-asylum-seekers.html>. Page 6.

162 HL Debs, 29 Nov 2010, Column WA410. Available at: www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101129w0001.htm.

163 Joint Committee on Human Rights, March 2007. *The Treatment of Asylum Seekers* (Tenth Report of Session 2006-07). Page 81. In *R. (on the application of Sino) v. Secretary of State for the Home Department* [2011] EWHC 2249 (Admin) (25 August 2011) the High Court judge held that a failure to co-operate with removal does not itself justify immigration detention (in a case in which there was never any prospect of removal).

164 See, for example, Babar Ahmad who has been in detention since 2004 and is fighting extradition to the USA.

prolonged for months or years. Where detainees are able to bring proceedings, the government has been successfully challenged on many occasions since the end of 2008.¹⁶⁵

Foreign national ex-offenders account for a large proportion of those in long-term detention.¹⁶⁶ The UKBA's Enforcement Instructions and Guidance emphasises the importance of detention if there is any risk of re-offending¹⁶⁷ and does not include possible alternatives, such as release with reporting requirements, electronic tagging and probation support. In his recent report, the Independent Chief Inspector of UKBA underlined a series of issues regarding how the UKBA dealt with foreign national prisoners.¹⁶⁸ They included the fact that, while the UKBA presumes the release of such prisoners subject to satisfactory assessment of the risk to the public and of absconding, there was 'no evidence that a detailed assessment of the risk of reoffending had taken place in each case'.¹⁶⁹ The Chief Inspector contrasted the UKBA's approach to the release of foreign nationals from detention with the courts' decision to grant bail to ex-offenders between February 2010 and January 2011; 109 foreign national prisoners were released by the UKBA, compared with 1,102 by the courts.¹⁷⁰ He noted that the highest percentage of cases involved foreign nationals sentenced

¹⁶⁵ Detention Action (formerly known as London Detainee Support Group), *No Release, No Return, No Reason – Challenging Indefinite Detention* (September 2010): <http://www.bctrust.org.uk/wp-content/uploads/2011/04/NoReturnNoReleaseNoReasonReport.pdf>. Pages 10, 11. Detention Action, an NGO, examined the progress in the cases of 188 people who had been held for over a year. After 20 months, of 167 cases, 95 were released, 56 deported, 1 absconded and 15 remained in detention.

¹⁶⁶ Figures on those in long-term immigration detention do not include foreign offenders who are in prison post-sentence. In his latest annual report, HM Chief Inspector of Prisons noted that he continued to find people held under immigration powers in prisons; that too many foreign nationals reached their release date without knowing their immigration status and, in many cases, they 'could identify no clear reason why some remained in prison many months after the end of sentence'. *HM Chief Inspector of Prisons for England and Wales Annual Report 2010-2011* (September 2011). Page 35.

¹⁶⁷ Enforcement Instructions chapter 55.

¹⁶⁸ Independent Chief Inspector of the UK Border Agency, *A thematic inspection of how the UK Border Agency manages foreign national prisoners: February to May 2011* (27 October 2011). Available at: <http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Thematic-inspection-report-of-how-the-Agency-manages-Foreign-National-Prisoners.pdf>.

¹⁶⁹ Chief Inspector's Report, *ibid.* Paras 8 and 9. 'The policy appears to promise decisions based on an assessment of individual risk, but then withdraws that promise in the case of FNPs who have committed "serious" offences. But, in my judgement, that approach is inconsistent with other passages in the policy which indicate that the assessment, and resulting balance, of relevant factors, must be done in an individualised way.' See also *R. (B.A.) v. S.S.H.D.* [2011] EWHC 2748 (Admin).

¹⁷⁰ Independent Chief Inspector of the UK Border Agency, *A thematic inspection of how the UK Border Agency manages foreign national prisoners: February to May 2011*, 27 October 2011. Page 20.

for fraud and forgery,¹⁷¹ which do not carry particular weight under the UKBA policy when assessing the risk of further offending or harm to the public. Such detentions may, therefore, be unnecessary.

The Chief Inspector also highlighted the increase in the average length of detention from 143 days in February 2010 to 190 days in January 2011. Twenty-seven percent of all foreign national prisoners detained after their custodial sentence were held for more than a year.¹⁷² The Chief Inspector recommended that the UKBA should produce clearer timescales for obtaining travel documentation in individual cases to ensure that deportation action is accelerated where appropriate. In addition, he said that the UKBA should actively manage all cases where foreign national prisoners have yet to be deported, and regularly consider whether deportation can be enforced or the person can remain in the UK.¹⁷³

5. Under Article 5, anyone deprived of their liberty must have the opportunity to challenge their detention. However, the bail process remains inaccessible to many immigration detainees, including those unlawfully detained

Bail applications are an important check on the use of immigration detention, with suitability for release, rather than the legality of the detention, considered by the independent immigration judge at a hearing.¹⁷⁴ For most immigration detainees, an application for bail is the quickest way to seek release.

The JCHR noted that it had ‘heard considerable evidence that although the right to apply for bail is available to all detained asylum seekers after seven days, in reality many detainees are unaware, or unable to exercise, this right because of language difficulties, a lack of legal representation and mental health issues’.¹⁷⁵ Immigration officers must inform detainees of their bail rights on entering detention, but the charity Bail for Immigration Detainees (BID) found that it regularly has to explain these rights and many detainees are unaware of the limited legal advice available to them.¹⁷⁶

¹⁷¹ Ibid. Page 22.

¹⁷² Ibid.

¹⁷³ Ibid. Page 5.

¹⁷⁴ BID, *A nice judge on a good day: immigration bail and the right to liberty*, July 2010. Available at: <http://www.biduk.org/420/bid-research-reports/a-nice-judge-on-a-good-day-immigration-bail-and-the-right-to-liberty.html>. Page 3.

¹⁷⁵ Joint Committee on Human Rights, March 2007. *The Treatment of Asylum Seekers* (Tenth Report of Session 2006-07). Page 81, para 280.

¹⁷⁶ BID, *A nice judge on a good day: immigration bail and the right to liberty*, July 2010; Bail for Immigration Detainees & Information Centre about Asylum and Refugees, June 2011. ‘Provisional results of a survey of levels of legal representation for immigration detainees across the UK detention estate’.

Most people held in immigration detention rely on Legal Services Commission (LSC) funding to find a lawyer. Legal aid funding is generally provided through the LSC's Detention Duty Advice scheme, which offers access to a limited number of solicitors' firms through exclusive contracts. BID has expressed concern that this scheme is too small to provide advice to all detainees, and that the advice is of variable quality.¹⁷⁷ HMCIP has noted that 'as a general rule, it remains extremely difficult for detainees to find a competent and available legal representative; there is a national shortage of competent specialist legal advisers' and 'less than half of the detainees we have surveyed have had a legal visit in detention'.¹⁷⁸ BID and the Immigration Law Practitioners Association (ILPA) made similar findings.¹⁷⁹

Without adequate legal advice and representation, many detainees rely on a limited number of overstretched publicly-funded lawyers and charities. Others can only represent themselves, a difficult task made harder for those with little or no English, and for the judges, who must determine the merits of cases. BID observed 36 cases in 2010 and found that almost half of all bail applicants were unrepresented, and that the success rate for unrepresented applicants was significantly lower than for those with representation.¹⁸⁰

Insufficient publicly-funded legal advice for detainees puts at risk those who have made allegations of torture and who require an independent medical report. The charity Freedom from Torture, which produces such reports, is only able to do so if the detainee has been granted legal aid.¹⁸¹

¹⁷⁷ BID, 11 February 2011. BID submission to Ministry of Justice consultation on reform of legal aid in England and Wales 2011. Available at: <http://www.biduk.org/154/consultation-responses-and-submissions/bid-consultation-responses-and-submissions.html>. Accessed 27/02/12.

¹⁷⁸ Joint Committee on Human Rights, *The Treatment of Asylum Seekers*: Tenth Report of Session 2006-07. March 2007. Para 286.

¹⁷⁹ Ibid. Paras 287, 290. See also: BID: Response to Ministry of Justice proposals for the reform of Legal Aid in England and Wales.

¹⁸⁰ BID, *A nice judge on a good day: immigration bail and the right to liberty*, July 2010. Page 22.

¹⁸¹ Keith Best, CEO of Freedom from Torture, speaking to the Equality and Human Rights Commission at a Regional Roundtable, 4 July 2011.

Part III of the Immigration and Asylum Act 1999 contained measures providing for automatic bail hearings for every detainee after 28 days but was never implemented. The Act was later repealed by the Nationality, Immigration and Asylum Act 2002.¹⁸² Many detainees are unable to access bail procedures without sufficient knowledge and adequate legal representation, contributing to the lengthy detention that many experience. In many cases, the Home Office is never required to justify to a court its decision to deprive an individual of their liberty.

For many in immigration detention, the ability effectively to challenge their detention through a bail application, as is their right under Article 5, cannot be realised.

¹⁸² Michael Mansfield QC believes that there needs to be a statutory 28-day time limit, as recommended by the JCHR as, in one sense, this is a reflection of Article 5(4) of the ECHR where ‘it is mandatory for the detainee to be able to take proceedings by which the lawfulness of his detention shall be decided speedily by a court’. BID, *A nice judge on a good day: immigration bail and the right to liberty*, July 2010. Foreword.

Article 6: The right to a fair trial

Article 6 of the European Convention on Human Rights provides that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and the facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Summary

Article 6 provides that everyone has the right to a fair trial in both civil and criminal cases. A party to legal proceedings has the right to be heard by an independent, impartial tribunal, in public, and within a reasonable amount of time. Article 6 is not subject to any exceptions, though the procedural requirements of a fair trial may differ according to the circumstances.

Article 6 specifies some additional aspects of the right to a fair trial that apply in criminal cases: the accused should be informed promptly about the charges against them in language they understand; they should have sufficient time and facilities to prepare a defence; they should be able to defend themselves in person or through a lawyer of their own choosing; and they should be given legal aid if they cannot afford representation and the interests of justice require it. They should also be able to call and question witnesses in the same way as the defence.

The state is obliged to establish courts which give all those accused a fair trial, and to ensure that nobody is punished without a fair trial.

The key issues we address in this chapter are:

The use of closed material may compromise the right to a fair trial

‘Closed material procedures’ deal with cases involving the use of sensitive material which the government considers cannot be made public without damaging the public interest. This means that some evidence is heard in secret; neither the person involved in the proceedings nor their representatives are told what it is. Instead, a ‘special advocate’ – appointed by the Attorney General – examines the closed material and represents the interests of the person affected in closed sessions. After service of the closed material, any communication between the special advocate and the person whose interests they represent is prohibited without the permission of the court on notice to the government. This means that a case may be decided against someone, often with devastating effect, without that person ever finding out the reasons why.

The review shows that:

- The use of closed material means that the person affected is unlikely to know the case against him or her, which will almost certainly breach the right to a fair trial.
- Evidence derived from secret intelligence sources may not be as robust as that used by police in an open court process.
- The use of intercept evidence would increase the chances of successful prosecution of terrorist suspects while helping to ensure their right to a fair trial.
- The use of special advocates in closed hearings does not provide sufficient protection against the risk of an unfair trial.
- The use of closed material is expanding and is now used across a range of proceedings – and the government is proposing to expand it further.

Children may be at risk of Article 6 breaches when the justice system does not cater for the child's ability to understand and participate in court proceedings

There are various concerns about the treatment of children in the justice system, which suggest that breaches of Article 6 may be occurring.

The review shows that:

- The age of 10 for criminal responsibility in England and Wales is lower than international guidelines. Children with learning or communication difficulties may not receive sufficient 'special measures', or adaptations to court procedure, to ensure a fair trial.
- Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity.

Cuts to legal aid may compromise the right to a fair trial

Proposed changes to legal aid for civil law cases, by limiting people's access to legal advice and representation, may compromise rights to a fair hearing under Article 6(1) of the European Convention on Human Rights.

The review shows that:

- The current ‘fixed fees’ system can act as a barrier to those with complicated and unusual cases.
- Removing legal aid from areas of civil law may mean some people do not have access to a fair hearing.
- The policies aimed at mitigating the impact of legal aid cuts may not be sufficient to ensure that everybody has access to justice.
- Changes to contracts for criminal legal aid may have an impact on the quality and supply of criminal defence lawyers.

The UK's obligations under Article 6

Article 6 provides that everyone has the right to a fair trial in both civil and criminal cases. This gives an individual the right to be heard by an independent, impartial tribunal, in public and within a reasonable amount of time.

The right to a fair trial is a limited right and the procedural requirements of a fair hearing may differ according to the circumstances. For example, hearings should generally be open to the public so that justice can be seen to be done. Yet some or all of a trial may be held in private because it may involve children, or national security interests. Courts in countries that have signed the Convention are allowed to apply their own procedural rules so long as the outcome is a fair trial.

Article 6(1) applies both to cases involving 'civil rights and obligations' and to criminal cases. Through a series of judgments, the European Court of Human Rights has interpreted civil rights and obligations as including areas such as family law, employment law and commercial law. The principles contained in Article 6(1) may also apply to certain cases involving the relationship between the individual and the state, especially disputes involving money and property. Administrative decisions made by public bodies which are not courts or tribunals, such as a review by a local authority planning inspector, must be compliant with Article 6(1) unless there is a right of appeal to a court or tribunal that does comply with its requirements.¹

Article 6(2) and 6(3) offer additional protection in cases where an individual is charged with a criminal offence. This is necessary because the sanctions for serious criminal offences are the potential loss of liberty. The presumption that a defendant is innocent until found guilty under the law is central to the principle of a fair criminal trial. People charged with a criminal offence need to be informed promptly and in detail about the case against them in a language that they understand. They need to have sufficient time and resources to prepare a defence; to be able to defend themselves in person or through a lawyer whom they choose; and to be given legal aid if they cannot afford a lawyer and this is necessary for

¹ The test case for compliance with Article 6 is whether or not the tribunal will be adjudicating on civil rights or obligations.

the interests of justice.² Defendants in a criminal case have the right to examine and call witnesses.³ They also have the right to a free interpreter if they cannot understand or speak the language used in court.

Article 6 imposes two different types of obligations on the state:

- **a negative obligation** not to punish anyone without a fair trial.
- **a positive obligation** to establish a court system which upholds this right – for example, by providing interpreters or legal aid in criminal proceedings.⁴

Relation to other articles

Article 6 is closely linked with Article 5, which protects the right to liberty and security. Together these Articles ensure that nobody can lose their liberty, which is a fundamental right, without access to a fair trial. Article 5(4) is particularly relevant. Together with Article 6, it guarantees the right to a fair hearing for anyone challenging the lawfulness of their detention by the state.

Article 6 is also connected with Article 7, which deals with retrospective punishment.⁵ This provides that a person should only be convicted of a crime if the person's act or omission was a crime recognised in law when it occurred. The punishment for a crime should be no greater than that prescribed by the law at the time the crime occurred.

² The European Court of Human Rights has held that legal aid should be granted in the interests of justice when a person risks deprivation of liberty: *Hooper v. the United Kingdom* [2005] 41 EHRR 1.

³ However, see *Al-Khawaja & Tahery v. the United Kingdom*, Application No. 26766/05 and 22228/06 [2011] ECHR 2127.

⁴ Council of Europe, Human Rights Education for Legal Professionals. Available at: <http://www.coehelp.org/mod/glossary/showentry.php?courseid=75&concept=Positive+obligation>. Accessed 16/02/12.

⁵ Article 7 of the ECHR sets out:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.

Finally, Article 6 is connected with Article 13, the right to an effective remedy. This sets out that the state must provide redress to anyone whose rights under the Convention are breached. Procedural obligations are also provided by other articles, such as Article 8, the right to a private and family life. For instance, a local authority would need to consult parents and provide full disclosure to them about reasons to place a child of theirs who was in care into adoption.⁶

⁶ Re M (Care: Challenging Decisions by Local Authority) [2001] 2 FLR 1300.

The development of Article 6 in Britain

The British legal systems are widely recognised internationally as fair and just. Almost everyone can expect a fair public hearing in a reasonable time in front of an independent court or tribunal. The principle of a fair trial has been central to the British legal systems for centuries. It has long been recognised as essential for the rule of law that people believe they will be fairly heard and judged in court. This principle was first documented in the Magna Carta which, in 1215, set out in the name of the king that, ‘to no one will we sell, to no one will we refuse or delay, right or justice’.⁷ An ancient principle of common law which roughly corresponds to Article 6 is ‘natural justice’, or the duty to act fairly. In 1689, the Bill of Rights set out a host of provisions and assurances in law, rescinding the power of the monarch to suspend laws without parliamentary approval, prohibiting excessive fines and bail, and protecting jury trial.

The precise definition of a fair trial has evolved over time. For example, before 1836 the prosecutor could address the jury to argue that a defendant was guilty. However, the defence counsel, if the defendant had one, was not permitted to address the jury to argue otherwise.⁸

An impartial judiciary, independent of government, is a vital element in guaranteeing a fair trial. Judicial independence is a fundamental check on the power of the state and has been protected by statute since the Act of Settlement in 1701. The Constitutional Reform Act 2005 provided further protection of this principle by requiring the Lord Chancellor, other ministers of the Crown, and all with responsibility for matters related to the judiciary to uphold its continued independence.⁹

7 British Library, *Treasures in full: Magna Carta*. Available at: http://www.bl.uk/treasures/magnacarta/translation/mc_trans.html. Accessed 08/12/2011.

8 Bingham, T., 2011. *The Rule of Law*. Penguin. Page 91.

9 Constitutional Reform Act 2005. Part 2, Section 3. Available at: <http://www.legislation.gov.uk/ukpga/2005/4/section/3>. Accessed 08/12/2011.

Procedural standards are one important way in which fairness is protected. In civil cases, for example, parties are required as a general principle to disclose documents that they will rely on in court, as well as documents in their possession, even if these are detrimental to their case. They should also exchange the statements of the witnesses they wish to call in advance.¹⁰ These requirements ensure that both parties know the facts of the case and can respond effectively to allegations against them. In criminal cases the prosecution has a duty to declare all its material but there is not an equivalent obligation for the defendant.

Criminal trials are generally held in public, unless it is necessary to employ 'special measures' to support vulnerable individuals or for national security reasons. While generally still held in public, this may offer individuals greater privacy or protection. For instance, rape victims can give their evidence in court from behind a screen, by live-link, or in private. If a victim has learning difficulties, they may be able to give their evidence by video or with the assistance of an intermediary.¹¹ Since June 2011, children and some other vulnerable people have been automatically eligible for such support without having to apply for it.¹²

The UK is a signatory to a number of international conventions protecting the right to a fair trial. These include the United Nations Convention on the Rights of the Child, which contains Article 40, covering juvenile justice, and the International Covenant on Civil and Political Rights (ICCPR), which also provides for a fair trial in Articles 9, 14 and 15.

The UK has developed domestic institutions which support and protect the right to a fair trial, most notably within the criminal and civil courts and tribunals. The Law Commission is an independent body which keeps the law under review and recommends reform where it is needed. Its aims are to ensure the law is as fair, modern, simple and cost-effective as possible. The Criminal Cases Review Commission is an independent body set up in 1997 to review possible

¹⁰ Civil Procedure Rules, Part 21. Available at: <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part31.htm>. Accessed 08/12/2011.

¹¹ Youth Justice and Criminal Evidence Act 1999. Part II, Chapter I. Available at: <http://www.legislation.gov.uk/ukpga/1999/23/part/II/chapter/I>. Accessed 08/12/2011.

¹² Ministry of Justice, 2011. *More rights for children and vulnerable adults in court*. Available at: <http://www.justice.gov.uk/news/press-releases/moj/newsrelease270611b.htm>. Accessed 08/12/2011. The changes include: Giving child witnesses (under 18s) more choice about the way they give their evidence, allowing them to opt-out of giving video-recorded evidence and instead give evidence in court; giving victims of rape and serious sexual offences the opportunity to give evidence via video-recorded statements automatically – something currently limited to child witnesses; ensuring children and vulnerable and intimidated adults can have a supporter in the room when they are giving video-link evidence.

miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and may refer appropriate cases to the appeal courts. The Legal Services Commission (LSC) runs the legal aid scheme in England and Wales, providing funding to help ensure that people get a fair hearing. The LSC also runs the Community Legal Advice service which provides limited legal telephone advice to people. The Legal Aid, Sentencing and Punishment of Offenders Bill, currently before parliament, would abolish the LSC, transferring to the Lord Chancellor the administration of legal aid. The Lord Chancellor would have the power to issue directions and guidance on the operation of the legal aid scheme to a Director of Legal Aid Casework. Concerns have been raised about the proposed Director's apparent lack of independence from the government.¹³

Despite the strong legal and institutional framework supporting the effective implementation of Article 6, our evidence suggests that the UK may not be fully meeting its obligations in some areas. In each setting we look at whether there are adequate laws to comply with Article 6, and whether there are institutions and processes in place to protect and uphold the law. We draw conclusions about the key problems which must be tackled if the UK is to meet in full its human rights obligations under Article 6.

¹³ Joint Committee on Human Rights. 19 December 2011. Legislative Scrutiny: Legal Aid, Sentencing and Punishment of Offenders Bill. HL Paper 237, HC 1717. Para 1.22.

The use of closed material compromises the right to a fair trial

How Article 6 applies in cases involving sensitive intelligence material

The basic principles of a fair hearing include that the person involved should be informed of the case against them. The case should also be heard in front of an independent and impartial court within a reasonable time.

A trial – or, in civil cases, a hearing – is usually heard in public so that justice can be seen to be done. In both civil and criminal cases, all parties are normally entitled to see the evidence of the other parties as a matter of basic fairness. In addition, the parties are required to disclose to one another any other material they have which either harms their case or helps the other side. A significant exception to the requirement to disclose additional, relevant material is when Public Interest Immunity (PII) is invoked. This allows a party to seek the permission of the judge to withhold certain additional information on the grounds that disclosure would be contrary to the public interest, including the interests of national security. In making a PII order, the judge must balance the public interest in the fair administration of justice with the public interest in maintaining the secrecy of certain material whose disclosure one party claims would be damaging. If the judge agrees, the additional material is withheld from the one party but the other party is also not allowed to use it in court.

In addition to PII, the judge may sometimes direct that part or all of a case may be heard *in camera* in order to protect national security or some other sensitive public interest. This means that the case will be heard with both parties present, but with the media and members of the public excluded. The caveat is that any decision to withhold evidence must be necessary and proportionate and not undermine the right to a fair trial. The integrity of the justice system depends on the public being able to see that trials are fair.¹⁴

¹⁴ Metcalfe, E., 2009. *Secret Evidence*. JUSTICE. Page 224. The need for a trial to not only be fair but also be seen to be fair is a fundamental principle of English law ('justice must be seen to be done'). It is also recognised under Article 6 (see, for example, *A.B. v. Slovakia*, Application no.41784/98, March 4, 2003, at [55]).

Since 1997, however, ‘closed material procedures’ have been introduced in certain types of cases involving the use of sensitive intelligence material. This is very different from how PII operates in a civil or criminal case. Under a closed material procedure, the person concerned and his or her legal team, as well as the public and media, are completely excluded from any part of the case in which closed material is heard. Crucially, the ‘secret evidence’, or closed material, provided by the authorities will still be considered as evidence in the case even though it is not disclosed to the person concerned or to his lawyer. Neither will know who the ‘closed’ witnesses are or have the opportunity to challenge them in the closed hearings. Instead, there will be a ‘special advocate’ appointed to represent the interests of the person who has been excluded from the case. The special advocate will be allowed to challenge the closed evidence, but after service of the closed material will not be permitted to communicate with the person whose interests they represent, without permission of the court on notice to the Secretary of State.

In a case such as this, therefore, the person affected is likely to be prevented from knowing the full case against him and may, therefore, receive an adverse decision, with potentially devastating effects, without ever finding out the full reasons why.

Origins of the ‘closed material procedure’

Closed material procedures were introduced in the UK following the case of *Chahal v. the United Kingdom* at the European Court.¹⁵ The case concerned a foreign national whose deportation the Secretary of State had deemed to be ‘conducive to the public good’.¹⁶

Mr Chahal was held in immigration detention because the British government wanted to deport him on the ground of national security. Mr Chahal’s original case had been considered in private by an advisory panel to which neither he nor his lawyers had access. The Court found that Mr Chahal’s human rights had been violated because he was not given any opportunity to challenge the closed material against him, whether to dispute his detention (in breach of Article 5.4, the right to challenge the lawfulness of detention) or to dispute the decision to deport him (in breach of Article 13, the right to an effective remedy).

In response to the *Chahal* judgment, parliament passed the Special Immigration Appeals Commission Act 1997 which established the Special Immigration

¹⁵ *Chahal v. the United Kingdom* [1997] 23 EHRR 413.

¹⁶ Immigration Act 1971 3(5)(a).

Appeals Commission (SIAC). It enables foreign nationals subject to deportation on national security grounds, a right of appeal before an independent judicial tribunal that could assess the factual basis for the decision and, if necessary, overturn it. At the same time, SIAC's procedures have been designed to prevent the disclosure of sensitive information contrary to the public interest, including the interests of national security and international relations.

Before SIAC, sensitive material can be examined and taken into account in 'closed sessions' from which the appellant and his or her lawyers are excluded. The material considered in these hearings, known as 'closed material', is not disclosed to the applicant or his lawyers and has therefore been widely referred to as 'secret evidence'.

In order to reduce the unfairness caused by the use of closed material to the person affected, SIAC's procedures also provide for the use of 'special advocates'. These are independent lawyers appointed by the Attorney General to act on behalf of the appellants and represent their interests in closed sessions. They can examine the closed material, make submissions to the court and cross-examine witnesses.¹⁷ Once the special advocate has seen the closed material, they cannot have any communication with the appellant, including taking instructions from him, unless SIAC authorises it.¹⁸ SIAC, in turn, must notify the Secretary of State that the application has been made. This means that it is impossible for a special advocate to communicate with the person they represent in confidence once they have seen the closed material, although the Secretary of State does not see the person's reply. This issue is also the subject of consideration in the Justice and Security Green paper.

In some cases, special advocates have also complained that they have only received the closed material just before the hearing commences, limiting the time they have to scrutinise the evidence and mount a defence.¹⁹

¹⁷ Metcalfe, E., 2007. *The Future of Counter-terrorism and Human Rights*, JUSTICE. Page 12.

¹⁸ Rule 36 of the Special Immigration Appeals Commission (Procedure) Rules 2003 and duplicated in Rule 76.25 of the Civil Procedure Rules. The Special Advocate can seek instructions from the suspect without restriction before having sight of the closed material. However, after the Special Advocate has seen the secret material, the suspect can only send written instructions to the Special Advocate, and the Special Advocate has to seek permission from the Government and the Court or Tribunal to take instructions from the suspect. In practice, permission is rarely granted.

¹⁹ Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10. Paras 63-65.

When SIAC was first set up, the question of whether its procedures were compatible with the right to a fair hearing under Article 6 did not arise. This is because immigration and asylum claims are not covered by Article 6.²⁰ Nonetheless, SIAC's model of closed hearings and special advocates has become the basis for all subsequent closed material procedures in UK courts and tribunals. In the *Belmarsh* case concerning indefinite detention of foreign nationals subject to immigration control, the European Court of Human Rights found that SIAC's procedures in cases involving deprivation of liberty were required to meet 'substantially the same fair trial guarantees' as Article 6 in criminal cases.²¹

In October 2011, the government published its Justice and Security Green Paper.²² Among its key proposals is the extension of closed material procedures to be more widely available in civil proceedings, including the possibility of closed inquests. In a collective response to the Green Paper, serving Special Advocates said that the current closed material procedure does not deliver procedural fairness and there are no compelling reasons for giving the government a discretionary power to extend the procedures to any other civil proceedings.²³

Key issues

1. The fact that the person is unlikely to know the case against him or her will almost certainly breach the right to a fair trial

One of the core principles of natural justice²⁴ and one of the fundamental parts of the right to a fair trial under Article 6 is the right to know the case against you.²⁵ Any use of closed material that prevents a person from knowing the case against them is therefore highly likely to lead to that person having an unfair trial and risks breaching Article 6.

²⁰ See *Uppal and Singh v. the United Kingdom* [1979] 3 EHRR 391 (European Commission of Human Rights); *Maaouia v. France* [2001] EHRR 42 (European Court of Human Rights).

²¹ *A. and others v. the United Kingdom* [2009] EHRR 29, para 217.

²² Justice and Security Green Paper, Cm 8194, October 2011.

²³ Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

²⁴ See, for example, the judgment of Lord Dyson in *Al Rawi and others v. Security Service and others* [2011] UKSC 34 at para 12; and the judgment of Lord Neuberger MR in *Al Rawi* [2010] EWCA 482 at para 68.

²⁵ See, for example, *Ruiz-Mateos v. Spain* [1993] 6 EHRR 505 (civil proceedings) at para 63: 'The right to an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observations filed or evidence adduced by the other party'; see also *Brandstetter v. Austria* [1991] 15 EHRR 378 (criminal proceedings).

Special advocates and closed material are now used in a far wider context than just deportation. They have most controversially been used in relation to control orders, and now Terrorism Prevention and Investigation Measures (TPIMs) notices which have replaced control orders (this is also discussed in the chapter on Article 5). A TPIM notice is issued by the Home Secretary to restrict an individual's liberty and movements for 'purposes connected with protecting members of the public from a risk of terrorism'. They are seen as particularly controversial because the evidence used to justify TPIM notices is largely derived from intelligence sources, meaning that these cases often rest heavily on closed material and closed sessions.

It was in the context of control orders that the fairness of the closed material system was challenged in a series of cases that culminated in *A.F. (No. 3)* in the House of Lords.²⁶ This case focused on the question of whether an individual subject to a control order has a right to know sufficient details of the allegations against him, or whether it is possible to have a fair trial without even that evidence being known.

Taking account of the then recent Strasbourg judgment in *A. and others v. the United Kingdom* in relation to the stringent control orders before them, the House of Lords concluded unanimously that in order to guarantee a fair hearing under Article 6, individuals in control order cases must be given 'sufficient information' about the allegations against them to enable them to give effective instructions to the special advocates representing their interests.

Although *A.F. (No. 3)* established this principle in control order proceedings, special advocates have indicated that in practice there remain significant difficulties in obtaining sufficient disclosure of relevant material.²⁷

²⁶ *Secretary of State for the Home Department v. A.F. (No. 3)* [2010] 2 AC 269.

²⁷ Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10. See also Justice and Security Green Paper – Response to consultation from Special Advocates. 16 December 2011.

The Joint Committee on Human Rights (JCHR) recommended to the government that the legal framework governing the control order regime be amended to make explicit reference to the right to a fair hearing under Article 6. The government's reply was that this was not necessary because the Prevention of Terrorism Act must be read or interpreted in accordance with the Human Rights Act and the House of Lords decision in *A.F. (No. 3)* which requires the defendant to know the 'gist' of the case against him.²⁸ Special advocates have given evidence to suggest that in practice, individuals are still being given unnecessarily limited information, as the government continues to take an unduly 'precautionary' approach to disclosure.²⁹ The government, however, has denied this.

Since the introduction of control orders in 2005, a total of 52 people have been made subject to them.³⁰ As of December 2011, nine people were still subject to control orders.³¹ In the intervening years, 13 control orders have been upheld by the Court at the review under section 3(10) of the 2005 Act and 16 have been quashed or revoked on direction of the Court.³² Of the 16 that have been quashed or revoked, four were found to have been properly imposed but no longer necessary at the time of the hearing.³³ The figures for quashed control orders reflect in particular court decisions made in relation to early control orders when case law on Articles 5 and 6 was in its early stages. The Secretary of State now has a clearer idea where the parameters lie; this is illustrated by the fact that for control orders served between 2010 and 2011, three control orders were upheld by the courts and none were quashed (though not all proceedings have yet been completed).

28 Joint Committee on Human Rights. 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

29 Joint Committee on Human Rights, 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

30 Lord Carlile of Berriew. February 2011. *Sixth Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*. Page 7.

31 Control Order Powers, written answers and statements, 17 March 2011. Available at: <http://www.homeoffice.gov.uk/publications/about-us/parliamentary-business/written-ministerial-statement/control-orders-111210-100311/?view=Standard&pubID=867763>. Accessed 08/02/12.

32 Most recently in February 2012, the Court of Appeal ruled that a control order imposed under the Prevention of Terrorism Act 2005 was unlawful. *A.T. v. Secretary of State for the Home Department* [2012] EWCA Civ 42.

33 The combined total number of orders upheld, quashed and revoked is lower than the total number of individuals subject to control orders for reasons including the fact the first figure does not include cases where the hearing has yet to be heard; cases where the controlled individual either discontinued their proceedings or absconded from the control order before the hearing took place; or cases where the Secretary of State conceded that she could not make sufficient disclosure to comply with her obligations under Article 6 and so revoked the control order.

The Coalition government conducted a review that concluded that they should be replaced.³⁴ The Terrorism Prevention and Investigation Measures Act 2011 has repealed control orders and replaced them with new measures known as ‘terrorism prevention and investigation measures’ (TPIMs). In many ways these new measures mirror the current control order regime. The 2011 Act continues the use of special advocates. Although it provides for compliance with Article 6 in general terms, it relies on the government’s legal teams and ultimately the courts to interpret the legislation in line with the requirements of the *A.F. (No. 3)* judgment that the individual must be given sufficient information about the allegations against him to be able to give effective instructions.

The fairness of the closed material process has been questioned by non-governmental organisations and has been challenged in domestic and international courts.³⁵ In the case of *A. and others v. the United Kingdom*,³⁶ the European Court of Human Rights unanimously found that the use of special advocates, closed hearings and the lack of full disclosure of evidence in relation to proceedings relating to the (now repealed) provisions of Part 4 of the Anti-Terrorism Crime and Security Act 2001 did not enable individuals to effectively address the charges against them and the lawfulness of their detention, in breach of the requirements of Article 5.4.

It was this case that the House of Lords followed in *A.F. (No. 3)* when it determined that in order to have a fair trial under Article 6, in the context of the stringent control orders before the House of Lords, the individuals needed to have sufficient information about the allegations against them.³⁷ Despite this clear finding in relation to control orders, the government has argued that the *A.F. (No. 3)* disclosure requirement does not necessarily apply in other contexts. This is the subject of ongoing litigation. In the employment tribunal case of *Tariq*, the Supreme Court upheld the government’s position that the *A.F. (No. 3)* disclosure requirement did not apply in that context.

³⁴ HM Government. January 2011. *Review of Counter Terrorism and Security Powers: Review Findings and Recommendations* (Cm 8004).

³⁵ Human Rights Watch has increasingly criticised the ‘inadequate procedural safeguards and reliance on closed material as a basis for issuing Control Orders. Likewise Liberty has called attention to the principle of open justice; Judges must be open to public scrutiny and closed courts do not facilitate this. (See *From War to Law – Liberty’s Response to the Government’s Review of Counter-Terrorism and Security Powers* 2010).

³⁶ *A. and others v. the United Kingdom* [2009] 49 EHRR 29 concerned the detention without trial of foreign terrorist suspects prior to the introduction of control orders.

³⁷ *Secretary of State for the Home Department v. A.F. (No. 3)* [2010] 2 AC 269.

In the case of *Bisher Al Rawi & 5 Others*, the government sought to extend closed procedures to ordinary civil trials in which sensitive material supported the government's case.³⁸ Mr Al Rawi and five others, including Binyam Mohamed, had been detained by foreign authorities at various locations including Guantanamo Bay on suspicion of terrorism-related activities. They claimed in civil proceedings that the UK shared responsibility for their torture and mistreatment in these locations (the case of Binyam Mohamed is also discussed in the chapter on Article 3).

In its defence, the government sought to rely on intelligence which it argued was too sensitive to be seen by the claimants. The Supreme Court noted that the principles of open justice and natural justice are fundamental features of common law trials. It concluded that a closed material procedure would depart from those principles so significantly that the measure could only be introduced by parliament. The Supreme Court noted that there was already a well-established and effective system in place for keeping sensitive material secret in the public interest: Public Interest Immunity (see above). In such cases a court order can be granted so that sensitive material that a party might otherwise be required to disclose is not made public, on the grounds that to do so would be against the public or national interest. Unlike closed material, if the evidence is withheld on PII grounds, it will not be used as evidence in the case.

In making a PII order, the courts must balance the public interest in the administration of justice with the public interest in maintaining the confidentiality of certain documents whose disclosure would be damaging. The integrity of the justice system depends on the public being able to see that trials are fair.³⁹

Despite the Supreme Court finding that the introduction of a closed material procedure into civil proceedings was unnecessary and could undermine the right to a fair hearing, the recent Justice and Security Green Paper argues that the current system of PII is flawed because it renders 'the UK justice system unable to pass judgment on [national security] matters: cases either collapse, or are settled without a judge reaching any conclusion on the facts before them'.⁴⁰ A similar argument was dismissed by the Supreme Court in *Al-Rawi*.

³⁸ *Bisher Al Rawi & 5 Others v. Security Service, SIS, the Foreign and Commonwealth Office, Home Office, Attorney General* [2010] EWCA Civ 482.

³⁹ Metcalfe, E., 2009. *Secret Evidence*, JUSTICE. Page 224.

⁴⁰ Justice and Security Green Paper, Cm 8194, October 2011. Page 7.

The Commission considers that the Green Paper's criticisms of the current PII system are not justified, and its proposals are flawed both because they encompass far too wide a category of material and because they fundamentally fail to recognise the flaws in the closed material procedure.⁴¹

2. Evidence derived from secret intelligence sources may not be as robust as that used by police in an open court process

Much of the closed evidence used in cases which concern national security is heavily reliant on information from secret intelligence sources. This is a concern because such evidence may contain second- or third- hand testimony or other material which would not normally be admissible in ordinary criminal or civil proceedings.⁴² In addition, the standard of proof in most types of cases in which closed material is used is typically much lower than in civil and criminal cases. In control order cases, for instance, there only needs to be a 'reasonable suspicion' of involvement in terrorist-related activity,⁴³ which is a far lower standard of proof than either the civil standard ('the balance of probabilities') or the criminal standard ('beyond a reasonable doubt').

More generally, a number of senior judges have noted that closed material is likely to be less reliable than evidence produced in open court because it has not been tested by thorough cross-examination. In the Supreme Court case of *Al Rawi*, for example, Lord Kerr warned that: 'Evidence which has been insulated from challenge may positively mislead'.⁴⁴ Although special advocates are able to cross-examine a witness in closed hearings, they are prohibited from discussing their questions orally with the person they are representing after service of the closed material. For this reason, Lord Bingham described the task of special advocates as 'taking blind shots at a hidden target'.⁴⁵

⁴¹ Equality and Human Rights Commission January 2012. Response of the Equality and Human Rights Commission to the Justice and Security Green Paper. Available at: <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/commissions-response-to-consultation-justice-and-security-green-paper/>. Accessed 07/02/12.

⁴² See for example, paragraph 17(4) of the Special Advocates' response to the Green Paper on Justice and Security, referring to the use of 'second or third hand hearsay ... or even more remote evidence; frequently with the primary source unattributed and unidentifiable, and invariably unavailable for their evidence to be tested, even in closed proceedings'. The test now in the TPIM Act is 'reasonable belief'.

⁴³ Section 2, Prevention of Terrorism Act 2005.

⁴⁴ *Al Rawi*, para 93. See also e.g. Sedley, L.J. in *A.F. and others v. Secretary of State for the Home Department* [2008] EWCA Civ 1148 at paras 113 and 117.

⁴⁵ *Roberts v. Parole Board* [2005] UKHL 45 at para 18.

3. The use of intercept evidence would increase the chances of successful prosecution of terrorist suspects while helping to ensure their right to a fair trial

Critics of the control order regime – including the Joint Committee on Human Rights⁴⁶ – have called for the current ban on the use of intercept evidence (evidence gained from intercepting communications, particularly telephone conversations) in criminal proceedings to be lifted.⁴⁷ This would increase the chances of successful prosecutions against those suspected of involvement in terrorism and, in so doing, reduce the need to rely upon such exceptional measures as control orders. It would also help to ensure that terrorist suspects are provided with the full procedural protection of Article 6. At present, intercept material can only be used in closed hearings and not in open court, as it is in countries such as the US, France, Germany and Israel.

In response to these criticisms the previous government agreed to set up first a Privy Council review, which reported in January 2008 and agreed with the use of intercept as evidence in principle. However, it also identified a series of nine operational tests that had to be met in order to ensure ‘that the ability to safeguard national security or protect the public was not harmed’.⁴⁸ Subsequently, a Home Office-led work programme sought to find ways to implement the Privy Council recommendations and reported on this in December 2009.⁴⁹

In January 2011, the Home Secretary told parliament that the government was continuing ‘a programme of work’ that ‘will focus on assessing the likely balance of advantage, cost and risk of a legally viable model for use of intercept as evidence compared to the present approach.’⁵⁰ Most recently, the Justice and Security Green Paper was published in October 2011, but the use of intercept as evidence in civil proceedings was left out of the consultation.

⁴⁶ See Joint Committee on Human Rights, 2006. *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, Twenty-fourth Report of Session, 2005-06, and Joint Committee on Human Rights, 2007. *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post – charge questioning*, Nineteenth Report of Session 2006-07.

⁴⁷ See, for example, Liberty’s 2007 evidence to the Joint Committee on Human Rights on this subject. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy07/liberty-intercept-evidence.pdf>. Accessed 08/02/12.

⁴⁸ Privy Council Review of Intercept as Evidence, *Intercept Evidence: A Report*, CM7760. 2009. Para 208.

⁴⁹ Privy Council Review of Intercept as Evidence, *Intercept Evidence: A Report*, CM7760. 2009.

⁵⁰ Written Ministerial Statement, 26 January 2011, Column 9WS. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110126/wmstext/110126m0001.htm>. Accessed 08/06/12.

In any event, the main obstacle to lifting the statutory ban appears to be the operational tests identified by the Privy Council review in 2008, which critics have suggested give too much weight to the concerns of the security and intelligence services.⁵¹ They point out that the safeguards required by the Privy Council are unnecessary when compared to those found in other common law and EU jurisdictions.

4. The use of special advocates in closed hearings does not provide sufficient protection against the risk of an unfair trial

Although special advocates were originally introduced in SIAC in order to offset the obvious unfairness caused by the use of closed material, their effectiveness has been heavily criticised by a wide range of bodies at both the national and international level.⁵²

In *Al Rawi*, for instance, several senior judges noted the serious shortcomings of the special advocate system: Lord Neuberger described them as ‘a particularly poor substitute for the claimant’s own advocate in an open hearing’ and that their use ‘cannot be guaranteed to ensure procedural justice’;⁵³ Lord Dyson referred to ‘the limitations of the special advocate system’ and the criticisms of the Joint Committee of Human Rights in its 2010 report;⁵⁴ while Lord Kerr said that the use of special advocates ‘should never be regarded as an acceptable substitute for the compromise of a fundamental right’.⁵⁵

Most notably, serving special advocates themselves have been especially critical of the government’s claims in the recent Green Paper on Justice and Security as to their supposed effectiveness.⁵⁶ Describing closed material procedures as ‘inherently unfair’,⁵⁷ they identify a number of inherent problems with the current

51 See, for example, JUSTICE, October 2007. *Freedom from Suspicion*. Para 137.

52 See, for example, the European Court of Human Rights noted in *A. and others v. the United Kingdom* [2009] 49 EHRR 29 at para 199, referring to criticisms of special advocates by including from the Appellate Committee of the House of Lords, the House of Commons Constitutional Affairs Committee, the Parliamentary Joint Committee on Human Rights, the Canadian Senate Committee on the Anti-Terrorism Act, and the Council of Europe Commissioner for Human Rights. The Court noted in particular the submission of 13 serving special advocates to the House of Commons Constitutional Affairs Committee in 2005: ‘the special advocates pointed to the very limited role they were able to play in closed hearings given the absence of effective instructions from those they represented’.

53 [2010] EWCA 482 at paras 55 and 57.

54 UKSC 34 at para 27.

55 Ibid., at para 94.

56 Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

57 Ibid., para 15.

system including (1) the prohibition on any direct communication with the person they represent, ‘other than through the Court and relevant government body’, after the special advocate has received the closed material; (2) the inability to effectively challenge non-disclosure; (3) the lack of any practical ability to call evidence; (4) the lack of any formal rules of evidence to prevent poor quality material being admitted.

As the special advocates themselves note, less restrictive rules on communication between security-cleared counsel and affected persons exist in other countries which have used closed procedures, for example, military commissions in the US and the original procedures before the Security and Intelligence Review Committee in Canada.⁵⁸ In light of these problems, the Joint Committee on Human Rights (JCHR) has therefore recommended a system of greater communication between the special advocate and the party concerned.⁵⁹ Although the Justice and Security Green Paper suggests some potential improvements to the system by providing further training and support to special advocates,⁶⁰ the changes it proposes to the current procedures for communication are extremely limited and will not make any difference to the ability of special advocates to discuss closed material with the person whose interests they represent.⁶¹

In addition to concerns over their lack of effectiveness, the special advocate system has also been criticised for its lack of accountability. While the professionalism of those appointed as special advocates has not been questioned, there are concerns that their appointment is technically a matter of discretion for the Attorney General – the government’s chief Law Officer, rather than the decision of a court. Further, special advocates are explicitly not responsible to the person whose interests they are appointed to represent; unlike lawyers, they are not required to take instructions from the person affected nor do they need that person’s consent. The system of special advocates has also been criticised as not being an ‘effective substitute for a legal counsel of choice’.⁶²

⁵⁸ See Forcese and Waldman, August 2007. *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom and New Zealand on the Use of Special Advocates in National Security Proceedings*. Canadian Centre for Intelligence and Security Studies.

⁵⁹ Joint Committee on Human Rights, 26 February 2010. Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010, Ninth Report of Session 2009-10.

⁶⁰ Justice and Security Green Paper, Cm 8194. October 2011. Page xiv.

⁶¹ See Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

⁶² Amnesty International, August 2010. *United Kingdom: Time to End the Control Orders Regime, August 2010*. Endnote 43.

5. The use of closed material is expanding and is now used across a range of proceedings – and the government is proposing to expand it further

From its origins in deportation cases, the use of closed material has gradually extended across the legal system. Legislation has been passed permitting it in new areas, including terrorist asset freezing proceedings, employment tribunals, and even planning inquiries. The government's Green Paper on Justice and Security proposes extending the use of closed proceedings to any civil case in which a government minister certifies that it involves sensitive material that should not be disclosed in the public interest.⁶³ The proposals have been widely criticised by leading QCs,⁶⁴ special advocates,⁶⁵ and Non-governmental organisations.⁶⁶

The JCHR has raised concerns about the increasing numbers of different contexts in which closed material is used. In recent evidence to the JCHR, the government has identified 14 different contexts in which the special advocate system has been provided for in legislation in civil proceedings.⁶⁷ However, there are also a number of situations in which special advocates have been appointed on a non-statutory basis, for example, their use before the Security Vetting Appeals Panel. Accordingly, the government has no accurate figures of how many special advocates have been appointed since 1997.⁶⁸

For example, the House of Lords agreed that the Parole Board could use closed evidence in order to decide whether it is safe to release a prisoner on parole. This was permitted even though there was no explicit provision for the use of closed procedures in the law governing the Parole Board. More recently, the Supreme Court recently upheld the use of a closed material procedure in the employment tribunal in *Tariq v. Home Office*.⁶⁹

63 Para 2.7 of the Green Paper. The Secretary of State's decision would be reviewable by the trial judge on 'judicial review principles', but any challenge to this decision would itself necessarily involve closed proceedings.

64 See, for example, memorandum of Dinah Rose QC to the Joint Committee on Human Rights, 24 January 2012, at para 14: 'the Green Paper is fundamentally incompatible with our system of civil justice'.

65 See Justice and Security Green Paper – Response to consultation from Special Advocates, 16 December 2011.

66 See, for example, responses of JUSTICE, Liberty, Amnesty International, and the Bingham Centre for the Rule of Law. Available at: <http://ukhumanrightsblog.com/2012/01/31/more-secret-trials-no-thanks/>.

67 Memorandum submitted by the Ministry of Justice to the Joint Committee on Human Rights, 28 November 2011.

68 See the Freedom of Information Act requests referred to in JUSTICE, 2009. *Secret Evidence*. Para 359.

69 *Tariq v. Home Office* [2011] UKSC 35.

Parliament twice resisted attempts by the previous government to introduce closed inquests: first, as part of the Counter-Terrorism Act 2008 and subsequently under the Coroners and Justice Act 2009. Despite this, the government argued during the 7/7 London bombing inquests that closed hearings should be used because open hearings would involve disclosure of top secret intelligence files. This was vigorously resisted by many of the families of victims, nor was it supported by the Metropolitan Police. The coroner ruled that she had no power to adopt closed procedures, and that furthermore it would be unnecessary to do so.⁷⁰ On appeal the court upheld the coroner's ruling.⁷¹ In the end the public were excluded from the inquest, but 'interested persons', including the relatives of the 52 victims of the London bombings and their legal representatives, were admitted.

As a result of the court's ruling, families and victims were able to cross examine a witness from the Security Service. Significant evidence emerged about its effectiveness. The Security Service was criticised by the coroner for how it investigated and prioritised suspects, for poor record-keeping, and for inadequate procedures to ensure the 'supergrass' informant was shown the best possible images of a suspect.⁷²

If the families and victims had been excluded these findings might not have emerged. The fact that the closed material procedure was rejected does not seem to have presented any risk to the public. Nevertheless, as part of its recent Justice and Security Green Paper, the government has invited responses on whether various measures could be adopted to protect sensitive material from being disclosed in inquests, including the adoption of closed material procedures.⁷³

⁷⁰ See page 22 of the ruling of Hallett, L.J. dated 3 November 2010 in which she cited the judgment of the Court of Appeal in *Al Rawi* and her conclusion at page 28 that 'with full cooperation on all sides, most, if not all, of the relevant material can and will be put before me in such a way that national security is not threatened'.

⁷¹ *R. (Secretary of State for the Home Department) v. Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098.

⁷² See the concluding remarks of Lady Justice Hallett. 6 May 2011.

⁷³ Justice and Security Green Paper, Cm 8194, October 2011. Paras 2.10-2.19.

Children may be at risk of Article 6 breaches when the justice system does not cater for the child's ability to understand and participate in court proceedings

How Article 6 protects children in the justice system

Like adults, children are entitled to a fair trial. The state has an additional obligation to ensure the justice system takes into account the age, level of maturity and intellectual and emotional capacity of child defendants.⁷⁴ The trial process should allow a child defendant to participate effectively in the trial, to follow the proceedings and to give instructions, where necessary, to their lawyer.⁷⁵

The UN Committee on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the 'Beijing Rules') emphasise that courts must be seen to take account of a child's age and respond accordingly.⁷⁶ They stress that in order to participate effectively in a trial, a child needs to 'comprehend the charges, and possible consequences and penalties'.⁷⁷ The proceedings 'should be conducted in an atmosphere of understanding to allow the child to participate and to express himself or herself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.'⁷⁸

⁷⁴ 'Minors are entitled to the same protections of their fundamental rights as adults but ... the developing state of their personality – and consequently their limited social responsibility - should be taken into account in applying Article 6.' *Nortier v. Netherlands* [1993] 17 EHRR 273. See also *T. v. the United Kingdom* and *V. v. the United Kingdom* [1999] 30 EHRR 121.

⁷⁵ *T. v. the United Kingdom and V. v. the United Kingdom* [1999] 30 EHRR 121.

⁷⁶ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'), adopted by General Assembly resolution 40/33 of 29 November 1985.

⁷⁷ UNCRC, 25 April 2007. Committee of the Rights of the Child, General Comment No. 10 (2007) CRC/C/GC/10.

⁷⁸ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') adopted by General Assembly resolution 40/33 of 29 November 1985.

As a signatory to the UN Convention on the Rights of the Child (UNCRC) the UK is obliged to ensure that in its courts, the best interests of the child shall be of primary consideration.⁷⁹ Every year, around 96,500 children aged under 18 are tried in British courts. Most cases in which the defendant is a child will be dealt with by a youth court, which is a specialised form of magistrates' court. In youth courts, unlike adult courts, only people connected with the case, such as the victim, lawyers and family, may attend the hearing. While members of the press can be present in the court, they face some reporting restrictions; for example, they are not usually allowed to mention the child's name. Magistrates are trained to handle the children who come before them, and modifications will be in place to help children participate.

Under certain circumstances, where the alleged offence is very serious, or where the co-defendants are adults, children can appear in adult magistrates' courts.⁸⁰ In England and Wales, a child can also be tried in a Crown Court for a grave or indictable offence, including burglary, sexual assault, grievous bodily harm with intent, firearms offences and manslaughter.⁸¹ However, to protect a child's right to a fair trial, courts are obliged to ensure that each child can understand and participate in the proceedings.

The UK has taken many steps to satisfy these obligations. A child under 18 will normally be tried in a youth court in England and Wales.⁸² A practice direction for magistrates and Crown Courts emphasises that children and young people under 18 should be treated as vulnerable defendants and that:

'All possible steps should be taken to assist a vulnerable defendant to understand and participate in those proceedings. The ordinary trial process should, so far as necessary, be adapted to meet those ends. Regard should be had to the welfare of a young defendant.'⁸³

79 United Nations Convention on the Rights of the Child, Article 13, entered into force September 1990.

80 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 33.

81 NACRO, September 2004. *Youth Crime Briefing. The grave crimes provisions and long term detention*.

82 96,500 children between the ages of 10 and 17 proceeded through the youth/magistrate courts in 2010. Ministry of Justice, May 2011. Criminal Justice Statistics, *Quarterly Update to December 2010 Ministry of Justice Statistics bulletin*. Page 36, table 3.5.

83 Part III: Further Practice Directions Applying in The Crown Court And Magistrates' Courts, section 30.

Key issues

1. The age of criminal responsibility in England and Wales is lower than international guidelines and should be raised to minimise the risks of an unfair trial

In England and Wales the age of criminal responsibility is set at 10 years old. This is the age at which a person can be charged, and be found guilty, of committing a criminal offence. Any child below the age of 10 is not considered to have the capacity to distinguish right from wrong and be held liable for a criminal act.

The age of criminal responsibility in England and Wales is lower than many countries: in Scotland it is 12 years, in China, Russia and Germany it is 14 years, and in France and Brazil it is 18 years.⁸⁴ The UN Committee on the Rights of the Child has stated that setting the age of criminal responsibility below 12 is ‘not acceptable’.⁸⁵ In its concluding observations in 2008, it urged the UK to raise the age limit accordingly.⁸⁶ The Council of Europe Commissioner for Human Rights has also recommended that the government should increase the age ‘to bring it in line with the rest of Europe, where the average age of criminal responsibility is 14 or 15’.⁸⁷

Other jurisdictions respond to offences committed by children by adopting a welfare-based approach which regards children in trouble with the law as children first and foremost. This approach seeks to address the causes of their crime, which are likely to stem from neglect and abuse, rather than prioritising an adversarial system of proving guilt and innocence.⁸⁸ As a 2009 study of vulnerable defendants observed:

⁸⁴ Prison Reform Trust, June 2011. Bromley Briefings Factfile. Page 34.

⁸⁵ CRC Committee, 2007. *General Comment No. 10: children’s rights in juvenile justice*, UN document CRC/C/GC/10. Para 32.

⁸⁶ UNCRC, October 2008. Committee on the rights of the Child, Concluding Observations, CRC/C/GBR/CO/420. Para 78.

⁸⁷ Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visits to the United Kingdom (5-8 February and 31 March-2 April 2008), *Rights of the child with focus on juvenile justice*, CommDH (2008) 27, Strasbourg, 17 October 2008.

⁸⁸ Scotland Children’s Hearing System take most of the responsibility from courts for dealing with children and young people under 16, and in some cases under 18, who commit offences or who are in need of care and protection. This is based on the principle that children who commit offences and children who need care and protection are often the same children. This system seeks ways to support the child and move them away from re-offending. Where a decision is made to prosecute a child in a court, the hearing system can advise the court on how best to support the child in the process. This offers additional safeguards to support the child.

‘A welfare-based approach to offending by children does not imply that the harms caused by the offending should be overlooked, but seeks to address harmful behaviour by responding to the child’s welfare needs – on the assumption that these needs are likely to be at the heart of the offending behaviour.’⁸⁹

The Joint Committee on Human Rights (JCHR) has also criticized the government’s approach, noting:

‘We are not persuaded by the Minister’s response [to not increasing the age of criminal responsibility] ... Whilst we do not underestimate the effects on communities of the offending of some very young children, we do not believe that the UK’s current response is consistent with its international obligations to children. Indeed, we consider that resort to the criminal law for very young children can be detrimental to those communities and counter-productive.’⁹⁰

2. Children with learning or communication difficulties often do not receive sufficient ‘special measures’, or adaptations to court procedure, to ensure a fair trial

A quarter of children in the youth justice system have been identified as having special educational needs. This may mean they have problems reading, writing and understanding information, expressing themselves or understanding what others are saying. Nearly a quarter (23 per cent) have very low IQs of below 70.⁹¹ While an IQ of less than 70 does not necessarily mean that the child has learning disabilities, their language ability is likely to be less than that expected of their chronological age. They may therefore have difficulty understanding and responding to ordinary questions and especially legal questions. In addition, they may have greater difficulty recalling and processing information; be acquiescent and suggestible when responding to questions; and, under pressure, may try to appease the questioner.

89 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 61.

90 Joint Committee on Human Rights, 20 November 2009. *Children’s Rights*, Twenty-fifth Report of Session 2008–09, HL Paper 157 HC 318. Para 66.

91 Prison Reform Trust, June 2011. Bromley Briefings Factfile. Page 41.

Clearly, children with learning and communication difficulties require extra help if they are to fully understand and participate in their trial. In *R. (T.P.) v. West London Youth Court* concerning a case of a 15-year-old boy with a low IQ, charged with robbery and attempted robbery, the judge set out the minimum requirements of a fair trial.⁹³ This included that defendants had to understand what they had done wrong; what, if any defences were available to them; have the opportunity to make representations; and have the opportunity to consider what representations they wanted to make once they had understood the issues involved. The judge also set out ways to help achieve these requirements, including keeping questions short and clear, and ensuring that the claimant had support to sufficiently understand the issues.

To identify whether a child defendant has special needs, the child should be assessed before the trial begins and appropriate measures taken. A failure to do this risks breaching that child's Article 6 rights.⁹⁴ Youth offending teams do not, however, routinely assess children in this way.⁹⁵ The 'Asset' programme used by the Youth Justice Board aims to assess through a structured interview the factors contributing to a young person's offending, and to 'highlight any particular needs or difficulties the young person has, so these may be addressed'.⁹⁶ However, Asset does not look specifically at learning disabilities or communication difficulties.⁹⁷ HMI of Court Administration found that because procedures to identify young people with learning difficulties are ad hoc, the difficulties only came to light on the day of the hearing, or in some cases, did not come to the attention of the court at all:

'The variety of personal support needs across the range of learning difficulties through to learning disabilities is vast and there is limited understanding of this by court staff (and other agencies). Without an understanding of the depth of the problem and therefore, the likely effect on behaviour and understanding, court staff cannot be expected to make appropriate provision or communicate effectively.'⁹⁸

92 *R. (T.P.) v. West London Youth Court* [2005] EWHC 2583 (Admin).

93 *R. (T.P.) v. West London Youth Court* [2005] EWHC 2583 (Admin).

94 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 44. A Joint Inspection by HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011. *Not Making Enough Difference: A Joint Inspection of Youth Offending Court Work and Reports*. Para 3.5.3.

95 Ministry of Justice. Asset – Young Offender Assessment Profile: <http://www.yjb.gov.uk/engb/practitioners/Assessment/Asset.htm>.

96 Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children*. Page 44.

97 HM Inspectorate of Court Administration, *HMICA thematic inspection of Youth Courts, Implementation of the Youth Court Good Practice Guide 2001*, March 2007. Page 12.

98 HM Inspectorate of Court Administration, *HMICA thematic inspection of Youth Courts, Implementation of the Youth Court Good Practice Guide 2001*. March 2007. Page 12.

The Inspectorate also noted that youth offending teams expressed concern that a child with some learning difficulties might not be able to ‘give good account of themselves’ in court proceedings. In consequence, the child’s right to a fair trial might be affected.⁹⁸ In 2011, a joint inspection of youth offending court work in six areas of England and Wales found no evidence of a screening process to identify learning and communication difficulties and disabilities.⁹⁹

Even when a court has identified that a child needs support to help understand legal proceedings, such assistance may not always follow. In 2011, for instance, a High Court judge quashed an earlier decision by the Crown Court to refuse to allow the defendant, a boy with attention deficit hyperactivity disorder, the benefit of a registered intermediary. An intermediary is an advocate for the child, who explains issues to them and speaks on their behalf.

A psychiatrist’s report stated that the intermediary would ‘enable him to give his best evidence and receive a fair trial’. The judge found that without the intermediary ‘the risk that this claimant would not receive a fair trial would be real’.¹⁰⁰

The European Court of Human Rights has found the UK in breach of Article 6 when a court made insufficient adaptations to cater for a defendant’s learning disability.

In *S.C. v. the United Kingdom* [2004], the Crown Court tried an 11-year-old boy for attempting to steal a bag from an elderly woman causing her to fall and fracture her arm. The boy was assessed before the hearing and found to have a significant degree of learning delay. The court allowed measures to enable the boy to participate; for example, he was accompanied by a social worker and given frequent breaks.

The European Court of Human Rights still found a breach of his Article 6 rights, because the defendant did not understand that he might be given a custodial sentence. Once the sentence had been imposed, he still expected to go home with his foster father.

99 A Joint Inspection by HMI Probation, HMI Courts Administration, HM Crown Prosecution Service Inspectorate, 2011. *Not Making Enough Difference: A Joint Inspection of Youth Offending Court Work and Reports*. Para 3.5.3.

100 *R. v. Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin).

The Court concluded that the boy's age and low intellectual ability meant he was unable to participate effectively because the special measures were insufficient. It recommended that he should have been tried by a specialist tribunal which could make proper allowances for his difficulties and enable him to have a general understanding of the process and its potential outcomes.¹⁰¹

3. Children who are tried in Crown Courts are at risk of Article 6 breaches, as insufficient consideration is given to their age and maturity

Children accused of serious offences such as burglary, sexual assault, grievous bodily harm with intent, firearms offences and manslaughter, can be tried in Crown Courts. In 2009 and 2010, 2,886 children under 18 were tried in this way. Nearly half of these cases (1,426) resulted in a custodial sentence.¹⁰²

Conditions in Crown Courts do not always uphold a child's Article 6 rights. In 2008, the UN Committee on the Rights of the Child recommended that in the UK:

‘...children in conflict with the law are always dealt with within the juvenile justice system and never tried as adults in ordinary courts, irrespective of the gravity of the crime they are charged with.’¹⁰³

The government has not implemented this recommendation. However, over the last two decades it has introduced measures to improve the experience of children tried in adult courts. This was largely in response to a European Court of Human Rights ruling on the 1993 Jamie Bulger case, in which two 11-year-old defendants were found guilty of murdering a two-year-old. The Court did not query the verdict, but found that the defendants had not received a fair trial:

In *T. v. the United Kingdom and V. v. the United Kingdom*,¹⁰⁴ the European Court of Human Rights found that the two defendants in the Bulger case had not been able to fully understand and participate in their trial, in breach of Article 6. The Crown Court had introduced some special measures: for example, the trial procedure was explained to the defendants, they were taken to see the court room in advance, and the hearing times were shortened. Nevertheless, the European Court of Human Rights ruled that the formality and ritual of the

¹⁰¹ *S.C. v. the United Kingdom* [2004] 40 EHRR 121 (60958/00).

¹⁰² Information provided to the Equality and Human Rights Commission by the Youth Justice Board. September 2011. It notes: ‘The figures below have been drawn from administrative IT systems, which, as with any large scale recording system, are subject to possible errors with data entry and processing and may be subject to change over time.’

¹⁰³ Convention on the Rights of the Child, October 2008. Committee on the Rights of the Child, 49th session, CRC/C/GBR/CO/4.

¹⁰⁴ [1999] 30 EHRR 121.

Crown Court would be incomprehensible and intimidating to an 11-year-old child. Some of the modifications to the court room actually increased their sense of discomfort; in particular the raised dock, designed to allow the defendants to see what was going on, left them feeling exposed to the scrutiny of the press and public.

Psychiatric evidence found that, at the time of the trial, both applicants were suffering from post-traumatic stress disorder, and found it impossible to discuss the offence with their lawyers. They had found the trial distressing and frightening and were unable to concentrate.

The European Court of Human Rights concluded that it was highly unlikely that either applicant would have felt able, either in the court room or outside, to co-operate with their lawyers and give them information for the purposes of their defence.

The government subsequently amended its rules for trial procedures in Crown Courts, to enable child defendants to understand and participate more effectively in the court process.¹⁰⁵ The amended rules, introduced in November 2009 and most recently updated in October 2011, try to make the Crown Court as similar as possible to a youth court. For example, a Crown Court judge can remove his or her robe and wig, and instruct barristers to do so as well; choose a court where all participants are on the same, or nearly the same, level and allow the child to familiarise him or herself with the court room beforehand.¹⁰⁶ There is also an emphasis on clear and simple language.¹⁰⁷ There is, however, still no automatic consideration of special measures for child defendants – this is left to the court's discretion.¹⁰⁸

¹⁰⁵ *The Consolidated Criminal Practice Direction Part III.30: Introduced in November 2009 and last updated in October 2011.*

¹⁰⁶ Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children.* Page 16.

¹⁰⁷ *The Consolidated Criminal Practice Direction Part III.30.12.* Last updated October 2011.

¹⁰⁸ Jacobson, J. and Talbot, J., 2009. *Vulnerable Defendants in the Criminal Courts: a review of provision for adults and children.* Page 50. Plans to develop a 'young defendants pack' to assist children in understanding the court procedures and their rights was not implemented (Ibid., page 34); Vizard, E. Dr, Child Defendants, March 2006. Occasional Paper OP56, Royal College of Psychiatrists. Page 9.

Amended trial rules are guidance only, not statutory provisions. There is consequently a risk that guidance to support vulnerable defendants may not always be followed, particularly as lawyers and judges may have received little, if any, training in youth justice or child-welfare legislation.¹⁰⁹

¹⁰⁹ See for example, JUSTICE and The Police Foundation, January 2011. *Time for a new hearing, A comparative study of alternative criminal proceedings for children and young people*. Pages 35-36; O'Neill, S., 2009. *Should we retain the present court system for young defendants?* Available at: <http://www.michaelsieff-foundation.org.uk/content/Report%207%20-%20Sally%20O'Neill's%20Speech.pdf>. Accessed 08/02/12.

Cuts to legal aid may compromise the right to a fair trial

How Article 6 protects people's access to justice

Article 6 includes the provision that anyone charged with a criminal offence should be given free legal assistance if they do not have sufficient means to pay for it themselves, when this is required in the interests of justice. This provision aims to minimise the possibility that innocent people may be wrongly convicted or even lose their liberty because they do not have the financial means to defend themselves.

There is no parallel provision for civil cases. Article 6(1) merely requires a fair and public hearing within a reasonable time by an independent and impartial tribunal. However, in certain situations, for example where a case is very complex or a litigant has particular difficulty in representing themselves, and legal aid has not been available, the European Court of Human Rights has found violations of Article 6(1).

In *Airey v. Ireland* [1979]¹¹⁰ a victim of domestic violence had been trying to gain a judicial separation from her husband on the grounds of alleged physical and mental cruelty to her and her four children. She had been refused legal aid, and could not afford a lawyer.

The European Court of Human Rights stated that Convention rights must be 'practical and effective' to safeguard an individual. It added that this was particularly important 'in view of the prominent place held in a democratic society by the right to a fair trial.'¹¹¹

The Court found that while there is no general right to legal aid in civil cases, legal aid is required when legal representation is compulsory, because of the complexity or nature of the proceedings or the ability of an individual to represent him or herself.

¹¹⁰ *Airey v. Ireland* [1979] 2 EHRR 305.

¹¹¹ *Airey v. Ireland* [1979] 2 EHRR 305.

The refusal of criminal legal aid has been the subject of successful challenges against the UK in the European Court of Human Rights.¹¹² In the cases of *Benham v. the United Kingdom* [1996] and *Perks and others v. the United Kingdom* [1999] the Court found a breach of Article 6 where legal aid was not granted even though the deprivation of liberty was at stake.¹¹³ In *Ezeh and Connors v. the United Kingdom* [2003] it found a breach of Article 6 when prisoners had no access to legal aid for disciplinary hearings which could extend their imprisonment.¹¹⁴

The Court has also found breaches in relation to the refusal of legal aid in civil cases.

In *Steel and Morris v. the United Kingdom* [2005] the Court held that the lack of civil legal aid in that case was a violation of Article 6.¹¹⁵ The case concerned libel proceedings brought by the fast food chain McDonalds against the two applicants, who had distributed a leaflet severely criticising McDonalds' practices and food.

Having been refused legal aid, the defendants represented themselves through the trial which, at 313 court days, was the longest case in English legal history. The Court noted that the case was factually and legally complex, and that the volunteer lawyers and the extensive judicial assistance and latitude granted to the defendants did not substitute for counsel experienced in libel law.

The Court held that 'equality of arms' was central to the concept of a fair hearing. Absolute 'equality of arms' was not required, provided both sides have a reasonable opportunity to present their case effectively. Access to legal aid for a fair hearing should depend on what was at stake for the individual, the complexity of the law and procedure and the person's ability to represent themselves.

¹¹² In *Bonner v. the United Kingdom* [1995] 19 EHRR 246 the European Court of Human Rights found a breach of Article 6(3)(c) because the accused needed the services of a lawyer to argue his grounds for appeal, given the fact that he faced an eight-year sentence if convicted.

¹¹³ *Benham v. the United Kingdom* [1996] 22 EHRR 293 and *Perks and Others v. the United Kingdom* [1999] 30 EHRR 33.

¹¹⁴ (2003) All ER 164.

¹¹⁵ *Steel and Morris v. the United Kingdom* [2005] 41 EHRR 22.

Key issues

1. The current 'fixed fees' system can act as a barrier to those with complicated and unusual cases

It is more difficult for the government to cap costs in criminal cases, because it is obliged by Article 6(2) to provide legal aid where necessary. However, the government has introduced measures to reduce expenditure on legal aid for civil and family work.

For example, in 2007, fixed fees were introduced for advice under the Legal Help scheme in areas of social welfare law. The fixed fees payment scheme operates through standard payments for legal advice based on 'average' case lengths, so that solicitors and advisers normally receive a set amount to advise a client, regardless of the actual length or complexity of the case. Only cases that pass an 'exceptional cases' threshold (three times the average case length) are remunerated on the basis of the time taken.¹¹⁶

A study published in 2009, by the Ministry of Justice recognised that the providers who had the greatest difficulty with the fixed fee system were those who dealt mainly or exclusively with more complex cases.¹¹⁷ Many respondents pointed out that the fixed fee scheme creates a number of 'perverse incentives' for organisations to 'cherry pick' shorter, more straightforward cases and to delegate casework to junior and less experienced advisers. These findings have clear implications for access to civil justice, particularly for people with complex or unusual cases.

2. Removing legal aid from areas of civil law may mean some people do not have access to a fair hearing

In November 2010, the government published a Green Paper, *Proposals for the Reform of Legal Aid in England and Wales*, which recommended removing half a million cases per year from the scope of the civil legal aid scheme.¹¹⁸ Following a public consultation, the Ministry of Justice published its final proposals alongside the Legal Aid, Sentencing and Punishment of Offenders Bill 2010-2011.¹¹⁹ This reform package narrows the scope of legal aid, by excluding

¹¹⁶ Legal Help is publicly funded advice and assistance; it does not cover the cost of representation in court, which requires a full legal aid certificate.

¹¹⁷ Ministry of Justice, June 2009. *Study of Legal Advice at Local Level*.

¹¹⁸ Ministry of Justice, November 2011. *Proposals for the Reform of Legal Aid in England and Wales*.

¹¹⁹ Ministry of Justice, June 2011. *The Reform of Legal Aid in England and Wales: the Government Response*.

family cases where no domestic violence is involved, as well as many areas of civil law including clinical negligence, employment disputes, criminal injuries compensation, and some debt and housing cases where the home is not at risk.

The reform proposals would also establish a mandatory telephone gateway to access civil legal aid services, which would initially cover relevant debt cases, disputes about the provision of education for children with special needs, discrimination law cases and community care cases. It also tightens the financial eligibility rules for civil legal aid, makes certain adjustments to legal aid remuneration for criminal cases, and imposes an across-the-board reduction of 10 per cent for all civil and family work.¹²⁰

There are serious human rights issues regarding the removal of certain areas of law from the scope of civil legal aid. For example, disallowing publicly-funded legal help for employment advice could block the most accessible route to advice for victims of workplace discrimination cases, even though such cases would technically remain in scope. Removing legal aid for complex employment cases in the higher courts could be in breach of Article 6(1) where the individual would have great difficulty representing themselves.

There are similar issues about the decision to exclude welfare benefits cases from legal aid. Family and housing law cases potentially raise issues under Article 8, which covers the right to private and family life. In this context, it can be argued that the state has an obligation to provide effective access to justice for these civil law disputes. Although legal aid in family cases will be available where domestic violence is involved, this will depend on very strict evidential tests. The government has indicated that it will only accept specified types of evidence as proof that domestic violence has taken place.

The Legal Aid Bill proposes to retain judicial review cases (the vehicle for many cases involving human rights) within the scope of legal aid.¹²¹

¹²⁰ Although the reductions in the scope of legal aid are primarily focused on civil law, Clause 12 of the Bill paves the way for secondary legislation to introduce a means and merits test to limit access to legal advice for those held in a police station. However, the Minister for Legal Aid has publicly denied that the government plans to seek to use the clause.

¹²¹ Other claims against public authorities (typically for damages) will only be eligible for legal aid where they concern a significant breach of human rights, or an abuse of position or power.

However, many clients could remain unaware that they had a potential judicial review claim if no legal aid were available for first-stage advice on the underlying legal dispute. This could happen, for instance, in cases concerning housing or community care. There is a danger that these changes will compromise the effectiveness of remedies under the Human Rights Act 1998, and potentially breach Articles 6(1) and 13 which cover the right to an effective remedy.¹²²

Removing Asylum Support cases (apart from cases involving accommodation) from the scope of legal aid could lead to destitution for asylum seekers with valid claims for support.¹²³ The urgency of such cases, where the client is already facing – or will soon experience – severe hardship means that they are ill-suited for the delays likely to be involved in making an application for exceptional legal aid funding. This point is discussed below.

3. The policies aimed at mitigating the impact of legal aid cuts may not be sufficient to ensure that everybody has access to justice

The Legal Aid Bill confirms proposals about exceptional funding put forward in the earlier Green Paper, ‘Proposals for the Reform of Legal Aid in England and Wales’. It provides that exceptional funding should be made available in cases where the failure to do so would be likely to result in a breach of the individual’s rights under domestic and international legal obligations, including those under Article 6(1). This may not provide sufficient protection because clients may still be deterred from seeking advice in the first place, or be turned away by advisers, if their problem appears to be outside the scope of the legal aid scheme. It could also lead to delayed decision-making about funding.¹²⁴ Many clients would need expert legal help in preparing an application for exceptional funding. The Ministry of Justice has made no commitment to making legal aid available to pay for this expert help.

¹²² Article 13 of the European Convention on Human Rights sets out the right to an effective remedy: *‘Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.’*

¹²³ *R. v. SoS Home Department ex parte Limbuela* [2005] UKHL 66. Article 3 of the Convention states: *‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment.’* The denial of support to an asylum seeker under section 55 of the Nationality, Immigration and Asylum Act 2002 may leave him destitute and the question then arises whether this consequence amounts to a breach of his rights under Article 3.

¹²⁴ See Joint Committee on Human Rights, 19 December 2011. *Legislative Scrutiny – Legal Aid, Sentencing and Punishment of Offenders Bill*. Para 1.31.

The proposal for a mandatory telephone gateway for access to advice, initially in four areas of civil law, has human rights implications. Research suggests that a telephone service is not suitable for all clients.¹²⁵ The proposal could have a particularly negative impact on clients with poorer mental health,¹²⁶ as well as those with learning or cognitive impairments, on older and disabled people using community care services, as well as being indirectly discriminatory in relation to disability.

The government has offered reassurances that adaptations and other adjustments will be put in place to assist disabled callers.¹²⁷ However, it remains unlikely that the telephone service will meet all adjustment needs and it could still deter some clients from seeking advice.

Requiring disabled clients to use a mandatory telephone gateway could in some circumstances amount to a breach of Article 14 (enjoyment of rights without discrimination) in conjunction with Article 6(1) in relation to disability. The requirement could also be in breach of Article 5 of the Convention on the Rights of Persons with Disabilities (non-discrimination) when read with Article 13 (access to justice).

The telephone gateway would be staffed by unqualified operators who would be expected to offer advice on issues that may be factually and legally complex.¹²⁸ The operators would work by following a script and would be trained to identify key words and issues from a client's description of their problem. However, this approach is based on a mistaken assumption that all clients will understand the questions put to them, and that in setting out their problem, they will use the key words. If clients fall short in either instance, important legal issues might be overlooked.

In December 2011, the government announced it was delaying the implementation of the reforms to civil legal aid until April 2013. This includes the introduction of the mandatory telephone gateway.¹²⁹

¹²⁵ Hobson, J. and Jones, P., 2004. *Report on evaluation research on alternative methods of delivery*, Legal Services Commission.

¹²⁶ Pearson, J. and Davis, L., 2009. *Civil law, social problems and mental health*; Legal Services Research Centre; Pearson J.; Davis L. 2002. *The Hotline Assessment Study Final Report – phase III: full-scale telephone survey*; Centre for Policy Research.

¹²⁷ Ministry of Justice, June 2011. Reform of Legal Aid in England and Wales: the Government Response. Page 171.

¹²⁸ Ministry of Justice, June 2011. *Reform of Legal Aid in England and Wales: the Government Response*.

¹²⁹ Written Ministerial statements, 1 Dec 2011: 1 Dec 2011: Column 74WS-75WS. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/wmstext/111201m0001.htm#111201400000008>. Accessed 18/01/12.

4. Changes to contracts for criminal legal aid may have an impact on the quality and supply of criminal defence lawyers

The current provision of criminal legal aid is reasonably compliant with Article 6(3)(c) and still responds to demand rather than being capped. Net criminal legal aid expenditure was around £1.1 billion in 2009/10, compared with total legal aid expenditure of £2.2 billion net.¹³⁰

Under pressure to make savings in the Criminal Defence Service budget, the Ministry of Justice has tried to curtail expenditure. For example, it has introduced fixed legal fees for magistrates' court and police station work, and taken steps to contain fees for higher cost criminal cases. The government intends to introduce competitive tendering for criminal defence contracts, with the first contracts taking effect in April 2015.¹³¹ This development may have a negative impact on the quality and supply of legally aided criminal defence work, because lawyers will be competing for the lowest price. Competitive tendering is likely to reduce substantially the number of firms doing criminal defence work, with provision consolidated into a small number of large firms, thus reducing client choice.¹³² Such an outcome could have an impact on people's rights under Article 6(2), which will need to be kept under close review.

¹³⁰ Legal Services Commission Annual Report 2009-2010.

¹³¹ Written Ministerial statements, 1 Dec 2011: 1 Dec 2011: Column 74WS-75WS. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111201/wmstext/111201m0001.htm#11120140000008>. Accessed 18/01/12.

¹³² House of Commons Constitutional Affairs Committee, May 2007. Implementation of the Carter Review of Legal Aid, Third report of session 2006-2007.

Case study:**Youth Justice Liaison
and Diversion project**

‘Oliver’ talked of an impulse to shoot people for what he termed the “greater good” after he was charged with assault and criminal damage.

When a psychologist assessed Oliver, it quickly became apparent that this 14-year-old boy suffered from psychosis and required urgent psychiatric support. Oliver may have entered an adult court system without proper support for his mental health condition. Instead, the troubled youngster was given the assistance he required at an early stage in the judicial process thanks to a scheme that aims to promptly identify juvenile offenders with health and social vulnerabilities. The scheme, called Youth Justice Liaison and Diversion (YJLD), reduces the likelihood of breaches of Article 6 of the Human Rights Act by adopting a welfare based approach based on early intervention. It ensures that the court understands and manages the mental health needs of young people who commit serious crimes. It also tries to prevent further offending by tackling the emotional and social problems that have led young people into trouble.

“In some cases youngsters were not getting support until perhaps two to three years after first becoming known to the police,” explains Lorraine Khan, national programme manager at the Centre for Mental Health. “Early intervention means we can improve a young person’s mental health prospects or their engagement with school, which means they may avoid custody and offending again and have a greater chance of gaining employment.”

This approach could deliver additional economic and social benefits. Imprisonment is expensive, and male youths who go to jail are six times more likely to become young fathers and 15 times more likely to contract HIV than their peer group.

“In some cases youngsters were not getting support until perhaps two to three years after first becoming known to the police...”

“We work closely with the police and screen under-18-year-olds entering the justice system for a range of problems,” says Dr Rebecca Morland, a manager and consultant psychologist, who has worked in one site area. “For those with less complex needs, we liaise with parents and help young people to get the necessary assistance. Where there are more complex needs, the children have access to a specialist mental health worker who can rapidly assess them and refer them to other services.”

Oliver’s mental health problems had not been picked up and by the time he came to YJLD’s attention he was ‘very ill’. Oliver described suffering increasingly frequent and intense delusions and hallucinations over the previous year. He also claimed to have easy access to a gun which posed grave concerns for the safety of himself and others. YJLD immediately put in place a safety plan to ensure that Oliver received the psychological and psychiatric support he required. A report by YJLD regarding Oliver’s mental health was considered by the magistrate, who gave him an ‘absolute discharge’. Oliver, who continues to receive support, might well have gone to prison without YJLD. Without the report, a court may not have had the necessary information to ensure it reached a fair and appropriate decision.

The Department of Health and the Centre for Mental Health set up YJLD in 2009, and it is now operating in 37 areas.



Article 8: The right to respect for private and family life, home and correspondence

Article 8 of the European Convention on Human Rights provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Summary

Article 8 protects the private life of individuals against arbitrary interference by public authorities and private organisations such as the media. It covers four distinct areas: private life, family life, home and correspondence.

Article 8 is a **qualified right**, so in certain circumstances public authorities can interfere with the private and family life of an individual. These circumstances are set out in Article 8(2). Such interference must be proportionate, in accordance with law and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others.

The concept of private life in UK law is based on the classic civil liberties notion that the state should not intrude into the private sphere without strict justification. In our modern system aspects of this right are protected by several regulators and pieces of legislation, including the Data Protection Act and the Regulation of Investigatory Powers Act.

The current legal and regulatory system is not providing adequate protection for personal information

We discuss issues of privacy and media freedom under Article 10, freedom of expression. This chapter focuses on information privacy, which concerns the collection, use, tracking, retention and disclosure of personal information. There is evidence that technological developments and a weak legal and regulatory system leave members of the public at risk of Article 8 breaches in this area.

The review shows that:

- Britain's legislation relating to information privacy and surveillance is patchy, and in some areas there is no protection against infringements.
- The regulators and monitors charged with protecting information privacy are not equipped to deal with the sheer amount of information being processed and shared.

- Public sector organisations continue to make serious errors which put information privacy at risk.
- Retaining the DNA of innocent people on a national database may breach their Article 8 and Article 14 rights.

Not enough is done to protect the dignity and autonomy of people who use health and social care services

Article 8 protects dignity and autonomy. Though these concepts are not mentioned in the article itself, they have developed through case law. Article 8 rights are often considered alongside Article 3, which covers mistreatment serious enough to constitute torture or inhuman or degrading treatment. There is evidence of mistreatment of some of those who use health and social care services which may breach Article 8.

The review shows that:

- People who are receiving health and social care from private and voluntary sector providers do not have the same guaranteed level of protection under the Human Rights Act as those receiving it from public providers.
- There is a lack of awareness, both within local authorities and among care staff, of how human rights obligations apply in a health and social care setting.
- Better complaints systems are needed across the health and social care sectors.
- Increased pressure on health and social care budgets puts the Article 8 rights of services users at risk.

Requirements to annul marriage prior to gaining gender recognition continue to cause hardship for some transsexual people

In the UK, a transsexual person who is married or in a civil partnership is required to have their marriage or partnership annulled before he or she can be given a gender recognition certificate under the Gender Recognition Act (2004). The European Court of Human Rights has ruled that this is not a breach of Article 8, but the requirement continues to cause hardship for those affected.

The review shows that:

- Transsexual people currently have to divorce or end their civil partnership if they want their gender to be legally recognised.

There continues to be a lack of appropriate accommodation for Gypsies and Travellers

Article 8 does not impose an obligation on public authorities to provide homes for anybody, or to provide sites for Gypsies and Travellers. It does, however, oblige authorities to respect the home. This applies particularly in situations where local authorities wish to evict people from their homes. Due to a long-term lack of authorised sites, Gypsies and Travellers often have no choice other than to live in unauthorised sites. This increases the likelihood that they will face eviction.

The review shows that:

- To date, the courts have not found a breach of Article 8 in relation to an eviction from an unauthorised Gypsy and Traveller site. However, there may be grounds for challenging this precedent.
- There continues to be a shortage of authorised Gypsy and Traveller sites, increasing the likelihood of further forced evictions from unauthorised sites.

The UK's obligations under Article 8

Article 8 protects the private life of individuals against arbitrary interference by public authorities and private organisations such as the media. It is a wide-ranging article that covers four distinct areas: private life, family life, home and correspondence.

Article 8 is a **qualified right**, so in certain circumstances public authorities can interfere with the private and family life of an individual. These circumstances, or exceptions, are set out under Article 8(2). Such interference must be in accordance with law, proportionate, and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others.

The burden is on the state to justify an interference with an Article 8(1) right. This means that the state must show that the interference falls within one of the exceptions in Article 8(2), and that it is in accordance with the law and necessary in a democratic society. This requires the state to demonstrate that the interference corresponds to a 'pressing social need' and that it is 'proportionate to the legitimate aim being pursued'. A state will find it harder to justify an interference which concerns a more intimate aspect of a person's private life.

Under the Human Rights Act 1998 (HRA), the obligations placed upon the state by the European Convention on Human Rights pass on to all public authorities.

Ultimately, the courts decide whether the requirement is met by applying a proportionality test to determine whether the interference is justified in the light of particular circumstances of the case.

Article 8 imposes two types of obligations on the state and public authorities:

- a **negative obligation** not to interfere with an individual's private life, family life, home and correspondence
 - a **positive obligation** to take steps to ensure effective respect for private and family life, home and correspondence, between the state and the individual, the individual and private bodies, and between private individuals through law enforcement, legal and regulatory frameworks and the provision of resources.
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Private life

Private life includes an individual's physical and psychological integrity, personal or private space, the collection and publication of personal information, personal identity, personal autonomy and sexuality, self-development, relation with others and reputation.¹ Article 8 also provides a framework for monitoring the gathering and retention of personal data. It is designed to ensure that the right to keep personal data from being disclosed to third parties can be balanced against legitimate aims of a democracy, such as crime prevention or the economic wellbeing of society. Types of data that would fall within the scope of Article 8(1) include census information and ID schemes.

Most forms of surveillance will constitute an interference with the right to a private life. This includes the use of CCTV, phone-tapping, the installation of listening devices in the workplace and home, and surveillance via GPS. The digital recording of a public scene, for example by CCTV, can give rise to Article 8 considerations.²

Family life

The concept of family life goes beyond formal or traditional relationships. It covers engaged couples, cohabiting couples and same-sex couples.³ It also covers relationships with siblings, foster parents and foster children and grandparents and grandchildren.⁴

1 R. Clayton and T. Tomlinson, 2009. *The Law of Human Rights*, Second Edition. Oxford: Oxford University Press. See also *Connors v. the United Kingdom* [2005] 40 EHRR 9. Para 82.

2 *Peck v. the United Kingdom* [2003] 35 EHRR 41.

3 For engaged couples, see *Wakefield v. the United Kingdom* [1990] 66 DR 251; for cohabiting couples, *Kroon v. Netherlands* [1994] 19 EHRR 263; for same sex couples, *Schalk and Kopf v. Austria* [2010] ECHR 30141/04. While the European Court has not specifically recognised transsexual unions under Article 8 it has referred to 'the increased social acceptance' in this area: see *France v. B.* [1992] ECHR 40 and *Sheffield & Homer v. the United Kingdom* [1998] 27 EHRR 163. In *Christine Goodwin v. the United Kingdom* [2002] 35 EHRR 18 it found 'no justification for banning the transsexual from enjoying the right to marry under any circumstances'.

4 For jurisprudence on the relationship between grandparent and grandchild, see *Re J. (Leave to Issue an Application for a Residence Order)* CA [2003] 1 FLR 114; for foster parent and foster child, see *Gaskin v. the United Kingdom* [1989] 12 EHRR 36; ECHR 30141/04; for siblings see *Senthuran v. Secretary of State for the Home Department* [2004] EWCA Civ 950 [2004] 4 All ER 365.

In Britain, Article 8 issues arise frequently in the context of immigrants and asylum seekers. It is generally accepted that Article 8 may be engaged by an interference with family ties in Britain, but immigration control is usually cited as a legitimate reason under Article 8(2) for the interference.⁵ The issue in dispute is generally the proportionality of the interference. So, for example, case law suggests that it will rarely be proportionate to order removal for immigration purposes of a spouse to a country that the other spouse cannot reasonably be expected to reside in.⁶ Nor may it be proportionate to sever a genuine and subsisting relationship between parent and child. In deportation cases of non-British citizens who have committed a serious crime it is still necessary to draw the balance of proportionality under Article 8.⁷ Extradition in accordance with an extradition treaty is a proportionate interference with Article 8(1), save for in exceptional circumstances.⁸

Home

A home is not just one's current residence, but can also include a holiday home, business premises, caravans and homes built in contravention of applicable town planning regulations.⁹ More recently, 'home' has been described as 'the place, the physically defined area, where private and family life develops'.¹⁰

Obvious examples of interference with one's home would include a search of the premises, the occupation of one's house and land, and emissions or smells which prevent someone from enjoying their home. The applicants in *Guerra v. Italy*¹¹ lived approximately one kilometre away from a chemical factory which made products which were classified as high-risk. The European Court of Human Rights found that Italy had failed to take steps to ensure effective protection of the applicants' Article 8 rights: it had failed to provide residents with essential information that would have enabled the applicants to assess the risks they and their families might run if they continued to live in their homes which were exposed to danger in the event of an accident at the factory.

5 *L.K. (Serbia v. Secretary of State for the Home Department)* [2007] EWCA Civ 1554. Para 8; J. Wadham, H. Mountfied, C. Gallagher, E. Prochaska, 2009. *Blackstone's Guide to the Human Rights Act 1998*. Fifth Edition. Oxford: Oxford University Press. Page 218.

6 *Huang v. Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167. Para 20.

7 See *Boultif v. Switzerland* [2001] 33 EHRR 50; *Uner v. Netherlands* [2006] 3FCR 340; *Maslov v. Austria* [2008] ECHR (GC) 1638/03.

8 *Launder v. the United Kingdom* [1997] 25 EHRR; *R.(on the application of Bermingham & Others v. Director of Serious Fraud)* [2006] EWHC 200 (Admin).

9 For business premises, see *Niemietz v. Germany* [1992] 16 EHRR 97; for holiday homes, see *Demades v. Turkey* [2003] ECHR 16219/90; for caravans and homes built in contravention of planning regulations, *Buckley v. the United Kingdom* [1996] 3 EHRR 101 and *Chapman v. the United Kingdom* [2001] 33 EHRR 18.

10 *Moreno Gomez v. Spain* [2004] ECHR 633 [2005] 41 EHRR 40. Para 53.

11 *Guerra v. Italy* [1998] 26 EHRR 375.

Correspondence

Correspondence includes postal correspondence, telephone calls, emails and text messages.¹² Examples of interference with correspondence include opening, reading, censoring or deleting correspondence.¹³ The European Court of Human Rights has held that the indiscriminate and routine checking of prisoners' correspondence violates Article 8.¹⁴ In a series of successful cases the Court held that telephone interception was in breach of Article 8 in the UK because it was not 'in accordance with the law'. In other words, there was no domestic law to regulate it.¹⁵ These rulings led to new laws, including the Regulation of Investigatory Powers Act 2000. More recently, telephone hacking civil cases are being brought under Article 8. The most recent case, brought by Chris Bryant, Lord Prescott and Brian Paddick and others against the Metropolitan Police, successfully argued that there was a breach of Article 8 because the police failed to provide them with information about the hacking and failed to carry out an effective investigation as part of its positive duty under Article 8.¹⁶

How Article 8 relates to other articles

Because of their wide scope, Article 8 rights are often closely related to other rights protected under the Convention. They include, in particular, other qualified rights such as Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association and Protocol 1, Article 1 (protection of property)).¹⁷

¹² For interception of telephone calls see *Malone v. the United Kingdom* [1984] 7 EHRR; for emails, *Halford v. the United Kingdom* [1997] 14 24 EHRR 523; and for post, *Golders v. the United Kingdom* [1975] 1 EHRR 524.

¹³ *McCallum v. the United Kingdom* [1990] 13 EHRR 596; *Campbell v. the United Kingdom* [1992] ECHR 13590/88.

¹⁴ *Jankauskas v. Lithuania* [2005] ECHR 59304/00.

¹⁵ See, for example, *Malone v. the United Kingdom* [1990] and *Halford v. the United Kingdom* [1997].

¹⁶ *R (on the application of Bryant and others) v Commissioner of the Police of the Metropolis* [2011] EWHC 1314 (admin); in February 2012, the Metropolitan Police admitted it had acted unlawfully and the case was settled out of court. For a report of the settlement, see BBC website, 7 February 2012, 'Phone hacking: Met police failed to warn victims.' Available at: <http://www.bbc.co.uk/news/uk-16922305>. Accessed 27/02/2012.

¹⁷ J. Wadham, H. Mountfied, C. Gallagher, E. Prochaska, 2009. *Blackstone's Guide to the Human Rights Act 1998*. Fifth Edition. Oxford: Oxford University Press. Page 203.

Article 8 rights often compete with other qualified rights, in particular the freedom of expression. Case law has made it clear that neither article has automatic precedence over the other. Ultimately, the court must decide on a case-by-case basis how the balance should be struck. For example, in *Re Guardian news and Media Ltd and others*,¹⁸ the Supreme Court had to consider whether three men who were suspected of facilitating terrorism, and who were subject to orders freezing their accounts, were entitled to anonymity orders which would prevent the press from naming them when reporting the proceedings. The three men argued that their Article 8 rights would be infringed if they were named by the press, while the media organisations argued that their Article 10 rights would be infringed by the anonymity orders, and that if the men were not named, readers would be less interested in the report and the informed debate would suffer. The court had to balance the two competing rights, and found that the powerful general public interest in identifying the men in any report of the proceedings outweighed the effect on their Article 8 rights. For more information on this subject, see the chapter on Article 10.

Article 8 rights are often also considered alongside Article 3 in cases where ill-treatment violates dignity but does not meet the level of severity demanded by Article 3 to constitute torture, or inhuman or degrading treatment.¹⁹ This is discussed in the chapter on Article 3.

¹⁸ *Re Guardian news and Media Ltd and others* [2010] 2 All ER 799.

¹⁹ *S. and Others v. Slovakia* [2009] ECHR 8227/04. See also Chapter 3.

The development of Article 8 in Britain

The concepts relating to respect for private and family life, home and correspondence in UK law are based on the classic civil liberties notion that individuals should have the right to be 'let alone' and to enjoy their private space without arbitrary interference from the state or other individuals.²⁰ English law has traditionally provided a significant amount of protection for the individual against the arbitrary power of the state. For example, state officials can force entry into an individual's home only if a power has been provided for in legislation or the common law, a principle that was established in law in 1765.²¹

Before the Human Rights Act 1998 (HRA) was enacted, there was no explicit right to privacy in English law. Instead, remedies for breaches of particular privacy interests have relied on certain aspects of the common law. For example, a person's reputation and confidential information were protected by the defamation and confidentiality laws; personal and property interests by the law of trespass.²²

In some areas, developments in legislation over the last 100 years have seen increasing amounts of personal information collected from individuals and massive expansion in state surveillance; this has been driven in large part by the rapid growth of the welfare state, as well as the growth of other state functions such as policing and the security services, and has been facilitated by fast-paced developments in technology.²³ If in 1765 the powers available to officials to force entry into someone's home uninvited were limited, it was estimated in 2007 that at least 266 separate pieces of legislation permitted such an intrusion.²⁴

20 S. Foster, 2006. *Human Rights and Civil Liberties*. Oxford: Oxford University Press. Page 206; C. Raab and B. Goold, 2011. *Information Privacy*, Manchester: Equality and Human Rights Commission.

21 *Entick v. Carrington* [1765] UKHC KB J98; see H. Snook, 2007. *Crossing the threshold: 266 ways the state can enter your home*, London: Centre for Policy Studies.

22 M. Amos, 2006. *Human Rights Law*. Oxford: Hart Publishing. Pp. 343-344.

23 JUSTICE, 2011. Freedom from suspicion. *Surveillance reform for a digital age*. London: JUSTICE.

24 H. Snook, 2007. *Crossing the threshold: 266 ways the state can enter your home*, London: Centre for Policy Studies.

In other respects, such as our freedom to develop personal relationships, the state has become less intrusive. For example, the past 40 years have seen the legal rights of same-sex couples progressively transformed since the decriminalisation of homosexuality in 1967.

The UK has ratified several international conventions relevant to Article 8. They include the UN's Covenant on Economic, Social and Cultural Rights (CESCR), which the UK ratified in 1976, and which provides for '[t]he widest possible protection and assistance ... to the family ... particularly for its establishment and while it is responsible for the care and education of dependent children'.²⁵ In 2009 the UK ratified the Convention on the Rights of Persons with Disabilities, which requires signatory states to ensure that disabled people have the support they need to live independently in the community. There is currently little protection for personal data and information privacy under international conventions other than at the European level.

By incorporating Article 8 into UK law, the HRA changed how privacy is viewed and valued in the UK. It has led to increased protection for the right to private and family life, and imposed obligations on the state to protect and promote Article 8.²⁶ For example, the Regulation of Investigatory Powers Act 2000 provides protection from infringements of privacy relating to personal data and surveillance.

Enhanced protection for the right to privacy for individuals who have undergone gender reassignment was introduced with the Gender Recognition Act 2004. The concept of the right to respect for human 'dignity', which is now widely accepted as being protected under Article 8, is embedded in the Mental Capacity Act 2005 and the Health and Social Care Act 2008, which require service providers to meet minimum standards of care.

²⁵ D. Robertson, 1997. *A dictionary of human rights*, London: Europa. Page 184.

²⁶ Raab and Goold, 2011; House of Lords Select Committee on the Constitution, 2009. *Surveillance: Citizens and the State*, 2nd Report of Session 2008-9, Vol.1: Report, HL-18 I, 9 February 2009. London: The Stationery Office. Para 126.

In October 2011, the home secretary announced the government's intention to implement changes to the immigration rules. This would involve setting out in legislation the balance to be struck between an individual's right to respect for family and private life and the wider public interest in protecting the public and having effective immigration controls. The Equality and Human Rights Commission has offered to work with government to clarify the meaning of Article 8 in this context, without jeopardising the important protections it offers.²⁷

However, despite the legal and institutional framework that has been developed to support Article 8, Britain may not be fully meeting its Article 8 obligations in some areas.

The issues raised in this chapter were selected to illustrate how the rights protected under Article 8 can apply to everyone in the case of information privacy; a large minority of the population in the case of older and disabled people; and small minorities that may be socially marginalised, including transsexual people and Gypsies and Travellers.

²⁷ Equality and Human Rights Commission, 2011. Private correspondence to Damian Green MP, Minister of Immigration. 15 November 2011.

The current legal and regulatory system is not providing adequate protection for personal information

How Article 8 protects privacy

There are many aspects to privacy. We discuss issues of privacy and media freedom under Article 10, freedom of expression. This chapter focuses on information privacy, which concerns the collection, use, tracking, retention and disclosure of personal information.²⁸ Subject to limited exceptions, Article 8 protects an individual's right not to have personal information or data disclosed to third parties without their consent.²⁹ This means that people generally have the right to determine who has access to personal data about themselves, and what the data will be used for. The legal principle is that: 'all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit'.³⁰

Any data processing and surveillance by the state is likely to engage Article 8. Because Article 8 is a qualified right, however, such activity will not breach Article 8 if it can be justified under one of the requirements listed in Article 8(2). However, the state has a positive obligation under Article 8 to protect individuals from breaches by third parties in some circumstances, for example through domestic laws and regulation.

There are still a number of issues relating to surveillance and information privacy that pose particular challenges for the state in meeting its Article 8 obligations. To some extent, this is due to the complexity of Article 8(2) itself, and the difficulties that the UK courts, the European Court of Justice and the European Court of Human Rights have had in providing clear guidance on the meaning and scope of the terms.

²⁸ Personal information is data which relates to an individual and from which they can be identified.

²⁹ J. Wadham, H. Mountfied, C. Gallagher, E. Prochaska, 2009. *Blackstone's Guide to the Human Rights Act 1998*. Fifth Edition. Oxford: Oxford University Press. Page 214.

³⁰ *R. v. Dyment* [1988] 45 CCC (3d) 244. Paras 255-256.

Over the last few decades, developments in technology have led to a rapid expansion of surveillance and data collection techniques that enable public authorities and private companies to collect, retain and access and share a huge amount of personal information about people going about their daily lives. In 2011 the Commission published an important report by Charles Raab and Benjamin Goold on information privacy that raised questions about how well our personal information is protected³¹ given the extent to which data collection and surveillance permeates the lives of individuals in the UK today. For example, there is an extensive network of at least 1.8 million CCTV cameras trained on everything from roads to schools to shopping centres; an estimated 80 million active mobile phone subscriptions allow companies to collect data on the location of subscribers at any time; and electronic travel passes, such as the Oyster card used in London, collect data on the travel patterns of millions of individuals.³²

The Joint Committee on Human Rights (JCHR) has pointed out that the collection and sharing of data is not objectionable in itself.³³ There are undoubted benefits to the use of data sharing and surveillance techniques to prevent and fight crime and protect national security. Public authorities are often required to share data (or enable others to do so) for administrative purposes, for example taxation, or in meeting other obligations such as protecting the right to life.³⁴ Many pieces of legislation permit data to be collected for different purposes. The JCHR reviewed the data protection provisions in 2008. It found that 17 pieces of legislation provided inadequate protection for personal data.³⁵

31 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Pp. 28-29.

32 JUSTICE, 2011. *Freedom from suspicion: Surveillance reform for a digital age*. London: JUSTICE.

33 Joint Committee on Human Rights, 2008. *Data Protection and Human Rights*, Fourteenth Report of Session 2007-08, HC 132. London: The Stationery Office. Para 14.

34 Ibid. Footnote 16. The JCHR refers to the case of *Edwards v. the United Kingdom* [2002] ECHR 203 46477/99, in which the failure to ensure the police passed information to the prison authorities about the risk posed by a mentally ill detainee contributed to the finding of the European Court of Human Rights that the UK had breached its positive obligation to protect life when that detainee killed his cellmate.

35 Ibid. See chapter 3 'Data protection in legislation'. Pp. 9-12.

In 2004 the Information Commissioner, Richard Thomas, warned that Britain would ‘sleep-walk into a surveillance society’, in response to the government’s plans to introduce ID cards and an accompanying National Identity Register.³⁶ The scheme, introduced under the Identity Act 2006, has now been scrapped by the Coalition Government as part of its pledge to protect civil liberties.³⁷ However, many changes to the ways in which personal data is collected and shared continue to come about with minimal or no scrutiny, although there are signs that the tide might be turning amid increasing public concern over information privacy issues.³⁸

In this section of the report, we summarise some central deficiencies in the legal patchwork of protection for information privacy. Further detailed criticisms of the existing system can be found in the recent analysis conducted for the Commission in the research report ‘Protecting Information Privacy’ by Raab and Goold.³⁹

Key issues

1. Britain’s legislation relating to information privacy and surveillance is patchy, and in some areas there is no protection against infringements

UK law protects privacy in a piecemeal fashion. Privacy is protected by various parts of the common law, such as the civil remedy of breach of confidence; the criminal law, for example the Protection from Harassment Act 1997; and legislation including the HRA, the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. However, these three key statutes have significant shortcomings that could allow breaches of Article 8 to occur.

The Data Protection Act (DPA) regulates the use of personal data in the UK and is primarily concerned with data ‘processing’, which is any use, disclosure, retention, storage, holding or collection of personal data. The general protection principles set out in the Act state that any individual or organisation, whether public authority or private company, is required to ensure that all personal data

36 BBC, 2004. ‘Watchdog’s Big Brother UK Warning’, 16 August 2004. Available at: http://news.bbc.co.uk/1/hi/uk_politics/3568468.stm. Accessed 27/02/2012.

37 See Home Office website, <http://www.homeoffice.gov.uk/agencies-public-bodies/ips/about-us/suppliers/identity-cards/>. Accessed 27/02/2012.

38 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Page 10.

39 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission.

are fairly and lawfully processed; processed for limited purposes; adequate, relevant and not excessive; accurate and up to date; not kept for longer than is necessary; processed in line with rights of data subjects under the Act; secure, and not transferred to other countries without adequate protection.⁴⁰

However, not all personal information is considered to be personal data for the purposes of the Act. For example, in relation to the public sector, if personal information is held in the form of manual (paper) files the protection afforded by the Act is usually limited to right of access to the data and correction of inaccuracies. Personal information held manually by private sector companies is not subject to the Act. In addition, data that are being held and processed for the purpose of safeguarding national security is exempt from the general protection principles, and there are also exemptions in relation to issues of health, education and social work, as well as crime and taxation.

The definition of ‘personal data’ (data which relates to an individual and from which they can be identified) is central to the operation of the DPA. However, this definition is not clear. For example, information that is recorded as part of a ‘relevant filing system’ is specifically included in the Act, but it has proved difficult for the courts to ascertain what exactly this means. The Information Commissioner’s Office, which regulates and enforces the DPA, defines a relevant filing system as being ‘records relating to individuals (such as personnel records) [that] are held in a sufficiently systematic, structured way as to allow ready access to specific information about those individuals’.⁴¹

A ruling by the Court of Appeal in *Durant v. Financial Services Authority*⁴² in 2003 indicated the shortcomings of the protection offered by the DPA. Mr Durant had requested personal information held about himself by the Financial Services Authority (FSA) in both electronic and manual forms following a dispute between himself and Barclays Bank that he felt the FSA had not investigated satisfactorily. The FSA supplied Mr Durant with the copies of the data in electronic form, but refused to give him access to the manual data, arguing that these were not personal data. The Court of Appeal agreed, finding that the DPA applies only to data recorded as part of a ‘relevant filing system’.⁴³

40 Schedule 1 of the Data Protection Act ‘The Data Protection Principles’.

41 See ICO guidance for organisations, *Key Definitions of the Data Protection Act*. Available at: http://www.ico.gov.uk/for_organisations/data_protection/the_guide/key_definitions.aspx. Accessed 27/02/2012.

42 *Michael John Durant v. Financial Services Authority* [2003] EWCA Civ 1746.

43 For a more recent discussion on what constitutes ‘personal data’ see *Common Services Agency v. Scottish Information Commissioner (Scotland)* [2008] UKHL 47.

There is also some uncertainty over whether biometric data including fingerprints, retina and iris patterns and voice samples would be considered to be personal information, although a ruling in *S and Marper v. the United Kingdom*⁴⁴ found that a DNA sample and any profile created from it was to be considered as such.⁴⁵

The Regulation of Investigatory Powers Act (RIPA) governs the exercise of covert surveillance powers that are likely to obtain private information by the police and other public bodies. It distinguishes between different types of conduct – intrusive surveillance, directed surveillance, and covert human intelligence sources (informants and undercover police) – and then sets out different requirements for authorisation concerning each type of conduct. It was introduced to bring surveillance techniques used by public authorities into compliance with the HRA, and reflects the requirements of proportionality in Article 8(2) by requiring that when public authorities use surveillance techniques to obtain private information about someone they do so in a way that is ‘necessary, proportionate and compatible with human rights’.⁴⁶ Certain justifications for surveillance are only available to particular organisations and not others; and, depending on the organisation in question and type of surveillance, there are different seniority requirements for authorisation.

As noted by Raab and Goold, on the face of it RIPA appears to offer considerable protection for information privacy.⁴⁷ However, the regulatory framework it establishes contains many anomalies and exceptions that have resulted in patchy protection that is complex and difficult to understand. The Court of Appeal has described it as a ‘particularly puzzling statute’, and Lord Bingham, in the House of Lords, concurred ‘the House has experienced the same difficulty’ interpreting the provisions of the Act.⁴⁸

44 *S. and Marper v. the United Kingdom* [2008] ECHR 1581.

45 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Page 31.

46 See Home Office website, ‘Regulation of Investigatory Powers Act’. Available at: <http://www.homeoffice.gov.uk/counter-terrorism/regulation-investigatory-powers/>.

47 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission.

48 *R. v. W.* [2003] EWCA Crim 1632; *Attorney General's Reference* (no. 5 of 2002) [2004] UKHL 40. Para 9.

Over the past decade, RIPA has gradually been expanded in order to keep up with developing surveillance methods. The government has argued that RIPA is ‘responsive and robust enough to meet both current and future needs’.⁴⁹ However, it has been criticised for being out of date.⁵⁰ The Commission’s report on information privacy points out that the legislation has failed to anticipate future developments and has had to respond to ‘rapid and often unexpected changes in both the technological and political landscape of privacy, surveillance, and data sharing’.⁵¹ The legislation also ignored many changes that had already taken place when the legislation was drafted, such as the existence of digital networks operated by mobile phone providers, and the millions people who were already using the internet on a daily basis.⁵²

This approach has led to many anomalies within UK law. For example, as Raab and Goold note:

‘It has been held that the unintended monitoring of a mobile phone call by the police – as a result, for example, of that mobile phone coming within range of a covert surveillance device being used for some other purpose – does not constitute an interception provided the call is not recorded.’⁵³ Given that this data would not be personal data under section 1 of the DPA (as it is not ‘recorded’), there is no obvious remedy available to an individual whose privacy has been violated in this way.’⁵⁴

49 House of Lords, 2009. *Surveillance: Citizens and the State*, Vol 1: Report, Second Report of Session 2008–9, London: The Stationery Office. Para 119. See also para 120 for evidence to House of Lords Committee on the Constitution from David Marukami Wood, representing the Surveillance Studies Network.

50 JUSTICE, 2011. *Freedom from suspicion. Surveillance reform for a digital age*. London: JUSTICE. Page 60.

51 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Page 44.

52 JUSTICE, 2011. *Freedom from suspicion. Surveillance reform for a digital age*. London: JUSTICE... Page 64. For example, the Office for National Statistics reported that in 1998–99, 10 per cent of households in the UK had internet access, and in 1999–2000 this figure had increased to 19 per cent: Office for National Statistics (2003) *Annual Abstract of Statistics, 2003 edition*. Table 8.4, page 122. Available at: http://data.gov.uk/dataset/annual_abstract_of_statistics. Accessed 27/02/2012.

53 *R. v. E.* [2004] EWCA Crim 1243.

54 Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission, 2011. Pp. 35–36.

One high profile example illustrating how RIPA has not provided adequate protection from serious breaches of privacy is that of the secret interception of internet sessions by the telephone communications company BT.⁵⁵ In 2006, BT secretly intercepted and profiled the internet sessions of 18,000 of its customers as part of an advertising strategy. The interception was carried out as part of a trial internet advertising platform created by an American company called Phorm, and involved monitoring the online activity of customers without their knowledge or consent, with the aim of delivering targeted web-based advertisements. The details of the secret trial were exposed by the media in 2008, leading to complaints against BT and Phorm.

The City of London Police, the Crown Prosecution Service and the Information Commissioner all investigated the complaints but concluded that the actions and intentions of BT did not constitute a criminal or civil offence under RIPA, because the data collected through the interceptions was intended for market research only, and was anonymised and then destroyed. The European Commission (EC), however, took the issue much more seriously, and in 2009 began legal proceedings against the UK following citizens' complaints about how the British authorities had handled the issue.

There were three areas in which the EC considered the UK to be in breach of its rules:

- The EC rules define consent as 'freely given, specific, and informed indication of a person's wishes', but under RIPA legislation the person intercepting the communication needed only 'reasonable grounds for believing' that consent to do so has been given.
- There was no national independent body to supervise the interception of some communications.
- UK law covered only 'intentional interceptions', whereas EU rules require member states to protect individuals from all unlawful interceptions, whether intentional or unintentional.⁵⁶

⁵⁵ JUSTICE, 2011. Freedom from suspicion. *Surveillance reform for a digital age*. London: JUSTICE.

⁵⁶ European Commission, 2010. 'The European Commission refers UK to Court over privacy and personal data protection', press release, 30 September 2010. Available at: http://ec.europa.eu/unitedkingdom/press/press_releases/2010/pr1097_en.htm. Accessed 27/02/2012.

In October 2009 the EC asked the UK government to amend its rules to comply with EU rules on consent to interception and on enforcement by supervisory authorities in October 2009. By November 2010 the UK government had still taken no action, and was referred by the EC to the European Court of Justice.⁵⁷ In 2011 the government finally made the necessary amendments to RIPA that provide for sanctions and a supervisory mechanism (the Interception of Communications Commissioner) to deal with breaches of the rules.⁵⁸ Acknowledging that there are now provisions in law for the UK to enforce rights to information privacy, the EC has recently dropped its legal action against the UK government.⁵⁹

However, the Equality and Human Rights Commission has argued that there is a need for wider reform of RIPA, and privacy protections in general.⁶⁰

2. The regulators and monitors charged with protecting privacy are not equipped to deal with the sheer amount of information being processed and shared

As part of its positive obligations under Article 8, the government must ensure that there are effective regulatory safeguards to protect breaches of the right to private life.⁶¹ The institutions charged with supervising the implementation of the DPA and RIPA include the courts, the Information Commissioner's Office, the Investigatory Powers Tribunal, and the Office of the Surveillance Commissioner. Raab and Goold note that 'the sheer amount of personal information being collected, processed, and shared in the UK now presents a serious challenge to both the existing legislative regime and the regulators charged with administering it'.⁶²

⁵⁷ Ibid.

⁵⁸ Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011.

⁵⁹ European Commission, 2012. 'Digital Agenda: Commission closes infringement case after UK correctly implements EU rules on privacy in electronic communications', 26 January, 2012. Available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/60&format=HTML&aged=0&language=en&guiLanguage=en>. Accessed 27/02/2012.

⁶⁰ See Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission, for arguments for wider reform of RIPA, and Equality and Human Rights Commission website, <http://www.equalityhumanrights.com/legal-and-policy/consultation-responses/ehrc-submission-review-of-counter-terrorism-and-security-powers/>.

⁶¹ Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Page 28.

⁶² Ibid. Page 13.

The Information Commissioner's Office (ICO) has responsibility for enforcing the DPA, as well as the Freedom of Information Act 2000, Privacy and Electronic Communications Regulations and Environmental Information Regulations. Its enforcement action powers include criminal prosecution and non-criminal enforcement and audit. It can issue monetary penalties for non-compliance of the DPA of up to £500,000. The ICO also campaigns to raise awareness of information privacy, handles complaints, and upholds information rights in the public interest.⁶³

Until recently, the ICO has had very limited resources, with no auditing or inspection powers. It could recommend that a body change its practices or else face prosecution, but otherwise had no meaningful enforcement powers. It was given its current powers to issue monetary fines for data protection offences in April 2010, but so far these have been extremely sparingly used. The Home Affairs Committee has suggested that the ICO does not have adequate resources or technical expertise to carry out its functions effectively, while Privacy International and JUSTICE have claimed that the ICO is failing to investigate complaints properly.⁶⁴ Privacy International claims that it has not secured a successful complaint in nearly 20 years, 'even when colleague commissioners across Europe had supported our position'.⁶⁵

The Office of Surveillance Commissioners (OSC) monitors the exercise of some elements of RIPA, as well as powers under Part III of the Police Act 1997. It provides information to public authorities who authorise and conduct covert surveillance operations and use covert human intelligence sources (informants and undercover police) on how to carry out their activities in compliance with RIPA. Those who make authorisations under RIPA are subject to review and inspection by the OSC, and are obliged to keep an audit trail of the authorisations.⁶⁶ The roles of two separate commissioners, the Interception of Communications Commissioner, and the Intelligence Services Commission, include scrutinising and monitoring compliance with RIPA by the security services.

⁶³ See Information Commissioners Office website, at: www.ico.gov.uk.

⁶⁴ JUSTICE, 2011. Freedom from suspicion. *Surveillance reform for a digital age*. London: JUSTICE.. JUSTICE points to the ICO finding technical errors, but claims it has never reviewed a request that it concluded was unnecessary or disproportionate. See House of Commons Home Affairs Committee, 2011. Unauthorised tapping into or hacking of mobile communications, HC 907. London: The Stationery Office. Para 36.

⁶⁵ Privacy International, 2011. 'The UK Information Commissioner's Office: 'Let's bury our bad news on a busy news day'', report from 28 September 2011. Available at: <https://www.privacyinternational.org/article/uk-information-commissioners-office-lets-bury-our-bad-news-busy-news-day>. Accessed 27/02/2012.

⁶⁶ See Office for Surveillance Commissioner website, at: <http://surveillancecommissioners.independent.gov.uk/>. Accessed 27/02/2012.

A series of codes and guidance on various data collection practices have also been developed within the public and private sectors, as well as by the regulators, such as the ICO's CCTV Code of Practice, 2008. There are also several codes of practice for different surveillance techniques that have been developed under RIPA. For example, under the Covert Surveillance Code of Practice, the police must obtain a surveillance authorisation if they intend to use an existing public area CCTV system as part of a pre-planned surveillance operation. The codes vary in complexity and clarity, and can also be ambiguous about whether legal compliance is required or whether they are simply encouraging good practice.⁶⁷

Questions have also been raised about whether the system for reviewing authorisation requests made under RIPA is adequate. In evidence to the House of Lords Committee on the Constitution, the Surveillance Commissioner estimated that he reviewed only around 10 per cent of the approximately 30,000 requests for authorisations made per year by public authorities.⁶⁸ A further issue that has been repeatedly raised in reviews of RIPA and surveillance regulation is the lack of independent judicial oversight.⁶⁹ Currently, non law-enforcement bodies, such as local authorities or NHS bodies, have their own in-house officer to authorise their covert surveillance requests. The Coalition Government is proposing to limit local authority powers so that they have to seek magistrates' approval before carrying out any covert surveillance.⁷⁰

⁶⁷ Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission. Page 49.

⁶⁸ House of Lords, 2009. *Surveillance: Citizens and the State*, Vol 1: Report, Second Report of Session 2008-9, London: The Stationery Office. Para 253; In 2010-11, 29,855 authorisations were made by public authorities, including 13,780 for directed surveillance by law enforcement agencies, 8,477 for directed surveillance by other public authorities and the recruitment of 4,176 covert human intelligence sources by law enforcement agencies: Office for the Surveillance Commissioner, 2011. *Annual report of the Chief of Surveillance Commissioners to the Prime Minister and Scottish Ministers for 2010-11*. London: The Stationery Office. Pp. 10-12. Available at: <http://surveillancecommissioners.independent.gov.uk/docs1/OSC%20Annual%20Report%202010-11.pdf>. Accessed 27/02/2012.

⁶⁹ House of Lords, 2009. Para 160; JUSTICE, 2011. Freedom from suspicion. *Surveillance reform for a digital age*. London: JUSTICE.; Raab and Goold, 2011. *Protecting information privacy*. Manchester: Equality and Human Rights Commission; G.Crossman with H. Kitchen, R. Kuna, M. Skrein and J. Russell, 2007. *Overlooked: Surveillance and personal privacy in modern Britain*. London: Liberty.

⁷⁰ Home Office, 2011. Protection of Freedoms Bill. Fact sheet – Part 2 Regulation of surveillance. Available at: <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/fact-sheet-part2?view=Binary>. Accessed 27/02/2012.

Many significant changes in the way personal data is collected have been introduced with minimal or no scrutiny by the public or by parliament. For example, CCTV and Automatic Number Plate Recognition (ANPR) systems have proliferated in the absence of any specific or bespoke regulatory framework, as the Home Office acknowledges.⁷¹ Although surveillance is popular with the public, research on its effectiveness as a deterrent to crime is inconclusive.⁷²

A joint complaint filed by lobby groups in 2011 drew attention to the ANPR ‘ring of steel’ established round the town of Royston, Hertfordshire, stating that:

‘a network of ANPR cameras has been constructed throughout the UK by the Association of Chief Police Officers – there was no public debate, no Parliamentary debate, no Act of Parliament, not even a Statutory Instrument before this network was constructed.’⁷³

The Home Office proposes to introduce a Code of Practice for CCTV, to be monitored by a Surveillance Camera Commissioner, in the Protection of Freedom Bill, with the aim of both CCTV and Auto Number Plate Recognition being properly regulated so that the systems are proportionate, necessary and are used appropriately. However, the Commissioner will not have any enforcement powers, or be able to fine those who don’t comply. The Home Office considers there to be ‘some possibility’ that this lack of enforcement ‘[will] limit the impact and effectiveness of the code’.⁷⁴

3. Public sector organisations continue to make serious errors which put information privacy at risk

A series of major information management mistakes by public sector organisations in recent years have drawn attention to the lack of oversight both within the Ministry of Justice, which has ministerial responsibility for the DPA and RIPA, and by senior civil servants, who have responsibility for ensuring that their departments have policies and procedures in place for handling personal information in a way that meets their obligations under Article 8.

⁷¹ Home Office, 2011. ‘Consultation on a code of practice relating to surveillance cameras. Impact Assessment.’ Available at: <http://www.homeoffice.gov.uk/publications/consultations/cons-2011-cctv/>. Accessed 27/02/2012.

⁷² J. Woodhouse, 2010. *CCTV and its effectiveness in tackling crime*. SN/HA/5624. London: House of Commons Library.

⁷³ Privacy International, 2011. ‘PI and partners take on automated number plate recognition in UK’. Press release, 9 June 2011. Available at: <https://www.privacyinternational.org/article/pi-and-partners-take-automated-number-plate-recognition-uk>. Accessed 27/02/2012.

⁷⁴ Home Office, 2011. ‘Consultation on a code of practice relating to surveillance cameras. Impact Assessment.’

In November 2007, for example, the government revealed that discs containing personal details from 7.25 million families, or 25 million individuals, claiming child benefit had gone missing in the post between HM Revenue and Customs (HMRC) and the National Audit Office. The information included dates of birth, addresses, bank account numbers and national insurance numbers, ‘opening up the threat of mass identity fraud and theft from personal bank accounts.’⁷⁵

The Minister at the time, Michael Wills, acknowledged that a lack of ‘the right sort of culture’ could undermine the technological apparatus and framework designed to protect information privacy. He told the Joint Committee on Human Rights (JCHR) in response to questions about the incident that ‘there was no question that if people had the idea of the right to privacy burning in the forefront of their minds we would have a far smaller number of these sorts of revelations and these sorts of deplorable breaches’.⁷⁶ The JCHR agreed, attributing the errors to ‘the government’s persistent failure to take data protection safeguards sufficiently seriously’, defining the problem as a cultural one that exposed insufficient respect for the right to respect personal data in the public sector.⁷⁷

The JCHR reported in 2008 that the HMRC incident had caused the government to take data protection issues more seriously, and the Information Commissioner’s Office was subsequently given greater powers to monitor and enforce the DPA.⁷⁸ However, since then, serious breaches of data protection continue to occur. For example in February 2011, it was revealed that two local authorities had put clients’ privacy at ‘significant risk’ following the theft of two unencrypted laptops containing sensitive personal information.⁷⁹ In September 2011, it emerged that during an office move the Eastern and Coastal Kent Primary Care Trust had accidentally sent a CD containing personal information on 1.6 million people to a landfill site.⁸⁰

⁷⁵ The *Guardian*, 2007. ‘Lost in the post – 25 million at risk after data discs go missing,’ the *Guardian*, 21 November 2007.

⁷⁶ Joint Committee on Human Rights, 2008. Data protection and human rights. Para 27.

⁷⁷ Ibid.

⁷⁸ Ibid. Para 38.

⁷⁹ Information Commissioner’s Office, 2011. ‘*Councils fined for unencrypted laptop theft*’. Press release, 8 February 2011. Available at: http://www.ico.gov.uk/news/latest_news/2011.aspx. Accessed 27/02/2012.

⁸⁰ PublicService.co.uk, 2011. ‘NHS lost CD with data on 1.6 million patients, reported by PublicService.co.uk’. Press release, 16 September 2011. Available at: http://www.publicservice.co.uk/news_story.asp?id=17467. Accessed February 2012.

4. Retaining the DNA of innocent people on a national database may breach their Article 8 and Article 14 rights

The European Court has found the UK to be in breach of Article 8 with the retention of DNA samples and profiles in its national database. The database, the largest of its kind in the world, was established in 1995 under the Criminal Justice Public Order Act 1994. Its original goal was to assist the detection of serious crime suspects, particularly in cases of sexual assault and burglary, where the chance of discovering forensic evidence at the crime scene is greatest.⁸¹

From the late 1990s, a small number of area forces pioneered the practice of taking DNA samples from anyone charged with any recordable offence, and gradually the database expanded. In 2001 under the Criminal Justice and Police Act the scheme was altered to allow for the indefinite retention of the DNA material. This applied regardless of the guilt or innocence of the individual; once the record had been created, it remained. In 2003, the Criminal Justice Act 2003 extended this further to allow the police to take the DNA of those arrested for (but not necessarily charged with) a recordable offence.

By 2006, the national database carried the profiles of over 3 million people in England and Wales, and by January 2012 the number of people whose samples were indefinitely retained had expanded to 5.5 million.⁸² The retention of the sample and profile raises questions about the protection and use of this personal information in relation to information privacy and the undermining of the presumption of innocence.

In 2008, the failure to remove the profiles of individuals who were acquitted or not charged from the database was challenged in the case of *S. and Marper v. the United Kingdom*.⁸³ Previously the Court of Appeal had held that indefinite retention was lawful because it was easy to distinguish between those who were innocent and those who were guilty. However, the European Court unanimously ruled that Article 8 had been breached, as the policy was disproportionate and unnecessary.⁸⁴

81 Non-intimate samples of DNA were legitimately allowed to be taken from those charged, reported, cautioned or convicted for recordable offences under the Criminal Justice Public Order Act 1994.

82 For 2006 figure see Parliamentary Office of Science and Technology, 2006. 'The National DNA Database'. Available at: <http://www.parliament.uk/documents/post/postpn258.pdf>. Accessed 27/02/2012. The latest figures for 2012 are available from the National Policing Improvement Agency <http://www.npia.police.uk/en/13338.htm>. The 2012 figure is the 'estimated number of individuals retained on the NDNAD' at 4 January 2012, England and Wales only.

83 *S. and Marper v. the United Kingdom* [2008].

84 *Ibid.* Para 125.

The Home Office's initial proposals for addressing this ruling still involved the indefinite retention of DNA profiles for those convicted of a recordable offence.⁸⁵ The proposals were halted after the Committee of Ministers, the Strasbourg body responsible for overseeing implementation of the European Court's judgments, concluded that they did not conform to the legal requirement of proportionality, and that they failed to meet the requirements of the judgment with respect to children. The Committee also criticised the poor quality of the evidence provided by the Home Office to underpin its arguments, and the lack of independent oversight.⁸⁶

The retention of innocent people's samples on the database also raises questions in relation to Article 14 of the European Convention. Article 14 prohibits discrimination against a wide range of groups in the enjoyment of the rights contained in the European Convention.⁸⁷ Evidence suggests that there are a disproportionate number of black, Asian and young people on the database, compared to the general population.⁸⁸

In a report on the police and racism in 2009, the Equality and Human Rights Commission argued that, 'the police service has failed to properly acknowledge or address the race equality impact of the database'.⁸⁹ Non-governmental organisations such as Genewatch (which monitors the human rights implications of genetic technologies), and civil liberties groups such as Liberty and the Runnymede Trust, have repeatedly expressed their concern

85 See Home Office, 2009. Keeping the right people on the DNA database. Available at: <http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dna-consultation?view=Binary>. Accessed 27/02/2012; GeneWatch UK, for example, described these proposed retention times as 'far too long' and questioned the evidence base for the proposals, see www.genewatch.org. Accessed 27/02/2012; Media coverage was also negative, with the *Daily Mail* querying why the 'DNA of innocents' should be retained for a six year period. *Daily Mail*, 'DNA of Innocents will be kept on database for six years,' 29 October 2009. Available at: <http://www.dailymail.co.uk/news/article-1223688/DNA-innocents-kept-database-years.html>. Accessed 27/02/2012.

86 Council of Europe Committee of Ministers, 2009. 1065th meeting (DH), 15 and 16 September 2009. Preliminary list of items for consideration. Available at: <https://wcd.coe.int/ViewDoc.jsp?id=1461727&Site=CM>. Accessed 27/02/2012.

87 It does not, however, provide a free-standing right to equality.

88 See <http://www.npia.police.uk/en/13852.htm> for a breakdown of England and Wales plus British Transport Police subject profiles retained on the NDNAD by ethnic appearance, as at 4 January 2012.

89 J. Benetto, 2009. *Police and Racism: What has been achieved 10 years after the Stephen Lawrence inquiry report?* London: Equality and Human Rights Commission. Available at: <http://www.equalityhumanrights.com/news/pre-june-2009/commission-reports-on-police-and-racism-ten-years-on-from-the-macpherson-inquiry/>. Accessed 27/02/2012.

that Asian and black individuals, in particular black men, are over-represented in the database.⁹⁰ In *S. and Marper v. the United Kingdom*, the applicants submitted evidence that this could potentially lead to racial profiling in criminal investigations.⁹¹

The National Policing Improvement Agency (NPIA) recently carried out two equality impact assessments relating to the use of the database. In 2007, it noted the ‘suspicion’ that profiling ‘may affect ethnic minority men disproportionately’ and that this ‘requires evidence’.⁹² Its 2009 Equality Impact Assessment also noted the concerns about disproportionality and the impact this could have on the relationship between police and ethnic minority communities. It pledged to produce more robust estimates of the number of black male profiles on the database.⁹³ These are not yet publically available.

The Protection of Freedoms Bill, before parliament at the time of writing, contains the latest attempt by the government to address the *S. and Marper* judgment. The bill contains some significant improvements on the current situation. For example, except in very specific circumstances, the DNA samples taken to create DNA profiles will be destroyed, and only the resulting profile will be retained. Also, the DNA profiles of those arrested or charged with a minor offence but not convicted, will be destroyed. This means that many black people

⁹⁰ See, for example, responses to the Home Office consultation, Home Office, 2009. They include Genewatch, <http://www.genewatch.org/sub-539481>, Liberty, <http://www.liberty-human-rights.org.uk/human-rights/privacy/dna-retention/index.php>, and Runnymede Trust, <http://www.runnymedetrust.org/uploads/policyResponses/KeepingTheRightPeopleOnTheDNADatabase.pdf>. Accessed 27/02/2012.

⁹¹ C. Gallagher, 2007. Witness Statement of C. Gallagher, submitted by the applicants, March 2007, paras 116-118. Available at: <http://www.statewatch.org/news/2007/nov/echr-marper-witness-statement-dna.pdf>. Accessed 27/02/2012.

⁹² National Police Improvements Agency, 2007. *Stage One Equality Impact Assessment of NDNAD*. Page 5. Available at: http://www.npia.police.uk/en/docs/Stage_One_EIA_of_NDNAD_.pdf. Accessed 27/02/2012.

⁹³ National Police Improvements Agency, 2009. *Stage Two Equality Impact Assessment - November 2009 (second Review)*. Available at: http://www.npia.police.uk/en/docs/NDNAD_Full_Impact_Assessment_November_2009.pdf. Accessed 27/02/2012.

currently on the database will be removed soon after the bill is passed.⁹⁴ In addition, a person who has been charged with a serious crime but not convicted will have their DNA profile held for three years, with a possible two-year extension with court approval, rather than indefinitely as is currently the case.

The equivalent Scottish system does not allow retention of DNA when an arrest does not lead to a charge. This system was approved of in the *S. and Marper* case as being compatible with Article 8.⁹⁵ However, in England and Wales, the government proposes to allow retention without charge ‘where the circumstances make it particularly pressing ... for the purposes of prevention or detection of crime’.⁹⁶ Exactly what these circumstances will be is not yet known, but the JCHR has expressed concern that they may create a significant risk of incompatibility with Article 8.⁹⁷ Furthermore, the current proposals will allow police to keep the DNA of people deemed to be a risk to national security, even if they have not been convicted of an offence.

Until the bill is enacted, the Association of Chief Police Officers guidance has recommended that Police National Computer records, fingerprints and DNA records should be destroyed only in ‘exceptional cases’.⁹⁸ This material and information continues to be routinely retained, although the Supreme Court recently ruled that the ACPO guidelines are in breach of Article 8 and therefore unlawful.⁹⁹

94 T. May, T. Gyateng and M. Hough, 2010. Differential treatment in the youth justice system. Manchester: Equality and Human Rights Commission. Also, the Home Office has stated that ‘levels of disproportionality (in race, age and gender) are highest at the earliest stages of the criminal justice system. The proposed change will remove from the Database the majority of those who have not been convicted of an offence, i.e. those from the early stages of the CJS ... any impact should be positive in these areas by removing large number of such individuals.’ See Home Office Crime and Policing Group Impact assessment for the proposal: ‘DNA & fingerprints: New framework for their retention and destruction’. Available at: <http://www.parliament.uk/documents/impact-assessments/IA12-004C.pdf>. Accessed 27/02/2012.

95 Liberty, 2011. *Liberty’s report stage briefing on Part 1 and 2, Chapter 1 of the Protection of Freedoms Bill in the House of Commons*. Pp. 7-12. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy11/liberty-s-report-stage-briefing-on-the-dna-retention-and-surveillance-camera.pdf>. Accessed 27/02/2012.

96 Home Office, 2012. *Protection of Freedoms Bill. European Convention on Human Rights. Memorandum by the Home Office*. 11 February, 2012. Para 18. Available at: <http://www.homeoffice.gov.uk/publications/about-us/legislation/freedom-bill/human-rights-memorandum?view=Binary>. Accessed 27/02/2012.

97 Joint Committee on Human Rights, 2011. *Legislative Scrutiny: Protection of Freedoms Bill*. Eighteenth Report of Session 2010-12. HL Paper 195. London: The Stationery Office. Page 3.

98 Association for Chief Police Officers, 2006. Retention guidelines for nominal records on the police national computer. Page 11. Available at: <http://www.acpo.police.uk/documents/PoliceCertificates/SubjectAccess/Retention%20of%20Records06.pdf>. Accessed 27/02/2012.

99 *R.(G.C. & C.) v. Commissioner of Police for the Metropolis* [2011] UKHL 21.

Not enough is done to protect the dignity and autonomy of people who use health and social care services

How Article 8 protects the dignity and autonomy of people using health and social care services

People using health and social care services have a right to be treated with dignity and respect and to be involved in decisions about their care. The concepts of ‘dignity’ and ‘personal autonomy’ have been developed through case law especially – but not only – in relation to the respect for private and family life under Article 8 of the Convention. Through its judgments, the European Court has made it clear that ‘the very essence of the European Convention is respect for human dignity and freedom’, and that Article 8 is relevant to questions relating to the quality of life.¹⁰⁰

As discussed above, Article 8 rights are often considered alongside Article 3 in cases where ill-treatment violates dignity but does not meet the level of severity demanded by Article 3 to constitute torture, or inhuman or degrading treatment.¹⁰¹

Article 8 also imposes a positive obligation on public authorities to protect and promote the right to respect for dignity and personal autonomy of individuals. This applies to the way they perform all of their powers and duties, and includes taking active steps to prevent breaches, taking measures to effectively deter conduct that would amount to a breach, responding to any breaches, and providing information to individuals to explain the risk to their human rights, where it is clear that this risk exists.

¹⁰⁰ *Burke, R. (on the application of) v. The General Medical Council* [2004] EWHC 1879 (Admin).

See also *Pretty v. the United Kingdom* [2002] ECHR 2346/02.

¹⁰¹ *S. and Others v. Slovakia* [2009], see also the chapter on Article 3.

For example, in *Bernard v. London Borough of Enfield*, Ms Bernard, a severely disabled woman who used a wheelchair, took a case against her local council.¹⁰² She claimed that the accommodation provided for her, her husband and their six children was inappropriate and inadequately adapted. She could not use the stairs and so could not access the bathroom and bedrooms. Although Ms Bernard's care plan stated that she needed assistance to move house, the local authority had not taken steps to move the family to suitably adapted accommodation, even after receiving a court order to re-house her. Although the High Court found that the council's behaviour did not meet the higher threshold of breaching Article 3, it had breached Article 8. The Court described the council's failure as showing a 'singular lack of respect' for Mrs Bernard's private and family life and awarded damages of £10,000.¹⁰³

In relation to health and social care, Britain's positive human rights obligations are partly fulfilled by having adequate laws, and effective systems of regulation. Several different pieces of legislation relating to this area uphold Article 8 principles. For example, the Health and Social Care Act 2008 (Regulated Activity) Regulations 2010 explicitly require registered providers of health and social care services to ensure 'the dignity, privacy and independence of service users'.¹⁰⁴ The Mental Capacity Act 2005 supports personal autonomy by starting from a presumption of mental capacity. The NHS constitution, designed to give patients legally enforceable rights, states that 'you have the right to be treated with dignity and respect, in accordance with your human rights'.¹⁰⁵

There are three regulators of health and social care in England and Wales. In England, the Care Quality Commission (CQC) monitors the quality of care given by all registered providers of health and social care services in the public, private and voluntary sectors. In Wales, the Care and Social Services Inspectorate Wales (CSSIW) regulates social care and local authority care support services, while NHS and independent health care providers are regulated by the Healthcare Inspectorate Wales (HIW).

Despite these protections, there is evidence that Article 8 breaches occur in health and social care settings. In 2007, the Joint Committee on Human Rights (JCHR) published its inquiry into the human rights of older people in health

102 *R.(Bernard) v. London Borough of Enfield* [2002] EWHC 2282 Admin.

103 *R.(Bernard) v. London Borough of Enfield* [2002]. Para 34.

104 Regulation 17(2)(a) Health and Social Care Act 2008 (Regulated Activities) Regulations 2010.

105 NHS, 2010. *The NHS Constitution*. Page 9. Available at: <http://www.nhs.uk/choiceintheNHS/Rightsandpledges/NHSConstitution/Documents/nhs-constitution-interactive-version-march-2010.pdf>. Accessed 27/02/2012.

care.¹⁰⁶ The inquiry exposed serious human rights concerns, including evidence of treatment which it believed to be in breach of Article 8. This included individuals being treated roughly by staff, being left in their own waste, having their glasses or hearing aids left out of reach, suffering a lack of privacy when changing clothing or using the toilet, being given medication inappropriately to subdue them or being physically restrained.

In 2008, the JCHR found that people with learning disabilities also experienced serious infringements of their dignity and autonomy in health and social care settings. It reported cases of neglect and carelessness, including cases in which people had been made to bathe in cold water, or had been subjected to an inappropriate use of physical restraint.¹⁰⁷ The JCHR concluded that the poor treatment of people with learning disabilities was ‘endemic’ in health and social care settings and highly likely to breach Article 8.¹⁰⁸

Although it is five years since the JCHR first exposed evidence of human rights abuses in health and social care settings, such treatment continues to be reported. In early 2011, the Parliamentary and Health Service Ombudsman (PHSO) reported the stories of 10 older people from across England who had suffered unnecessary pain, indignity and distress while in the care of the NHS.¹⁰⁹ The poor treatment in all 10 cases is likely to have breached Article 8.

In October 2011, the CQC published its findings from 100 unannounced inspections of NHS acute hospitals. It showed that 20 hospitals had failed to comply with one or both of the essential standards of ‘dignity’ or ‘nutrition’, while a further 35 that did comply still needed to make improvements.¹¹⁰ Inspectors reported bells being placed out of people’s reach so they could not call for help, patients being ignored for hours at a time, and patients being given no help eating or going to the toilet.¹¹¹

106 Joint Committee on Human Rights, 2007. *The Human Rights of Older People in Healthcare* Eighteenth Report of Session, 2006-07, Vol. I – Report and Formal Minutes. London: The Stationery Office.

107 Joint Committee on Human Rights, 2008. *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*. London: The Stationery Office. Para 136.

108 Ibid. Para 138.

109 Parliamentary and Health Service Ombudsman, 2011. *Care and compassion? Report of the Health Service Ombudsman on ten investigations into NHS care of older people*, Fourth Report of the Health Service Commissioner for England, Session 2010-11, HC 778. London: The Stationery Office. Page 9.

110 Care Quality Commission, 2011. *Dignity and nutrition inspection programme. National overview*. Available at: http://www.cqc.org.uk/sites/default/files/media/documents/20111007_dignity_and_nutrition_inspection_report_final_update.pdf. Accessed 27/02/2012. The dignity standard relates to Outcome 1: respecting and involving people who use services; nutrition standard relates to Outcome 5: Meeting nutritional needs.

111 Ibid. Page 4.

In November 2011, the Equality and Human Rights Commission conducted its own inquiry into older people's experience of home-based care. It found that, while many were satisfied with the service, there were also many examples of poor treatment which amounted to breaches of Article 8 rights. The inquiry heard of cases where people were put to bed against their wishes in the early afternoon, strip-washed while people talked over them, or roughly handled by carers.¹¹² The inquiry report also noted that 'many home care packages cover only the most basic needs necessary for physical wellbeing. Any failure to follow the care plan can cause neglect of the older person and is also likely to be in breach of the right to respect for private life under Article 8'.¹¹³

Key issues

1. People who are receiving health and social care from private and voluntary sector providers do not have the same guaranteed level of direct protection under the Human Rights Act as those receiving it from public providers

As explained in more detail under Article 3, the HRA applies to both public authorities and to other organisations when they are performing functions of a public nature. This is important in social care settings because most care homes are owned by private or voluntary sector organisations, as are the majority of home-based care services.¹¹⁴ Nearly 90 per cent of home care agencies are privately owned or run by voluntary agencies,¹¹⁵ but it is estimated that 80 per cent of the home care provided by the independent sector is commissioned by local authorities.¹¹⁶

In 2007, the House of Lords ruled that residents of independent care homes had no direct protection under the HRA even if their care was funded by local authorities, because the care homes were not performing a 'public function'. Legislation has now closed this protection gap.¹¹⁷ However, the House of Lords' decision also cast doubt on whether the HRA applies to private and voluntary

¹¹² Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission. Part 3b.

¹¹³ Ibid. *Close to home*. Page 30.

¹¹⁴ Department of Health, 2010. *How social care is delivered* [Archived internet page]. Available at: <http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/SocialCare/Aboutthedirectorate/Howsocialcareisdelivered/index.htm>. Accessed 10/11/2011.

¹¹⁵ UKHCA, 2011. An Overview of the UK Domiciliary Care Sector 2011. Available at: [http://www.ukhca.co.uk/pdfs/domiciliarycaresectoroverview.pdf#search="overviews of uk domiciliary sector"](http://www.ukhca.co.uk/pdfs/domiciliarycaresectoroverview.pdf#search=). Accessed 10/11/2011.

¹¹⁶ Laing and Buisson, 2011. *Domiciliary Care, UK Market Report 2011*. London: Laing and Buisson.

¹¹⁷ Health and Social Care Act 2008.

sector organisations who are commissioned by local authorities to provide home care. Following the evidence from the Home Care Inquiry, the Commission has argued that this legal loophole should be closed.¹¹⁸

Even this would not, however, address the lack of human rights protection for people who pay for their own residential or domiciliary care. The ageing population and budget constraints mean that the proportion of people funding their own care is likely to grow as many local authorities continue to narrow their eligibility criteria in response. As a result, in future a large proportion of care users will not be able to hold their service providers to account for breaches of human rights.

Private and voluntary sector health providers who are under contract to the NHS may also be operating outside the scope of the HRA,¹¹⁹ although this point has not yet been tested in court. The current Health and Social Care Bill will mean more independent providers being commissioned to provide NHS services, leading to a danger that human rights protection will be eroded in this sector.

2. There is a lack of awareness, both within public authorities and among care staff, of how human rights obligations apply in a health and social care setting

When the HRA was enacted, one of the intentions was that it should create a ‘culture of human rights’ in which public authorities would ‘habitually and automatically respond to human rights considerations in all of their policies and practices’.¹²⁰

A human rights-based approach in health and social care means that the service user is placed at the centre of decision-making. It ensures that qualified rights, like the right to respect for dignity and personal autonomy under Article 8, are only restricted where proportionate and necessary. It can also help providers to decide how to balance competing rights, for example between the staff

¹¹⁸ Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission.

¹¹⁹ Joint Committee on Human Rights, 2009. *Legislative Scrutiny: Health Bill*, Eleventh Report of Session 2008-2009. HL 69. London: The Stationery Office. Para 1.30; private hospitals are subject to inspections from the Care Quality Commission.

¹²⁰ Lord Irvine, in oral evidence to Joint Committee on Human Rights, 19 March 2001. See Joint Committee on Human Rights, 2001. *Evidence to Joint Committee on Human Rights: implementation of the Human Rights Act 1998*. Para 38. Available at: <http://www.publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1031906.htm>. Accessed 27/02/2012.

and service users. Services which have applied such an approach have seen standards rise.¹²¹

For example, Mersey Care NHS Trust has implemented a human rights approach in its specialist mental health and learning disability services for people in Liverpool, Sefton and Kirkby. Service users receive training to enable them to participate fully in the running of the organisation. They help to interview potential recruits, induct new staff, and investigate serious incidents. As a result, both staff and service users say they are more aware of their rights and obligations.¹²²

A human rights-based approach provides an alternative to broad, standardised policies which can be impersonal and inflexible. In some cases, such a lack of flexibility, or a 'risk-based' attitude, has led to breaches of the right to respect for dignity or personal autonomy under Article 8.¹²³

For example, in the case of *R. v. East Sussex County Council*¹²⁴ the local authority had placed a blanket ban on manual lifting, in order to protect the needs of care staff. However, for two sisters who lived in a specially adapted house, the policy meant that they were unable to move or go outside their home. The judgment described the manual lifting ban as 'unlikely to be lawful because it does not consider a person's individual circumstances'. The local authority were ordered to find a better balance between the Article 8 rights of the service users and the rights of the carers to a safe working environment.¹²⁵

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- 121 See Equality and Human Rights Commission, 2009. *Human Rights Inquiry*. Manchester: Equality and Human Rights Commission. See also Jenna Vyes *et al.*, Mersey Care NHS Trust in association with BIHR, 2011. *Keeping me safe and well assessment manual - a human rights based approach*, Mersey Care NHS Trust. Available at: http://www.humanrightsinhealthcare.nhs.uk/Library/a-z/learning_disability_keeping_me_safe_and_well.pdf. Accessed 27/02/2012. See also Joint Committee on Human Rights, 2007, for examples of NHS Trusts which had adopted a human rights approach which improved the quality of care for patients.
- 122 L. Dyer, 2010. 'Taking a human rights based approach to mental health services', *Mental Health Practice*, 14(3), November 2010.
- 123 Bowers *et al.*, 2009. *Older peoples' vision for long term care*. York: Joseph Rowntree Foundation.
- 124 *R. v. East Sussex County Council ex parte A, B, X and Y* [2003] EWHC 167 (Admin) (Disability Rights Commission - Intervener).
- 125 J. Candler, H. Holder, S. Hosali, A.M. Payne, T. Tsang and P. Vizard, 2011. *Human Rights Measurement Framework: Prototype Panels, indicator set and evidence base*. Manchester: Equality and Human Rights Commission. Page 349, Indicator 43.

Although it has been 10 years since the HRA was introduced, there is widespread lack of awareness of the benefits of a human rights approach within the health and social care sector. The statutory materials and other official guidance in the sector tend to focus on ‘dignity’, and place emphasis on personal choice and control and person-centred care, without explicitly acknowledging that dignity and autonomy are human rights principles protected by the HRA.¹²⁶ The evidence consistently points to staff members not making the link between human rights and the care they are supposed to be giving.¹²⁷

In its 2007 report into older people’s health care, the JCHR concluded that the Department of Health and the Ministry of Justice had failed ‘to give proper leadership and guidance to providers of health and residential care on the implications of the Human Rights Act’.¹²⁸ In 2007, an investigation by the PHSO into the deaths of six individuals with learning disabilities found that ‘an underlying culture which values human rights was not in place in the experience of most of the people involved’.¹²⁹ Similarly, the former Healthcare Commission attributed some of the abuse and neglect it found within some services to lack of awareness. This underlines the importance of public authorities knowing and understanding what their obligations under the HRA are.¹³⁰

126 See Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission, page 87, for discussion of commissioning procedures and how many LAs deal with human rights on only a superficial basis.

127 Ministry of Justice, 2008. *Human Rights Insight Project*, Ministry of Justice Research Series 1/08; Joint Committee on Human Rights, 2008. *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*. London: The Stationery Office; British Institute of Human Rights and Age UK, 2011. *Older people and human rights project evaluation report*. London: Age UK.

128 Joint Committee on Human Rights, 2007. *The Human Rights of Older People in Healthcare* Eighteenth Report of Session, 2006-07, Vol. I – Report and Formal Minutes. London: The Stationery Office. Page 3.

129 Parliamentary and Health Service Ombudsman, 2008. *Six Lives. The provision of public services to people with learning disabilities*. Second Report of Session 2008-09. HC 203. London: The Stationery Office. Page 21.

130 Healthcare Commission, 2007. *Investigation into the service of people with learning disabilities provided by Sutton and Merton Primary Care Trust*. London: Commission for Health Audit and Inspection.

The Department of Health has since collaborated with five NHS organisations and the British Institute of Human Rights to develop guidance, case studies and human rights tools supporting the implementation of a human rights-based approach to the provision of health.¹³¹ However, the Commission's inquiry into older people and human rights in home care found that in 2011, many local authorities – who commission over 80 per cent of home care to private and voluntary providers – did not take the opportunity to explicitly promote and protect human rights in their commissioning processes. Many authorities showed poor understanding of their obligations under the HRA.¹³²

3. Better complaints systems are needed across the health and social care sectors

Under Article 8, the state should have adequate laws, institutions and procedures in place to protect individuals and ensure they are treated with respect for their dignity and autonomy. This includes having systems in place to ensure that breaches of Article 8 in the health and social care sectors are detected and dealt with.

The chapter on Article 3 identifies problems with the Care Quality Commission, namely that the CQC may not effectively investigate potential breaches of human rights, and no longer monitors commissioning practices of local authorities. This is also relevant to Article 8. As well as having a structure for inspecting services, an effective complaints system is also an essential element to protect people against undignified, abusive and inadequate treatment that does not take service users' wishes into account. A complaints system should allow service users to voice their concerns without fear of their care provision suffering.

Independent providers as well as public authorities must have a system in place for receiving complaints and inform people how to complain.¹³³ If providers do not provide a satisfactory resolution, complaints relating to health and social care provision in England can also be made to the PHSO and the Local Government Ombudsman respectively. In Wales, the CSSIW, the social care regulator, deals with complaints about social care, while the Public Service Ombudsman for Wales deals with health services complaints.

¹³¹ For details of the project, *Human Rights in Healthcare*, see the Department of Health's archived website: <http://webarchive.nationalarchives.gov.uk/+www.dh.gov.uk/en/Managingyourorganisation/Equalityandhumanrights/Humanrights/index.htm>. Accessed 27/02/2012.

¹³² Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission.

¹³³ Ibid.

The JCHR reported in 2007 and 2008 that many older people and people who are disabled do not know how to raise concerns, or doubt that anything will change for the better if they do.¹³⁴ Many service users and their families do not see poor treatment as a human rights issue and do not realise they can use human rights arguments to improve treatment.¹³⁵ The Commission's inquiry into the human rights of older people in home care has also highlighted institutional and systemic barriers to older people making complaints.¹³⁶ Just under a quarter of people who responded to the Commission's call for evidence said they would not complain, either because they did not know how to, or because they feared repercussions.¹³⁷

Individuals with limited mental capacity may not be able to raise concerns themselves if they receive poor treatment. In this event, they may qualify to use an advocacy service, such as the NHS's Patient's Advice and Liaison Service (PALS).¹³⁸ However, not all patients will qualify for such help, leaving many people with no one to act on their behalf or to help them speak for themselves.¹³⁹ In addition, those who have 'assisted autonomy' in the form of an advocate, may find that if their concern is at odds with the view of health and social care professionals, the latter's views will carry more weight.

These issues were illustrated in *Steven Neary v. Hillingdon Borough Council*, a case involving a 21-year-old man with childhood autism and a severe learning disability who lives with, and is cared for by, his father, Mr Neary.¹⁴⁰ Steven requires constant support and supervision, and Mr Neary was helped by an extensive care package provided by Hillingdon Council. In 2009 the local authority accepted Steven into respite care for a few days, but subsequently kept him there for a year, despite Mr Neary's insistence that Steven was best placed with him.

134 Joint Committee on Human Rights, 2007. *The Human Rights of Older People in Healthcare* Eighteenth Report of Session, 2006-07, Vol. I – Report and Formal Minutes. London: The Office. Para 242; Joint Committee on Human Rights, 2008. *A Life Like Any Other? Human Rights of Adults with Learning Disabilities*. London: The Stationery Office. Para 235.

135 Ministry of Justice, 2008; Joint Committee on Human Rights, 2008; British Institute of Human Rights, 2011.

136 Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission.

137 Ibid. Page 82.

138 PALS is open to all, and under the Mental Capacity Act those who do not have friends or family to consult with and who lack capacity should be referred to an Independent Mental Capacity Advocate.

139 See <http://www.pals.nhs.uk/>.

140 *London Borough of Hillingdon v. Steven Neary* [2011] EWHC 1377.

The case judgment focused on the unlawfulness of Steven's detention under Article 5 (the right to liberty), but also found Hillingdon council to be in breach of the right to respect for family life under Article 8, by failing to consider the human rights implications of keeping Steven away from his family for a long period of time.

One aspect of the Article 8 breach was based on the council's failure to listen to Mr Neary's complaints. The court said that 'Hillingdon's approach was calculated to prevent proper scrutiny of the situation it had created. In the weeks after Steven's admission, it successfully overbore Mr Neary's opposition. It did not seriously listen to his objections and the suggestion that it might withdraw its support for Steven at home was always likely to have a chilling effect. Once Mr Neary's resistance was tamed, the question of whether Steven was in the right place did not come under any balanced assessment.'¹⁴¹

3. Increased pressure on health and social care budgets puts the Article 8 rights of service users at risk

Rising costs, an ageing society and recent and ongoing public spending cuts have had an impact on the funding for the care and support of older and disabled people. At a time when resources are constrained, upholding service users' rights to dignity and autonomy requires additional commitment. Under Article 8(2), public authorities are permitted to balance the right to respect for dignity and autonomy against the 'economic wellbeing of the country', as long as any infringement of these rights is proportionate.

For example, in 2011, the Supreme Court found that Kensington and Chelsea Council in London had acted lawfully in cutting costs by substituting a woman's night time carer who helped her go to the toilet at night with the provision of incontinence pads, even though she was not incontinent. The court ruled that, even if the decision engaged Article 8, it did not amount to a breach of her rights under Article 8, given the demands on the local authority's limited resources.¹⁴²

¹⁴¹ *London Borough of Hillingdon v. Steven Neary* [2011]. Para 155(2).

¹⁴² *R. (on the application of McDonald) (Appellant) v. Royal Borough of Kensington and Chelsea (Respondents)* [2011] UKSC 33. See <http://www.equalityhumanrights.com/news/2011/june/commission-response-to-the-mcdonald-care-case/> for the Commission's response to this case. Accessed 27/02/2012.

Public authorities that commission providers on short-term contracts and prioritise low cost above quality risk driving down standards of care.¹⁴³ Evidence from the CQC's unannounced spot checks of hospitals in 2011 found evidence linking budget constraints with the failure by some providers to meet the essential standards of 'dignity' and 'nutrition'.¹⁴⁴ Age UK have argued that older and disabled people who are eligible for publicly-funded care often do not receive enough for them to continue living independently in their homes and maintain a good quality of life.¹⁴⁵

The Commission's inquiry into older people and human rights in home care found evidence of providers 'cutting corners', for example through limiting the amount of time staff can spend at a person's home to as little as 15 minutes per visit, generally as a result of local authority commissioning practices.¹⁴⁶ Older people who gave evidence to the inquiry described the negative emotional impact of being washed and dressed by a series of different people due to the high turnover of staff at the agency that delivered her care. In one extreme case, a woman had 32 different carers in a two-week period.

If public authorities reduce the quality of care due to budget constraints, they are likely to risk breaches of Article 8.

¹⁴³ Rubery *et al.*, 2011. *The recruitment and retention of a care workforce for older people. Summary report*. London: Department of Health. Pp. 8-9. The report highlights practices such as paying care staff by the hour and only for the time they spent in a person's home, and not for the travel time between visits.

¹⁴⁴ Care Quality Commission, 2011. *Dignity and nutrition inspection programme. National overview*.

¹⁴⁵ Age UK, 2012. *Care in crisis 2012*. Available at: http://www.ageuk.org.uk/Documents/EN-GB/Campaigns/care_in_crisis_2012_report.pdf?dtrk=true. Accessed 27/02/2012.

¹⁴⁶ Equality and Human Rights Commission, 2011. *Close to home: An inquiry into older people and human rights in home care*. Manchester: Equality and Human Rights Commission.

Requirements to annul marriage prior to gaining gender recognition continue to cause hardship for some transsexual people

How does Article 8 protect the right to private and family life for transsexual people?

The right to family life encompasses a wide definition of ‘family life’ that goes beyond formal or traditional relationships. It covers cohabiting couples, same-sex couples, siblings, foster parents and foster children and grandparents and grandchildren.¹⁴⁷ The state also has a positive obligation under Article 8 to ensure that gender reassignment is legally recognised.

The right to gender recognition under Article 8 was established in the case of Christine Goodwin, a post-operative transsexual woman. (A transsexual person is someone whose gender identity and/or gender expression differs from their assigned birth sex, and who intends to undergo, is undergoing or has undergone gender reassignment.)¹⁴⁸ She claimed that the lack of legal recognition of her new gender had resulted in numerous discriminatory experiences which amounted to a breach of Article 8.¹⁴⁹ The European Court concluded that Article

147 For jurisprudence on the relationship between grandparent and grandchild, see *Re J. (Leave to Issue an Application for a Residence Order)* [2003] CA 1 FLR 114; for foster parent and foster child, see *Gaskin v. the United Kingdom* [1989] 12 EHRR 36; for same sex couples see *Schalk and Kopf v. Austria* [2010] ECHR 30141/04; for siblings see *Senthuran v. Secretary of State for the Home Department* [2004] EWCA Civ 950, [2004] 4 All ER 365.

148 The terms ‘trans people’ and ‘transgender people’ are often used as umbrella terms for people whose gender identity and/or gender expression differs from their birth sex. This includes transsexual people, transvestite/cross-dressing people (those who wear clothing traditionally associated with the other gender either occasionally or more regularly), androgyne or polygender people (those who do not identify with male or female identities and do not identify as male or female), and others who define as gender variant.

149 *Goodwin v. the United Kingdom* [2002] 35 EHRR 447. See also European Court of Human Rights, 2011. ‘Gender Identity Issues’, Press Unit Factsheet – Transsexuals’ rights, October June 2011. Available at: http://www.echr.coe.int/NR/rdonlyres/6E6BB0DC-A41D-4ADB-94B3-37407490C629/o/FICHES_Droits_Transsexuels_EN.pdf. Accessed 27/02/2012.

8 had been breached,¹⁵⁰ ruling that society could ‘reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost’.¹⁵¹

Following this case, the government introduced the Gender Recognition Act (2004) (GRA) which sets out a process to give legal recognition ‘for all purposes’ to transsexual people in their new gender through the issuing of a gender recognition certificate.¹⁵² The Act provides an additional layer of privacy for people applying for such a certificate by making it a criminal offence for a person to disclose information about the application that was obtained in an official capacity.¹⁵³ Further protection is afforded by the Equality Act 2010, which prohibits discrimination because of gender reassignment in employment, education, services, functions of the state and housing.

Despite these advances, however, there remain many hardships for people trying to live in their acquired gender. There are no reliable estimates, but in 2000 Press for Change, a campaigning group for trans people, estimated that there were about 5,000 transsexual people in Britain. The estimate was based on Home Office data about numbers of people who had changed their gender on their passports.¹⁵⁴

150 European Court of Human Rights, 2011. ‘Gender Identity Issues’, Press Unit Factsheet – Transsexuals’ rights, October June 2011. Page 2.

151 *Goodwin v. the United Kingdom* [2002]. Para 91, quoted in Wadham *et al.*, 2009. Page 207.

152 Protection is provided for people who propose to undergo, are undergoing or have undergone gender reassignment.

153 Such a disclosure could be through word-of-mouth or through uncontrolled access to paper or electronic records, and would constitute a criminal offence liable to a fine of up to £5,000. See *Press for Change* website for more details, at: <http://transequality.co.uk/Privacy.aspx>, and <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-what-the-law-says/#GRA>. Accessed 27/02/2012.

154 S. Whittle, L. Turner and M. Al-Alaymi., 2007. *The Equalities Review. Engendered penalties: Transgender and transsexual people’s experiences of inequality and discrimination*. Press for Change. Available at: <http://www.nmhd.org.uk/silo/files/the-equalities-review.pdf>. Accessed 27/02/2012.

Key issues

1. Transsexual people currently have to divorce or end their civil partnership if they want their gender to be legally recognised

Under the GRA, transsexual people who are married or in a civil partnership and wish to have their new gender legally recognised have to divorce or annul the marriage or partnership. This criteria is set because if a person were permitted to change gender and remain married, it would create a same sex marriage, which is not allowed under UK law. Neither can a person remain in a civil partnership and change gender, as the law does not recognise a different sex partnership.

In many cases, ending the marriage or partnership is against the explicit wish of the couple, especially if they have children.¹⁵⁵ The Gender Identity Research and Education Society reports that this rule ‘can have a range of negative impacts, including those that affect the human rights, emotional and financial wellbeing of other family members, who are affected indirectly’.¹⁵⁶

In 2009, the Council of Europe’s Commissioner for Human Rights recommended that member states should ‘remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender’.¹⁵⁷ He argued that ‘protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages’.¹⁵⁸ The Commissioner further noted that in 2006 Austria’s constitutional court granted a transsexual woman the right to change her birth sex to female while remaining married to her wife. Germany’s constitutional court ruled similarly in 2008.¹⁵⁹

¹⁵⁵ T. Hammarberg, 2009. Human Rights and Gender Identity. CommDH/IssuePaper (2009)2, Council of Europe. Page 9. See also the Gender Identity Research and Education Society (GIRES) website, which reports that ending a marriage can cause ‘immense stress to spouses’ and that ‘the de-stabilising effect is particularly felt where young children are involved’. Available at: <http://www.gires.org.uk/GRA.php>. Accessed 27/02/2012.

¹⁵⁶ See GIRES website, <http://www.gires.org.uk/GRA.php>. Accessed 27/02/2012.

¹⁵⁷ T. Hammarberg, 2009. Human Rights and Gender Identity. CommDH/IssuePaper (2009)2, Council of Europe. Page 9. Section 3.6.

¹⁵⁸ Ibid. Section 3.2.2.

¹⁵⁹ Austrian Constitutional Court, BVerfG, 1 BvL 1/04 (18 July 2006); German Constitutional Court, BVerfG, 1BvL 10/05 (27 May 2008).

In the case of *Parry v. the United Kingdom* in 2006, the European Court of Human Rights ruled that the UK's approach in relation to gender recognition and existing marriages was reasonable and proportionate, within the margin of appreciation states are allowed on issues deemed to be highly culturally sensitive.¹⁶⁰ The Court found that a fair balance had been struck between the general interest of the community and the interest of the individual, noting that in the UK, civil partnerships offer an alternative contract to marriage, carrying with them almost the same legal rights and obligations. The Court found that the effects of the British system had not been shown to be disproportionate regarding respect for private and family life. The Court also noted that it did not consider it necessary for allowances to be made for a small number of marriages.¹⁶¹

However, some transsexual people affected by the requirement to dissolve a marriage or civil partnership have reported to the Equality and Human Rights Commission that an annulment is not emotionally acceptable to them.¹⁶² They may also face financial hardships by dissolving their marriage as spouses may lose their pension entitlements. Government guidance advises those who are married or in a civil partnership and want to apply for a gender recognition certificate to check the details of the pension schemes they hold, in case divorce or annulment affects their entitlements.¹⁶³

For those who choose to remain married and forgo legal gender recognition, the price is a more limited enjoyment of their Article 8 rights to private and family life.¹⁶⁴ One transsexual woman reported that she had decided not to seek

¹⁶⁰ *Parry v. the United Kingdom* [2006] ECHR 42971/05.

¹⁶¹ See European Court of Human Rights, 2011. *Gender Identity Issues*, Press Unit Factsheet – Transsexual Rights, October 2011. Available at: http://www.echr.coe.int/NR/rdonlyres/6E6BBoDC-A41D-4ADB-94B3-37407490C629/o/FICHES_Droits_Transsexuels_EN.pdf. Accessed 27/02/2012.

¹⁶² Views expressed to the EHRC in email correspondence and other statements.

¹⁶³ HM Courts and Tribunals Service, 2006. *Gender recognition guidance for married couples and civil partners where one or both partners wish to apply for a gender recognition certificate*, updated June 2006. Available at: http://www.justice.gov.uk/downloads/guidance/courts-and-tribunals/tribunals/gender-recognition-panel/other-guidance-and-information/Guide_married-couples-one-both-partners-apply-GRC10052011.pdf. Accessed 27/02/2012.

¹⁶⁴ See above, *Parry v. the United Kingdom* [2006]. Given these difficulties were not resolved, it may be that another case taken to the European Court of Human Rights might go in a different direction.

official gender recognition so she could remain married to her wife. She said this decision ‘has not enabled me to take some of the steps perhaps that I would have wanted to take to free myself from the past’.¹⁶⁵

In March 2012, the government plans to start consulting on how legislation could be developed on equal civil marriage rights for same sex couples and be adopted before the end of this parliament in 2015.¹⁶⁶

¹⁶⁵ University of Leeds ‘Gender Diversity, Recognition and Citizenship: Exploring the Significance and experiences of the UK Gender Recognition Act (GRA, 2004)’. Available at: <http://www.spectrumlondon.org.uk/pdf/GRA%20Research%20Report%20Final.pdf>. Accessed 27/02/2012; see also Equality and Human Rights Commission Scotland, 2011. *Equal access to marriage: Ending the segregation of same-sex couples and transgender people in Scotland*. Edinburgh: Equality and Human Rights Commission.

¹⁶⁶ See Home Office press release, 26 September 2011. ‘Government to consider options for equal civil marriage for same-sex couples’. Available at: <http://www.homeoffice.gov.uk/media-centre/press-releases/equal-civil-marriage-same-sex>. Accessed 27/02/2012. This time, however, the consultation appears to be on equal civil marriage only, rather than including equal civil partnership for opposite sex couples as well.

There continues to be a lack of appropriate accommodation for Gypsies and Travellers

How Article 8 relates to accommodation for Gypsies and Travellers

Article 8 protects the right to respect for an individual's home. The European Court has referred to a 'home' as 'the place, the physically defined area, where private and family life develops'.¹⁶⁷ 'Home' has been interpreted broadly to include a house or other traditional residence but also business premises¹⁶⁸ and a second property.¹⁶⁹ It also includes the caravans and sites of Gypsies and Travellers, ethnic groups with a nomadic tradition dating back centuries.¹⁷⁰

The right to respect for the home under Article 8(1) does not impose a positive obligation on public authorities to provide homes or sites for Gypsies and Travellers, or for anybody else. However, Article 8(2) prohibits interference with the right to respect for the home except where it is in accordance with the law, fulfils one of the six possible legitimate aims,¹⁷¹ and is proportionate. These rights relate to Gypsies and Travellers in two related ways.

Firstly, in recent decades there has been a shortage of authorised sites on which Gypsies and Travellers are allowed to live in caravans. In 1968 the Caravans Sites Act (CSA) 1968 imposed a duty on County Councils to provide caravan sites for Gypsies resorting to or residing in their area. However, since then, and despite a succession of new laws and initiatives, many local authorities have failed to provide sites in sufficient numbers.

¹⁶⁷ *Moreno Gomez v. Spain* [2004] ECHR 633 [2005] 41 EHRR 40.

¹⁶⁸ *Societe Colas Est and Others v. France* [2002] ECHR 421 [2004] 39 EHRR 17 and *Niemietz v. Germany Series A No. 251-B* [1992] 16 EHRR 97.

¹⁶⁹ *Demades v. Turkey* [2003] ECHR 16219/90.

¹⁷⁰ *Chapman v. the United Kingdom* [2001] 33 EHRR 18.

¹⁷¹ That is: it is the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Secondly, and partly as a result, many Gypsies and Travellers live on unauthorised sites.¹⁷² This exacerbates tensions between them and the settled community, as unauthorised sites may be unsanitary and have inadequate litter collection, for example. It also makes it difficult for Gypsies and Travellers to access services such as schools and health care and contributes to poorer health and educational outcomes.¹⁷³

Gypsies and Travellers living in unauthorised sites can face eviction, which may threaten their Article 8 right to respect for a home. To comply with Article 8 any eviction must have a legitimate aim, and must be proportionate. This will depend on a number of factors including whether there is a need to protect the environment, and whether there is alternative suitable accommodation available to the Gypsies and Travellers.¹⁷⁴

Some Gypsy and Traveller groups and their legal representatives have argued that evictions from unauthorised sites are not lawful as the provision of authorised sites is inadequate.¹⁷⁵ The lack of suitable alternatives often leaves Gypsies and Travellers with little choice but to live on unauthorised sites. These arguments have been backed by international human rights bodies including the United Nations Special Rapporteur on the Right to Housing¹⁷⁶ and the United Nations Committee on the Elimination of Racial Discrimination.¹⁷⁷

Thus far, these claims have not been upheld in court (see the discussion of the Dale Farm case, below). However, legal advice received by the Commission suggests that there may be grounds to challenge that decision.¹⁷⁸ In addition, the European Court has recognised that there needs to be special consideration given to the needs and different lifestyle of Gypsies and Travellers in the context of planning decisions, and we expect to see further consideration of this issue over the coming years.¹⁷⁹

172 Gypsies and Travellers sometimes face eviction from sites either where they are on unauthorised encampments (land not owned by the Gypsies and Travellers), or on unauthorised developments (land which is owned by the Gypsies and Travellers and they develop sites on, but without planning permission).

173 S. Cemlyn, M. Greenfields, S. Burnett, Z. Matthews and C. Whitwell, 2009. *Inequalities experienced by Gypsy and Traveller Communities*. Manchester: Equality and Human Rights Commission.

174 *Chapman v. the United Kingdom* [2001]. Paras 98 and 103.

175 *R. (McCarthy) v. Basildon DC* [2011] EWHC 2938 (Admin).

176 United Nations press release, 5 July 2011, 'Irish Traveller Community at Dale Farm facing eviction'. Available at: http://europe.ohchr.org/EN/NewsEvents/Pages/Dale_Farm.aspx. Accessed 27/02/2012.

177 Committee on the Elimination of Racial Discrimination, 2011. *Statement on Dale Farm*. 79th Session, 1 September 2011. Available at: http://www2.ohchr.org/english/bodies/cerd/docs/statements/DaleFarm_Statement.pdf. Accessed 27/02/2012.

178 Opinion of Andrew Arden QC to the Equality and Human Rights Commission, 2 August 2011.

179 *Chapman v. the United Kingdom* [2001].

Key issues

1. To date, the courts have not found a breach of Article 8 in relation to evictions from unauthorised Gypsy and Traveller sites. However, there may be grounds for challenging this precedent

In October 2011, after a prolonged legal battle, Basildon Council evicted the remaining residents from Dale Farm,¹⁸⁰ an unauthorised Gypsy and Traveller site. Dale Farm was a six-acre plot which, since 1982, had been the subject of green belt controls. In the 1980s the council created an authorised site of 34 pitches called Oak Lane for Gypsies and Travellers. In 2001, an Irish Traveller purchased a portion of the land on the adjoining Dale Farm and began to develop the land to create a site, without planning permission.

Basildon Council rejected the retrospective planning application to develop the site on Dale Farm because the land was subject to green belt controls, although it is widely reported that the land was previously used as a scrap yard.¹⁸¹ Representatives of the Gypsies and Travellers argued that there had been a breach of their Article 8 rights, as Basildon Council had failed to offer suitable alternative accommodation and to properly consider the rights of the residents who were vulnerable, including children. In October 2011, however, the High Court decided that Basildon Council had acted lawfully in refusing planning permission for the development of a site on Dale Farm, and the evictions went ahead.

Separately, however, the Commission received a legal opinion which indicated that there had been a breach of the Dale Farm residents' Article 8 rights, because of inadequacies in the particular legal process Basildon had followed to obtain the eviction.¹⁸² This indicates that there may be scope for a further challenge of the High Court's decision; or at least that similar cases may be decided differently in future.

¹⁸⁰ *R. (McCarthy) v. Basildon DC* [2011].

¹⁸¹ See, for example, Professor of Law at the London School of Economics, C. Gearty, 2011. 'The Dale Farm case shows that legal authority must be made clear before potentially life-wrecking actions are taken', Blog admin, London School of Economics, 29 September, 2011. Available at: <http://blogs.lse.ac.uk/politicsandpolicy/2011/09/29/dale-farm/>; BBC website 'Dale Farm: History of turmoil at Essex Travellers' site', 19 September 2011. Accessed 27/02/2012.

¹⁸² Opinion of Andrew Arden QC to the Equality and Human Rights Commission, 2 August 2011.

There are other reasons to believe that Article 8 may have to be reconsidered in future cases regarding evictions from unauthorised Gypsy and Traveller sites. In the case of *Chapman v. the United Kingdom*,¹⁸³ a Romany Gypsy woman, Sally Chapman, had bought land in the green belt in Hertfordshire and developed it as a site for her family without planning permission. Her application for planning permission was refused and the local authority issued an enforcement notice. She was then prosecuted for failing to comply with the enforcement notice.

Chapman took her case to the European Court of Human Rights, alleging that the refusal of planning permission and the enforcement measures breached her Article 8 rights. The Court rejected the argument that the absence of alternative sites meant that Chapman's family should be allowed to remain on the land in continuing breach of planning control. However, the case did establish some important principles:

- the Court observed that 'an international consensus may be emerging' among Council of Europe States, 'recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community'.¹⁸⁴
- the Court recognised that 'the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy'.¹⁸⁵
- although Gypsies are subject to the same laws as everybody else, the Court noted that membership of a minority group with a different traditional lifestyle 'may have an incidence on the manner in which such laws are to be implemented'.¹⁸⁶
- the vulnerable position of Gypsies as a minority means that special consideration must be given to their needs and their different lifestyle.

The judges in the Chapman case were split, with seven out of 17 arguing that eviction in the absence of other culturally appropriate accommodation was a breach of Article 8. The seven judges argued that:

¹⁸³ *Chapman v. the United Kingdom* [2001].

¹⁸⁴ Ibid. Para 93.

¹⁸⁵ Ibid. Para 73.

¹⁸⁶ Ibid. Para 96.

‘The Government is already well aware that the legislative and policy framework does not provide in practice for the needs of the Gypsy minority and that their policy of leaving it to local authorities to make provision for Gypsies has been of limited effectiveness it is in our opinion disproportionate to take steps to evict a Gypsy family from their home on their own land in circumstances where there has not been shown to be any other lawful, alternative site reasonably open to them. It would accordingly be for the authorities to adopt such measures as they consider appropriate to ensure that the planning system affords effective respect for the home, private life and family life of Gypsies such as the applicant.’¹⁸⁷

It is therefore possible that the European Court may take a different approach in the future. This is supported by several factors, including the strong minority view in *Chapman*, as well as the growing recognition in recent years of the importance of protecting the rights of Roma and Gypsies and Travellers in the European Court of Human Rights¹⁸⁸ and under the Framework Convention for the Protection of National Minorities. For example, the last report by the Council of Europe on the UK government’s performance under the Convention highlighted inadequate site provision as a major concern.¹⁸⁹

In other situations concerning the tenancy rights of Gypsies and Travellers the courts have found breaches of Article 8. In *Connors v. the United Kingdom*¹⁹⁰ a local authority sought to evict a family of Gypsy tenants from a site that the local authority owned and ran. The grounds for this were antisocial behaviour by the children and visitors of the family. The central issue in this case was the fact that tenants on local authority sites for Gypsies and Travellers did not have the same security of tenure as non-Gypsy tenants on local authority sites or in caravans on privately owned residential sites.¹⁹¹ The court found that the local authority had breached Article 8. The government has since responded to the judgment by

¹⁸⁷ *Chapman v. the United Kingdom* [2001]. Para 438. In granting leave to appeal in *South Buckinghamshire DC v. Porter* [2001] EWCA Civ 1549; [2002] 1 WLR 1359; [2002] 1 All ER 425, CA, Sedley LJ stated that our national Courts could refer to the minority decision in *Chapman v. the United Kingdom* [2001].

¹⁸⁸ See for example *DH v. Czech Republic* [2007] ECHR 922 57325/00, on Roma rights and education.

¹⁸⁹ Advisory Committee on the Framework Convention of the Protection of National Minorities, 2nd opinion on the UK government, 6 June 2007, ACFC/OP/II(2007)003.

¹⁹⁰ *Connors v. the United Kingdom* [2004] ECHR 66746/01.

¹⁹¹ C. Johnson, A. Ryder and M. Willers, 2010. *Gypsies and Travellers in the United Kingdom and Security of Tenure*. Roma Rights 1 2010 – Implementation of judgments. 26 July 2010. Available at: <http://www.errc.org/article/roma-rights-1-2010-implementation-of-judgments/3613/6>. Accessed 27/02/2012.

amending the Mobile Homes Act (1983) to provide the same security of tenure to Gypsies and Travellers as enjoyed by other tenants on local authority sites.¹⁹²

2. There continues to be a shortage of authorised Gypsy and Traveller sites, increasing the likelihood of further evictions from unauthorised sites

The most recent Gypsy and Traveller caravan count, undertaken biannually for the Department of Communities and Local Government (DCLG) was published in June 2011. The count indicates that in January 2011, there were 18,383 caravans counted in England, of which 17 per cent were on unauthorised land:¹⁹³

- 6,942 (38 per cent) were on socially rented sites
- 8,332 (45 per cent) were on private sites with planning permission
- 2,200 (12 per cent) were on land owned by Gypsies and Travellers without planning permission (unauthorised developments)
- 909 (5 per cent) were on unauthorised encampments.

Gypsies and Travellers living in caravans on unauthorised land in England currently have nowhere lawful to station them and so are homeless for the purposes of the Housing Act (1996). Many authorised sites only have temporary planning permission and are therefore not sustainable in the longer term. Data on the existence of sites does not reveal details about suitability of location or state of repair of sites.

The Equality and Human Rights Commission recently reviewed the progress made by local authorities in England and Wales in meeting their targets for site provision under the planning system in force up to 2010.¹⁹⁴ The report indicated that there has been some progress in making legal sites available for Gypsies and Travellers in England, as there were 15 per cent more pitches available

¹⁹² The Mobile Homes Act 1983 (Amendment of Schedule 1 and Consequential Amendments) (England) Order 2011.

¹⁹³ Department for Communities and Local Government, 2011. *Gypsy and Traveller caravan count* – January 2011. Available at: <http://www.communities.gov.uk/documents/statistics/pdf/1932949.pdf>. Accessed 27/02/2012.

¹⁹⁴ P. Brown, S. Henning and P. Niner, 2010. Assessing local authorities' progress in meeting the accommodation needs of Gypsy and Traveller communities in England and Wales: 2010 update. Manchester: Equality and Human Rights Commission. Available at: http://www.equalityhumanrights.com/uploaded_files/research/rr68_gt_web_version.pdf. Accessed February 2012.

in 2009 than there were in 2006.¹⁹⁵ There were also 1,835 more caravans on authorised sites in 2009 than in 2006. Data for Wales show a reduction of one caravan on authorised sites between January 2007 and January 2009.¹⁹⁶

The report estimated that an additional 5,821 residential pitches were required in England in the first five years after a local needs assessment was completed.¹⁹⁷ Taking into account all pitch changes between 2006 and 2009, it would take 16 years to meet those requirements at the current rate of progress – and 27 years if temporary permissions were excluded.¹⁹⁸ Although the planning system changed in 2010, there is no indication at present that the revised approach will result in a faster rate of progress. The government has set aside £60 million to help local authorities and other registered providers with the cost of providing new sites as part of the Homes and Communities Agency's Affordable Homes Programme.¹⁹⁹ However, some evidence suggests that some authorities are reworking their earlier accommodation assessments and developing Development Plan Documents which require fewer pitches than previously estimated.²⁰⁰

¹⁹⁵ Ibid., 2010. Page 14.

¹⁹⁶ P. Brown and P. Niner, 2009. *Assessing local authorities' progress in meeting the accommodation needs of Gypsy and Traveller communities in England*. Manchester: Equality and Human Rights Commission. Page 17. Available at: http://www.equalityhumanrights.com/uploaded_files/13assessing_local_housing_authorities_progress.pdf. Accessed 27/02/2012.

¹⁹⁷ P. Brown, S. Henning and P. Niner, 2010. *Assessing local authorities' progress in meeting the accommodation needs of Gypsy and Traveller communities in England and Wales: 2010 update*. Manchester: Equality and Human Rights Commission. Page 108.

¹⁹⁸ Ibid. Page 109.

¹⁹⁹ See Homes and Communities Agency website, at <http://www.homesandcommunities.co.uk/ourwork/traveller-pitch-funding>. Accessed 27/02/2012.

²⁰⁰ M. Hargreaves and M. Brindley, 2011. *Planning for Gypsies and Travellers: The Impact of Localism*. London: Irish Traveller Movement in Britain.

Furthermore, there is evidence that the planning system may not be fair towards Gypsies and Travellers. Department for Communities and Local Government figures from April 2009 to December 2010 show that only half of applications for new sites are successful in England, compared with around 70 per cent of residential applications. The Commission's report attributes this low success rate to very few local authorities having identified suitable land for site development, which means that 'plan-led' development cannot operate in the same way as for residential applicants.²⁰¹ In addition, the survey of local authorities carried out for the Commission report showed that between 2006 and 2009, 40 per cent of the applications for new sites in England were granted only on appeal, and half of the 'successful' applications for new sites only received temporary permissions.²⁰² As these will expire at some point in the future they are not sustainable.

201 P. Brown and P. Niner, 2009. *Assessing local authorities' progress in meeting the accommodation needs of Gypsy and Traveller communities in England*. Manchester: Equality and Human Rights Commission. Page 19.

202 Ibid. Page 35.

Case study:

Macmillan Values Based Standard

“I first had treatment for cancer in 2006 and it was a really daunting experience. I recall arriving at the hospital feeling very alone and frightened as I had no idea what to expect. I felt like I was heading into the abyss,” says Ciaran Henderson, a 38-year-old cancer patient.

Ciaran is now involved in a pioneering programme developed by Macmillan Cancer Support, which puts human rights at the centre of cancer care. “I’ve just started chemotherapy treatment for the third time and after the results of my scan I received a letter which explained what would happen to me, whom I should ask for, where I should go and information about the possibility of delays,” she says. “This was in stark contrast to 2006 when little information was offered ... What a difference that letter made. It was like an invitation. It’s a tiny little thing but the little things matter hugely if you are suffering from cancer.”

The Macmillan Values Based Standard aims to support these types of small but significant changes, as they can have a high impact on patient experience. Ciaran now sits on a ‘patient experience board’ at University College London Hospital, which provides feedback from patients to the hospital authorities. This is part of a drive by the hospital to improve how patients feel about their care. Ciaran says it has ‘empowered’ her at a particularly traumatic time in her life. This new approach was developed by Macmillan in response to a number of reports about poor standards of care within the NHS. For more than three years, the organisation has been working with health organisations, cancer patients, their carers and healthcare professionals to identify practical ways in which staff can improve the experience of cancer care for patients.

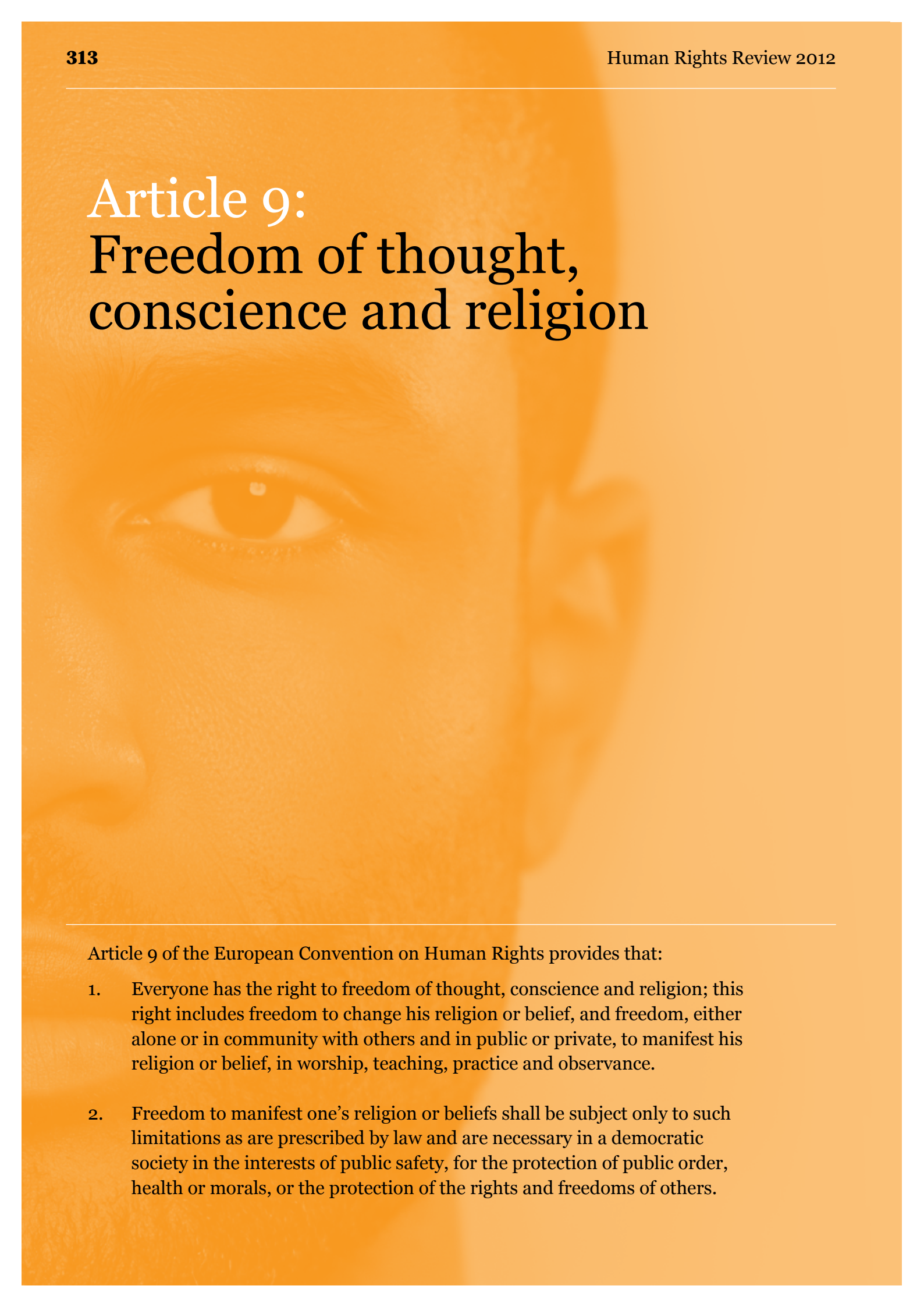
“The Standard is really about giving staff the power and the opportunity to meet their vocation, and to remember why they got into the job in the first place.”

As a result of these consultations, the organisation has developed the ‘Macmillan Values Based Standard’. This sets out eight different practical ways in which staff can apply the human rights principles of dignity and respect. These range from making sure that they have asked the patient how they would like to be addressed; talking to them about their broader personal circumstances, for example whether they have childcare issues which may be worrying them; prioritising making them comfortable; keeping them involved in decisions about their treatment and care; and acknowledging when they are in need.

Macmillan is working with various institutions to implement the new approach. At the University Hospitals Birmingham NHS Foundation Trust, where the project was piloted in 2011, Macmillan conducted training workshops with over 60 members of staff, in which they were encouraged to discuss the Macmillan Values Based Standard and how it might apply to their everyday work.

According to Macmillan’s project manager, Hana Ibrahim, the workshops encouraged staff to think about ways in which their current practice may not be meeting the standard. “For example, one nurse talked about a hospital rule that patients should be given only one pillow. In fact, there were plenty of pillows and no reason why patients shouldn’t be given more if necessary. Nevertheless, she had never felt that she could question this rule before.

“The Standard is really about giving staff the power and the opportunity to meet their vocation, and to remember why they got into the job in the first place.” Macmillan Cancer Support is now working to implement the approach across England during 2012.



Article 9: Freedom of thought, conscience and religion

Article 9 of the European Convention on Human Rights provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Summary

Article 9(1) protects the right of individuals to hold religious and other beliefs, and to practise them alone or with other people. It also protects people's right to freedom of conscience, and the right to follow one's own ethical and moral principles in one's actions. The right to hold, as distinct from to manifest, religious and other beliefs is an absolute right.

Holding a belief may be intrinsically bound up with manifesting it, for example, through worship, teaching others, the wearing of symbols or of special clothes, or the avoidance of certain foods. The right to manifest a belief is a qualified right and its limitation is permissible if it is prescribed by law and can be justified as being necessary in a democratic society in the interests of public safety, the protection of public order, health or morals or the protection of the rights and freedoms of others.

It was not until the Human Rights Act 1998 (HRA) that legislation recognised a general legal right to religious freedom. Anti-discrimination provisions followed in 2003 and 2006 and today Britain's Equality Act 2010 prohibits discrimination because of religion or belief in connection with employment, vocational training, education, premises and the provision of services, and by public authorities and associations.

Domestic case law on freedom of religion and belief is developing as a result of the implementation of the Human Rights Act and of domestic provisions regulating discrimination relating to religion and belief. The Commission has identified three areas in which we believe that the law should be interpreted in a way that is more strongly protective of Article 9 rights and that appropriately balances Article 9 and other rights.

The key issues we address in this chapter are:

Courts are setting too high a threshold for establishing 'interference' with the right to manifest a religion or belief, and are therefore not properly addressing whether limitations on Article 9 rights are justifiable

Indirect discrimination provisions in domestic law covering protection for individual beliefs may not be consistent with Article 9

The UK's obligations under Article 9

Article 9 protects the right of individuals to hold religious and other beliefs, to change them, and to manifest them through worship, practice, teaching and observance, alone or with other people. It also protects people's right to freedom of conscience, and the right to follow one's own ethical and moral principles (which may or may not be informed by a religious view) in one's actions. These rights under Article 9 apply both to individuals and to organisations. Article 9(1) includes the right not to have a religion or belief, so the state cannot require an individual to declare or deny adherence to a particular religion or belief.

Article 9 does not define 'religion', and the European Court has repeated on many occasions that the state is not entitled to assess the legitimacy of religious views or the way in which they are manifested.¹ Article 18 of the International Convention on Civil and Political Rights, which is similar to Article 9, has been interpreted by the UN Human Rights Committee as protecting:

'theistic, non-theistic and atheistic beliefs as well as the right not to profess any religion or belief. The terms belief and religion are broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions'.²

Religious beliefs which have attracted the protection of Article 9 include the Baha'i faith, Buddhism, Christianity, Hinduism, Islam, Jainism, Judaism, Rastafarianism, Sikhism and Zoroastrianism, as well as the Church of Scientology. Article 9 has also been applied to philosophical beliefs including atheism, veganism, environmentalism and pacifism.³

1 See, for example, *Hasan and Chaush v. Bulgaria* [2002] 34 EHRR 55. Para 78; *Metropolitan Church of Bessarabia v. Moldova* [2002] 35 EHRR 306. Paras 117 and 123; *Şahin v. Turkey* [2007] 44 EHRR 5 (Grand Chamber). Para 107.

2 General Comment 22, para 9. Available at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

3 For pacifism, see *Arrowsmith v. the United Kingdom* [1978] 3 EHRR 218; for veganism, see *H. v. the United Kingdom* [1992], 16 EHRR CD 44. Page 45; for environmentalism see *Grainger plc v. Nicholson* [2010] IRLR 4.

The right under Article 9(1) to hold religious and other beliefs and to change them is an absolute right, which means that the state is prohibited from interfering with it. Article 9 recognises that belief systems are part of the identity of individuals and their conception of life⁴ and that respecting an individual's beliefs accords respect for human dignity. As Lord Nicholls explained in the *Williamson* case (2005):

‘Religious and other beliefs and convictions are part of the humanity of every individual. They are an integral part of his personality and individuality. In a civilised society individuals respect each other’s beliefs. This enables them to live in harmony.’⁵

The holding of any belief, however unattractive, is protected,⁶ though some standards apply to those beliefs whose *manifestation* is protected: in *Williamson* the House of Lords suggested that while ‘[e]veryone is entitled to hold whatever beliefs he wishes’:

‘when questions of “manifestation” arise ... a belief must satisfy some modest, objective minimum requirements . The belief must be consistent with basic standards of human dignity or integrity. ... The belief ... must possess an adequate degree of seriousness and importance ... it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification ... Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention...’

The holding and manifestation of beliefs may be intrinsically bound up with each other. Manifestation can occur through worship, teaching and proselytism, observation by wearing symbols or special clothes, or by eating or avoiding certain foods. The right to manifest a belief is a qualified right and is subject to limitations as set out in Article 9(2). Interferences with the manifestation of belief may consist, for example, of uniform policies at work or school, or requirements to work at certain times or carry out certain tasks. Limitations

4 *Kokkinakis v. Greece* [1993] 17 EHRR 397. Para 31.

5 *R.(Williamson) v. Secretary of State for Education and Skills* [2005] 2 AC 246.

6 See *R. (Williamson) per* Lord Nichols, at para 23. See also paras 64, 57 and 76.

on an individual's freedom to manifest his or her religion or belief are only permissible if prescribed by law and necessary in a democratic society in the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Article 9 places the following obligations on the state:

- **a negative obligation** requiring the state not to interfere in the right of individuals and organisations to hold religious and non-religious beliefs.
- **a positive obligation** to secure enjoyment of Article 9 rights by ensuring they are protected in law, and there are sanctions if they are infringed, and by preventing or remedying any breach by its own agents or institutions.

Relation to other articles

Article 9 is closely related in its wording and values to the right to freedom of expression under Article 10, and to freedom of association under Article 11. The European Court of Human Rights differentiates between 'beliefs' protected by Article 9, and 'opinions' and 'ideas' protected by Article 10, although in some cases there may be some overlap.⁷ Article 9 is also supported by Article 2 of Protocol 1, which protects a right of parents to have their children educated in accordance with their beliefs.⁸

⁷ See J. Wadham, H. Mountfield, C. Gallagher, E. Prochaska, with A. Edmondson, 2009. *The Human Rights Act 1998*, 5th edn: Oxford: Oxford University Press. Page 222.

⁸ *Campbell and Cosans v. the United Kingdom* [1982] 4 EHRR 293; *R.(Williamson) v. Secretary of State for Education and Employment* [2005] 2 AC 246.

The development of Article 9 in Britain

Today Britain is a pluralistic, multi-faith and secular society. In 2009 the British Social Attitudes Survey recorded that 42.3 per cent of the population of England, Scotland and Wales said that they belonged to the Christian religion. A further 2.4 per cent said they were Muslim, 0.9 per cent Hindu, 0.8 per cent Sikh, and 0.4 per cent Jewish, while 1.7 per cent said they belonged to other minority religions.⁹ Over the last 25 years, the number of people who say they do not belong to any religion has increased; in the same survey, 51 per cent said they did not belong to any religion, compared with 34 per cent in 1985.¹⁰

Britain is relatively tolerant of religious differences. The overwhelming majority of people in Britain do not experience discrimination because of their religion or beliefs. For example, just two per cent of respondents to a Eurobarometer survey carried out in 2009 said that they had experienced discrimination or harassment because of their religion or beliefs in the past 12 months. Muslims are more likely than those with other religious beliefs to perceive that they have been refused a job or promotion because of religion or beliefs.¹¹

In the past, however, Britain has had a halting path to religious tolerance, with some faiths enjoying full freedom of conscience long before others. The misleadingly named Act of Toleration of 1689 was the first law of its kind to be passed in England to protect religious freedoms, following failed attempts by parliament to impose religious conformity. Its provisions extended only to non-conformist Protestants such as Quakers, Presbyterians and Baptists; other groups, including Catholics and Unitarians, continued to suffer religious, civil and political penalties, including denial of the right to freedom of worship,

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- 9 Taken from the annotated questionnaire of the British Social Attitudes Survey, 2009, published in December 2010. Available at: <http://www.natcen.ac.uk/media/606622/bsa%202009%20annotated%20questionnaires.pdf>. Accessed October 2011. For an overview of statistics on religion and belief, see D. Perfect, 2011. *Religion or Belief, Equality and Human Rights Commission Briefing Paper no. 1*. Manchester: Equality and Human Rights Commission. Pp. 10-11. Available at: http://www.equalityhumanrights.com/uploaded_files/research/briefing_paper_1_religion_or_belief.pdf.
- 10 For the 2009 figure of 51 per cent, see footnote 9; for the 1985 figure of 34 per cent, see Perfect, 2011. Page 9, table 6.
- 11 P. Weller, 2010. *Religious Discrimination in Britain: A review of research evidence, 2000-10*. Manchester: Equality and Human Rights Commission. Page 31.

the right to hold political office, and restrictions in relation to education and property. It wasn't until the 19th century that these restrictions were gradually removed for different groups at different times. For example, the Catholic Relief Act 1829 allowed Catholics to be admitted to parliament and the Religious Disabilities Act 1846 removed restrictions on education and property for this group.¹² Similar restrictions affecting the Jewish community were also removed, though social discrimination continued into the 20th century.

It was not until the Human Rights Act 1998 (HRA) that legislation recognised a general legal right to religious freedom.¹³ Anti-discrimination provisions followed in 2003 and 2006¹⁴ and today Britain's Equality Act 2010 prohibits discrimination because of religion or belief in connection with employment, vocational training, education, premises and the provision of services, and by public authorities and associations. The Act also imposes a duty on public authorities to have 'due regard' to the need to eliminate discrimination because of religion or belief, advance equality of opportunity and foster good relations between different groups. However, the Act allows organisations with a religious ethos to discriminate in offers of employment and in the provision of services in specific circumstances, recognising that religious beliefs influence the way such organisations run themselves. For example, a synagogue can have separate seating for men and women at a reception following a religious service; the Catholic Church can require that a Catholic priest be an unmarried man; and a Muslim faith school can require for a successful applicant for a headship which includes a religious role to, be a Muslim.¹⁵ The Act permits religious organisations to restrict a variety of posts to those of a particular religion or belief, and allows discrimination because of sex, sexual orientation and so on in relation to employment 'for the purposes of an organised religion'; an exception which applies to a narrow set of roles primarily concerned with the promotion and representation of the religion.

12 R. Sandberg, 2011. *Law and Religion*. Cambridge: Cambridge University Press. See chapter 3 for an overview of the history of religious freedom in Britain.

13 Sandberg, 2011. Pp. 36 and 37.

14 Employment Equality (Religion and Belief) Regulations 2003, Equality Act 2006. The 2006 Act prohibited discrimination in education, premises, goods and services and public functions.

15 Equality Act 2010. Schedule 3, Part 7, para 29; Schedule 9, paras 2, 3.

The legal protections offered by the HRA and the Equality Act and its predecessors are relatively new. In recent years, several cases have tested the freedom to manifest religion or belief, and protection against discrimination connected with religion. Some cases considered employees' rights to time off for religious observance;¹⁶ others considered the right of individuals to wear religious dress as teachers or pupils in schools,¹⁷ or the right to wear religious symbols in the workplace.¹⁸

Several cases have been about whether an employee can refuse to provide a service which conflicts with their religious views, where this may result in discrimination against others. Judges have had to strike a balance between the competing rights of an individual or group to manifest religious beliefs and the rights of others not to be discriminated against. Cases have considered a Christian registrar of marriages who refused to carry out civil partnership ceremonies for same-sex couples;¹⁹ a Christian relationship counsellor who refused to counsel same-sex couples on sexual issues;²⁰ Christian hoteliers who refused accommodation to same-sex civil partners;²¹ and a Catholic adoption agency which wanted to provide adoption services to heterosexuals alone.²² The courts have so far ruled that employers or organisations can legitimately limit the freedom of employees to manifest their religion or belief to prevent discrimination against other individuals or groups.

The lack of success of some claimants who bring cases under Article 9 or the Equality Act (or its predecessor legislation) has prompted some religious groups to argue that the right to manifest religion or belief is treated by the law as a 'lesser right' than others. They argue that religious discrimination claims are too readily trumped by the aim of preventing discrimination on other

16 For example, *Ahmad v. the United Kingdom* [1981] 4 EHRR 126.

17 For example, *R.(S.B.) v. Head Teacher and Governors of Denbigh High School* [2007] 1 AC 100.

18 *Eweida v. British Airways* [2010] ICR 890; *Chaplin v. Royal Devon and Exeter NHS Foundation Trust* [2010] ET Case No. 1702886/2009; *R.(Watkins-Singh) v. The Governing Body of Aberdare Girls' High School* [2008] EWHC Admin 1865, [2008] 3 FCR 203.

19 *Ladele v. London Borough of Islington* [2010] ICR 532.

20 *McFarlane v. Relate Avon Ltd* [2010] ICR 507 (EAT), [2010] IRLR 872; 29 BHRC 249 (CA).

21 *Hall and Preddy v. Bull and Bull*, Bristol County Court, 18 January 2011 [2011] EW Misc 2 (CC). Available at: www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/hall-preddy-bull-judgment.pdf.

22 *Catholic Care v. Charity Commission for England and Wales* [2010] EWHC 520 (Ch).

grounds.²³ This view does not appear to be widely held, however, among the representatives of different religious groups.²⁴ In contrast, other groups believe that religious groups enjoy a privileged position in the UK, and that the law does not provide sufficient protection to those without religious beliefs.²⁵ Minority communities tend to view equality legislation as a ‘guarantor’ of a ‘level playing field’.²⁶

Many of the Article 9 and other cases on religion have attracted considerable media coverage and public debate. The issues are contentious, but the experiences of the claimants are not necessarily representative of the common experience of other people following a particular faith, or a reliable indicator of the public role for religion or belief in society. It is also difficult to read legal or social ‘trends’ from the judgments as the cases are context- and fact-specific. The UN Special Rapporteur on freedom of religion or belief found in 2008 that the UK government had ‘balanced approaches in responding to difficult situations with regard to freedom of religion or belief and the contentious issues involved’ and welcomed the case-by-case approach which allowed each complaint to be judged according to particular circumstances.²⁷

The Equality and Human Rights Commission believes that the domestic courts have taken the appropriate approach in cases balancing competing interests. Some forms of manifesting belief, such as wearing religious clothing or jewellery, are likely to have a limited impact on other people; but other forms of manifestation may result in a refusal to provide a service to, or different treatment of, a particular group of people, and so may affect their fundamental rights and freedoms. The Commission²⁸ believes that an employer may legitimately refuse to accommodate an individual’s religious beliefs where

23 L. Woodhead with R. Catto, 2009. *Religion or belief: identifying issues and priorities*, Research report 48. Manchester: Equality and Human Rights Commission; A. Donald with Karen Bennett and Philip Leach, forthcoming. *Religion or belief, equality and human rights in England and Wales*. Manchester: Equality and Human Rights Commission; A. Jahangir, 2008. *Report of the special Rapporteur on freedom of religion or belief: addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*. A/HRC/7/10/Add.3. Para 14.

24 Donald *et al.*, forthcoming.

25 For example, see the National Secular Society’s current campaign challenging the saying of prayers as a formal part of council meetings: <http://www.secularism.org.uk/council-prayers.html>; and the British Humanist Association’s campaigns for non-religious beliefs to be respected in schools: <http://www.humanism.org.uk/campaigns/religion-and-schools>. Accessed 20/02/12.

26 Donald *et al.*, forthcoming; see also Perfect, 2011. Pp. 10-11.

27 Jahangir, 2008.

28 See Equality and Human Rights Commission submission to the European Court of Human Rights. Available at: <http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers/legal-intervention-on-religion-or-belief-rights/>.

such accommodation would involve discrimination on the basis of other protected characteristics. In a public sector context, employers are also obliged by the Equality Act 2010 to have due regard to the need to advance equality of opportunity for protected groups; so public sector employers cannot legitimately agree to actions which undermine the equality of opportunity for groups defined by reference to the protected characteristics.

Legislation and case law protecting freedom of religion and belief have developed considerably in the last 10 years. The Commission has identified two issues which relate to cases currently before the European Court of Human Rights in which the Commission has intervened. The first two issues concern the way domestic courts interpret claims of breaches of Article 9 or discrimination law, the third is about the circumstances in which it is proportionate to limit the manifestation of religion or belief.

Key issues

1. Courts are setting too high a threshold for establishing ‘interference’ with the right to manifest a religion or belief, and are therefore not properly addressing whether limitations on Article 9 rights are justifiable

In cases brought under Article 9 the court has to consider whether there has been an interference with the right to manifest a religion or belief and, if so, whether this interference is justified. The Commission believes that domestic courts are setting too high a threshold for the preliminary question whether there has been an interference with the right to manifest a religion or belief and that, as a result, they are too often failing to consider the question of justification.

The European Court of Human Rights and our domestic courts have tended to rule, for example, that no interference has taken place with Article 9 rights where workers have complained that job-related rules have placed restrictions on their ability to manifest their religion and belief.²⁹

²⁹ For example, see *Kalac v. Turkey* [1997] 27 EHRR 522 in which the ECHR stated that, in choosing to pursue a military career, Mr Kalac was voluntarily accepting a system of military discipline that could impose limitations on his rights and freedoms to take part in the activities of a religious sect. In *Konttinen v. Finland* [1996] 87 DR 68, similarly, it was ruled that the Article 9 rights of a Seventh-day Adventist were not interfered with when his employer refused his request not to work Fridays.

In *Ahmad v. the United Kingdom* [1981], for example, a teacher felt forced to resign because the school refused him permission to leave work 45 minutes early to attend a mosque during work hours. The European Commission on Human Rights found that his Article 9 rights had not been interfered with because he had freely entered into his contract. Moreover, Mr Ahmad had not notified his employer of his religious observance needs at the time of his recruitment, or for the following six years. The Commission ruled that Mr Ahmad had been free to resign and find employment elsewhere on terms that reflected his religious needs.³⁰ A similar approach was adopted in *Stedman v. the United Kingdom* [1997], in which an employer required the Christian applicant to work on Sundays some time after she had been in the job.³¹ The Commission dismissed her Article 9 complaint, ruling that she ‘was dismissed for failing to agree to work certain hours rather than for her religious belief as such and was free to resign and did in effect resign from her employment’.

The UK domestic courts have tended to follow this approach. For example, in *Copsey v. W.W.B. Devon Clays Ltd* [2005], the Court of Appeal found that the claimant’s rights had not been interfered with when his employer changed his working days to include Sunday, as he could find another job which would enable him to attend Sunday religious services.³²

Similarly, in *R. (S.B.) v. Governors of Denbigh High School* [2006], in which the House of Lords found that the application of a school’s uniform policy did not breach the Article 9 rights of the Muslim claimant, a majority of the Court took the view that there was no interference with the claimant’s rights. Baroness Hale and Lord Nichols suggested a different approach.

Shabina Begum, a 16-year-old Muslim girl, was sent home from her school in Luton, Bedfordshire, for wearing a full-length ‘jilbab’ rather than the school uniform which the school had introduced following consultation with local mosques, community leaders and parents. Ms Begum remained out of education for two years before she began to attend another school which allowed her to wear the jilbab. A majority of the House of Lords found that the school’s uniform policy did not constitute an interference with her Article 9 rights. Lord Scott, following the approach of the European Court of Human Rights, stated that a rule does not infringe the right of an individual to manifest his or her religion ‘merely because the rule ... does not conform to

³⁰ *Ahmad v. the United Kingdom* [1981] 4 EHRR 126.

³¹ *Stedman v. the United Kingdom* [1997] 23 EHRR CD.

³² *Copsey v. W.W.B. Devon Clays Ltd* [2005] ICR 1789.

the religious beliefs of that individual. And in particular this is so where the individual has a choice whether or not to avail himself or herself of the services of that institution' or 'other public institutions offering similar services, and whose rules do not include the objectionable rule in question'.³³

Baroness Hale and Lord Nichols suggested that this approach set too high a threshold for determining whether the school's uniform rule interfered with Ms Begum's right to manifest her religion.³⁴ Lord Nicholls said that he was not 'so sure' that there had been no interference noting that it was not easy to move to another school, and this disrupted her education. Baroness Hale thought that there had been interference with Begum's right to manifest her religion, as it was her parents' choice to send her to the school and accept the uniform policy, rather than her own. Both concluded, however, that the interference was justified.

The views of Lord Nichols and Baroness Hale are evidence of a new approach to Article 9 cases which has characterised the recent case law of the European Court of Human Rights. That Court has become more ready to accept claims of interference with applicants' rights to manifest belief, and to focus on the question of justification.³⁵ This is an approach the Equality and Human Rights Commission welcomes.

2. Indirect discrimination provisions in domestic law covering protection for individual beliefs may not be consistent with Article 9

Indirect discrimination occurs when a rule or practice applicable to everyone has a disproportionate adverse effect on a particular group of people, such as people sharing a specific religious belief. Where a claim of indirect discrimination is made, a court or tribunal will consider whether the claimant is put at a disadvantage by the rule or practice, and whether other people who share the relevant belief are or may be similarly disadvantaged by it. If so, the employer has to demonstrate that the rule is a proportionate (or reasonably necessary) way of meeting a genuine business need in order to avoid a finding of indirect discrimination.

³³ *R.(S.B.) v. Head Teacher and Governors of Denbigh High School* [2007] 1 AC 100.

³⁴ *R.(S.B.) v. Head Teacher and Governors of Denbigh High School* [2007].

³⁵ *Dahlab v. Switzerland* [2001] 42393/98; *Sahin v. Turkey* [2007] 44 EHRR 5.

In an Article 9 case a claimant only has to show that the rule or practice has interfered with his or her beliefs in order to require that the application of the rule be justified. As we saw above, establishing an ‘interference’ has often proven unnecessarily difficult, but there is nothing in Article 9 jurisprudence to suggest that the religions and beliefs protected by that provision are limited to those shared with others. The European Court of Human Rights has, until recently, tended to take the view that a practice amounted to the ‘manifestation’ of a religion or belief only if **required** by the particular religion or philosophical belief.³⁶ In recent judgments, however, the Court has found that Article 9 protects religious practices not prescribed by a religion, thus suggesting that personal rather than group belief is protected. For example, in *Jakobski v. Poland* [2010] the Court accepted that a Buddhist’s decision to adhere to a vegetarian diet could be regarded as motivated or inspired by a religion and was not unreasonable, and that the refusal of the prison authorities to provide him with a vegetarian diet breached his Article 9 rights. The Court did not insist that adherence to a vegetarian diet be **required** by the religion in order to amount to a manifestation of that religion.³⁷

Two recent domestic cases, *Eweida v. British Airways* and *Chaplin v. Royal Devon and Exeter NHS Trust*,³⁸ raise the question whether courts should interpret the indirect discrimination provisions as providing protection for individual belief in a way that is consistent with Article 9,³⁹ that is, whether indirect provisions should protect the personal beliefs of individuals, rather only those which are collectively held.

In *Eweida v. BA*, Nadia Eweida was asked by her employer, British Airways, in 2004, to conceal a crucifix which she wore on a neck chain. The company allowed the display of religious insignia only if it was ‘mandatory’ for the relevant religion. Ms Eweida, a devout Christian, acknowledged that her faith did not require her to wear the cross, but she viewed it as a personal expression of her beliefs. She refused the company’s offer of work which did not require her to wear a uniform and was eventually sent home as a result of her insistence on displaying the cross. Ms Eweida lost her internal company grievance and remained at home, unpaid, for five months before returning to work. She claimed indirect discrimination on grounds of religion. Her

³⁶ See *Arrowsmith v. the United Kingdom* [1980] 19 DR.

³⁷ *Jakobski v. Poland* [2010] 30 BHRC 417. See, similarly, *Bayatyan v. Armenia* [2011] 23459/03. Paras 110-111.

³⁸ *Eweida v. British Airways* [2010] ICR 890. *Chaplin v. Royal Devon and Exeter NHS Trust* is an employment tribunal decision and is unreported.

³⁹ L. Vickers, 2008. *Religious Freedom, Religious Discrimination and the workplace*. Oxford: Hart Publishing.

claim failed because neither the first instance tribunal nor the appeal courts (including the Court of Appeal) accepted that BA's policy placed people who shared her religion at a particular disadvantage. The Court of Appeal accepted her argument that the equality provisions had to be read so as to conform with the Convention, but ruled that there was:

'...no indication that ... solitary disadvantage should be sufficient ... or that any requirement of plural disadvantage must be dropped.'⁴⁰

A similar case is *Shirley Chaplin v. Royal Devon and Exeter NHS Trust*:

Ms Chaplin, a nurse, was prevented by the Trust from visibly wearing a crucifix on a chain around her neck at work for health and safety reasons. When she refused to remove it she was moved to a desk job, and claimed direct and indirect discrimination on grounds of religion. An employment tribunal held that there was no evidence that anyone other than Ms Chaplin had been put at particular disadvantage, and so her claim failed.

Eweida and Chaplin have lodged their cases with the European Court of Human Rights, claiming that domestic law failed adequately to protect their right to manifest their religion, contrary to Article 9 of the Convention taken alone or in conjunction with Article 14. Article 14 protects the right to non-discrimination in the enjoyment of other Convention rights and freedoms. The Court will consider whether the restrictions on visibly wearing a cross at work interfered with the applicants' right to manifest their religion or belief. If the court finds an interference, it will separately consider whether there was a breach of the state's positive obligation to protect Ms Eweida's rights under Article 9 and whether, in Ms Chaplin's case, the interference was 'necessary in a democratic society'. Finally the Court will consider in both cases whether there was there a breach of Article 14 taken together with Article 9.

The Equality and Human Rights Commission has intervened in the *Eweida* case at the European Court of Human Rights. Part of its role as a National Human Rights Institution is to interpret human rights law in a domestic context.⁴¹ In the Commission's view, domestic case law fails to accord with Article 14 read with Article 9. The Commission notes that the European Court of Human Rights has held that Article 14 guarantees respect for individual differences; in *Thlimmenos v. Greece* [2000] the Court stated that:

⁴⁰ *Eweida v. British Airways* [2010]. Para 15.

⁴¹ See Equality and Human Rights submission to the European Court on Human Rights, September 2011. Available at: <http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers/legal-intervention-on-religion-or-belief-rights/>.

‘The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is ... violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.’⁴²

The Commission takes the view that that the domestic courts have placed the focus on group, rather than individual, disadvantage, in their approach to indirect religious discrimination. For example, in the *Eweida* case, the Employment Appeal Tribunal (EAT) stated:

‘In our judgment, in order for indirect discrimination to be established, it must be possible to make some general statements which would be true about a religious group such that an employer ought reasonably to be able to appreciate that any particular provision may have a disparate adverse impact on the group.’⁴³

The Commission believes that group disadvantage may be difficult to identify in the case of religious and other beliefs. Unlike other protected characteristics such as race or national origin, beliefs are subject to personal interpretation by individual believers. In the *Eweida* case, for example, the Court of Appeal relied on the fact that no other employee had ever made a request to wear a crucifix over their uniform to conclude that Ms Eweida’s desire to wear the crucifix was merely ‘a personal choice’.⁴⁴ This reasoning overlooked how a general rule prohibiting jewellery had an adverse effect on an individual’s right to manifest her belief.

In religion and belief cases it is also difficult to identify a suitable comparator group to establish whether a rule has an adverse impact for a religious group. For example, in *Chatwal v. Wandsworth Borough Council* [2011], Mr Chatwal argued that a rule which required him to have contact with meat products indirectly discriminated against him as an Amritdhari Sikh.⁴⁵ His claim failed because he could not show that a significant number of such Sikhs held similar beliefs about not touching meat products. The Employment Appeal Tribunal noted that ‘there is no consensus in law as to how large (or small) this cohort of “others” or group must be in order to suffice’. It thus remains unclear what evidence is needed to prove a particular belief is generally held and the cogency of such beliefs.

⁴² *Thlimmenos v. Greece* [2001] 31 EHRR 15.

⁴³ *Eweida v. British Airways* [2009] ICR 303 (EAT), para 60, endorsed by the Court of Appeal [2010] ICR 890, para 24. See also the comments of the Court of Appeal about the difficulties of assessing the size of the group at para 18.

⁴⁴ *Eweida v. British Airways* [2010], para 9. This approach is in stark contrast with that adopted by the High Court in *R.(Watkins-Singh) v. Governing Body of Aberdare Girls’ School* [2008] EWHC 1865 (Admin).

⁴⁵ *Chatwal v. Wandsworth Borough Council* [2011] UKEAT/0487/10/JOJ, para 26.

The Commission believes that the *Eweida* and *Chaplin* cases highlight the importance of domestic courts complying with the obligation imposed by the Human Rights Act 1998 to interpret equality legislation compatibly with the Convention. The Convention should be followed to ensure that the requirement to demonstrate group disadvantage does not overwhelm an individual right to manifest a belief. The question of justification would still remain for the courts to determine.



Article 10: Freedom of expression

Article 10 of the European Convention on Human Rights provides that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Summary

Article 10 is a qualified right protecting the right to receive opinions and information and the right to express them. Freedom of expression is a cornerstone of other democratic rights and freedoms. It enables the public to participate in decision-making through free access to information and ideas. It encourages good governance, as media scrutiny of government and opposition may help to expose corruption or conflicts of interest. The state must not censor artistic, political or commercial expression unnecessarily, and must protect the exercise of the right to freedom of expression by individuals and the media.

Prior to the implementation of the Human Rights Act 1998 there was no general statutory protection of freedom of expression. Since then Article 10 has been instrumental in allowing media and thus public insight into court processes which previously took place behind closed doors. Britain also has a legal framework which protects free speech in education, for example, and which restricts it in criminal law to prevent solicitation to murder. Government has also ratified the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and Article 19 of both treaties protects freedom of expression. The Press Complaints Commission administers self-regulation for the press and complaints about editorial content and journalist conduct.

The key issues we address in this chapter are:

Libel and defamation laws are weighted against writers and commentators

Under Article 10(2), freedom of expression can be restricted 'for the protection of the reputation or the rights of others'. Defamation law allows the award of compensation if a person's reputation has been damaged as a result of such statements.

The review shows that:

- The legal defences available to journalists, commentators and other defendants in defamation cases are complex and hard to use. This may create a ‘chilling effect’ and encourage self-censorship.
- Libel laws are out of date and do not address issues arising from publication on the internet.

There has been a lack of rigour in upholding media standards. Greater clarity is needed about how the right to freedom of expression should be balanced against the right to a private and family life

In recent months there has been intense public debate around media standards, and in particular the way in which some media outlets have invaded the privacy of those they report on. The Leveson Inquiry is currently examining the culture, practices and ethics in the media and should provide more clarity on these issues.

The review shows that:

- The current regulatory approach appears to have major flaws and failings. The Press Complaints Commission has been subject to significant criticism following its failure to investigate the phone hacking scandal effectively.
- Article 8 rights to a private life are not always adequately protected against press intrusion by injunctions.
- Improper reporting of criminal investigations by the media may prejudice the right to a fair trial.

The high legal costs in cases related to freedom of expression may have a ‘chilling effect’ on freedom of expression

Defamation, libel and privacy cases are extremely costly. This, together with the very limited availability of legal aid in this area, means that conditional fee agreements (CFAs) play a very important role in funding litigation. CFAs, under which lawyers charge only if they win, normally carry a ‘success fee’ and so inflate the costs of legal cases. They are of limited value to those seeking injunctions to protect their privacy.

The review shows that:

- The high costs of libel cases have a chilling effect on public debate, restricting comment and leading to premature or unnecessary settlements of defamation actions.
- The proposed abolition of CFAs would undermine access to justice for claimants and defendants of limited means, potentially breaching Articles 8 and 10.

Counter-terror laws potentially criminalise free expression

The government has a duty to protect people from terrorist threats but laws introduced in recent years to prevent terrorism may be interpreted in ways which restrict legitimate forms of protest, political expression and other activities such as journalism and photography.

The review suggests that:

- The definition of ‘terrorism’ is too broad and potentially criminalises lawful activity as well as activity which is unlawful, but not properly regarded as terrorism.
- A number of terrorism offences are overly vague and threaten freedom of expression.

The UK's obligations under Article 10

Freedom of expression has been described as the 'lifeblood of democracy'.¹ It is both important in its own right, and fundamental to the enjoyment and realisation of other rights. At an individual level, freedom of expression has been described as 'key to the development, dignity and fulfilment of every person'.² It is important for people both to be able to express views and opinions, and to obtain ideas and information from others, and thus to gain a better understanding of the world around them.

Freedom of expression is also a cornerstone of all other democratic rights and freedoms. It enables the public to participate in decision-making: in order to exercise the right to vote, for example, citizens must have free access to information and ideas. It encourages good governance, as media scrutiny of government and opposition may help to expose corruption or conflicts of interest.

The special role played by journalists and the media in relation to Article 10 has been recognised repeatedly by many courts, including the European Court of Human Rights and the British courts. In one case, the European Court highlighted the media's role in making public information and ideas on matters of public interest:

'...not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'.³

Article 10 protects the right to receive opinions and information as well as the right to express them. It encompasses expression in any medium, including words, pictures, images and actions intended to express an idea or to present information (such as public protest, or symbolic acts such as flag-burning).

1 Lord Steyn in *R. v. Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, at 126.

2 Description by Article 19, www.article19.org.

3 *Thorgeirson v. Iceland* [1992]. Application No. 13778/88. Para 63.

Among the main categories of expression protected by Article 10 are the following:

- **political expression**, which includes legitimate, robust comment on public figures. Considerable protection is afforded to those who criticise governments, politicians and other public figures, whether their comments are based on fact or on opinion. It also includes political speech by politicians themselves. The significance of ensuring that politicians can speak freely is well-established – the European Court has made it clear that while freedom of expression is important for everybody, it is especially so for an elected representative.⁴
- **artistic expression**, such as creative writing, visual art, music, theatre and dance. These forms of expression contribute ‘to the exchange of ideas and opinions which is essential for a democratic society’.⁵
- **commercial expression** is also protected by Article 10, although the courts have found that it has less significance than political or artistic expression.

The right to freedom of expression is a qualified right and so must be carefully balanced against the rights of others, and other needs of society. Article 10(2) explicitly states that the exercise of freedom of expression carries with it ‘duties and responsibilities’. It can be restricted on several grounds, including national security, the prevention of disorder or crime and the protection of the reputation or rights of others.

Restrictions on freedom of expression may be justified under Article 10(2) and/or Article 17.⁶ In deciding whether a restriction on freedom of speech is lawful under Article 10 the context is all-important. For example, the representation of extreme racist views is likely to be protected if the intention is to expose and explain, rather than to promote, those views.⁷

Article 17 prevents the ‘abuse of rights’. Expression may not be protected if it is incompatible with a society based on tolerance, pluralism, and broadmindedness. For example, Article 10 may not be used to protect Holocaust denial or expression of extremist anti-democratic ideas.⁸

4 *Castells v. Spain* [1992] 14 EHRR 445, at para 42.

5 *Vereinigung Bildender Künstler v. Austria* [2008] 47 EHRR 5. Para 26.

6 See, for example, *Le Pen v. France*. Application No. 18788/09, 20 April 2010; *Féret v. Belgium*. Application No. 15615/07, 16 July 2009. Judgments available in French only.

7 *Jersild v. Denmark* [1994] 19 EHRR 1.

8 *Glimmerveen v. Hagenbeek v. Netherlands*. Application Nos 8348/78 and 8406/78 [1979] 18 DR 187.

Article 10 imposes two different types of obligations on the state:

- **negative obligations**, meaning that the state must itself refrain from unnecessary censorship of artistic, political or commercial expression.
- **positive obligations**, to help individuals and the media in exercise their right to freedom of expression. This includes, for example, providing adequate legal protection for journalists and their sources.

Relationship to other articles

Article 10 overlaps with several other rights, including the right to manifest one's beliefs (Article 9), the right to protest (Article 11), and the right to vote and stand for office (Protocol 1, Article 3). Often, a violation of Article 10 will occur with a violation of another Article, such as Article 11.

Article 10 can also come into conflict with other rights, for example the right to a fair trial (Article 6), the right to privacy (Article 8), and the right to freedom of thought, conscience and religion (Article 9).

The development of Article 10 in Britain

Freedom of expression is often said to have a long history in British common law. Lord Justice Laws, for example, has stated that ‘freedom of expression is as much a sinew of the common law as it is of the European Convention’.⁹ However, many expert academics and practitioners disagree, and consider that freedom of speech had at best an uncertain status in Britain prior to the Human Rights Act (HRA) 1998.¹⁰

Prior to the implementation of the HRA there was no general statutory protection of freedom of expression though such freedom was part of the ‘negative liberty’ enjoyed by everyone, or, as the Master of the Rolls put it in the *Spycatcher* case, ‘the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law ... or by statute’.¹¹ And while there was no general, legally binding standard against which to interpret restrictions upon freedom of expression, there were many examples of its value being recognised in specific contexts.

As early as 1689 the Bill of Rights guaranteed an almost absolute form of free speech to MPs in parliament,¹² recognising the importance of ensuring that politicians were free openly to express their views in parliament, without fear of reprisals. Similarly, today no MP or peer may be brought before the civil or criminal courts for any utterance made during parliamentary proceedings.

9 *R. v. Advertising Standards Authority Ltd, ex parte Vernons Organisation Ltd* [1992] 1 WLR 1289, at 1293A.

10 See, for example, R. Dworkin, 1981. ‘Is there a right to pornography?’ *Oxford Journal of Legal Studies* 177; E. Barendt, 1985. *Freedom of Speech*. Oxford: Clarendon Press; R. Singh, 1988. ‘The indirect regulation of speech: a time and a place for everything’ *Public Law* 212; G. Marshall, 1992. ‘Press Freedom and Free Speech Theory’ *Public Law* 40; P. Wragg, 2009. ‘Critiquing the UK Judiciary’s Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?’ Doctoral thesis. Durham University.

11 *Attorney General v. Guardian Newspapers* (No. 2) [1990] 1 AC 109, at page 178F. The *Spycatcher* case concerned the publication of a book called *Spycatcher: the candid autobiography of a senior intelligence officer* which was co-authored by a former MI5 officer. The book was first published in Australia but the allegations it made were blocked from publication in England.

12 Bill of Rights 1689, clause 9.

A number of other statutes explicitly refer to the importance of free speech. The importance of the right to freedom of expression is recognised in the Education Act 1986, for example, which ensures that freedom of speech within the law is secured for staff, students and visiting speakers at universities. Domestic law also identifies situations in which freedom of expression is restricted for legitimate reasons. *The Offences Against the Person Act 1861*, for example, prohibits solicitation to murder.

The common law has also long recognised that, in defamation cases, the protection of reputation must be weighed against the wider public interest in ensuring that people are able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed.¹³ For example, freedom of expression was protected long before any human rights convention by the defence of fair comment on a matter of public interest, a defence available to everyone but of particular importance to the media. In an 1863 case Mr Justice Crompton observed that ‘it is the right of all the Queen’s subjects to discuss public matters’.¹⁴

The importance of reporting proceedings in parliament and the courts has also long been recognised. In an 1868 case *The Times* was sued for libel after it published extracts from a House of Lords debate which included unflattering comments about someone who had alleged that a Law Lord had lied to parliament. The Court held in favour of *The Times* stating that, just as the public had an interest in learning about what took place in the courts, so it was entitled to know what was said in parliament; and only malice or a distorted report would destroy that privilege.¹⁵

Greater freedom of expression for artistic works has evolved relatively recently. Until 1959, the publisher of a book containing sexual references was liable to imprisonment. At times, books by Henry Miller, Lawrence Durrell, and Radclyffe Hall had been unavailable in England due to the obscenity laws. The 1960 acquittal by an Old Bailey jury of Penguin Books on obscenity charges arising out of the publication of an uncensored edition of D.H. Lawrence’s controversial book, *Lady Chatterley’s Lover*, was a crucial step towards freedom of the written word. Within a few years censorship of the theatre had also come to an end as a result of the Theatre Act (1968). Until then nudity and references to homosexuality on stage were restricted and theatre managers had to submit scripts for scrutiny by the Lord Chamberlain.

¹³ *Reynolds v. Times Newspapers* [2001] 2 AC 127, *per* Lord Nicholls.

¹⁴ *Campbell v. Spottiswoode* [1863] 3 B. and S. 769, at page 779.

¹⁵ *Wason v. Walter* [1868] LR 4 QB 73.

In the decades preceding the introduction of the HRA, the domestic courts increasingly made reference to Strasbourg case law when deciding cases involving defamation, censorship and protest. In some cases the European Convention and European Court of Human Rights offered stronger protection for free speech than domestic courts.

In the *Sunday Times* case the domestic courts prohibited publication by the newspaper of information about the damaging effects on fetuses of thalidomide (a drug given to pregnant women for morning sickness). The domestic courts held that publication would constitute a contempt of court while negotiations for settlement of an action for damages were ongoing between parents and the company marketing the drug. The European Court ruled that the injunction had breached the newspaper's Article 10 rights,¹⁶ because, given the public interest in publication, the interference was disproportionate to the pursuit of the legitimate aim of maintaining the authority of the judiciary. (The offence of contempt of court exists to maintain the authority of the judiciary.)

Spycatcher was an exposé of Britain's security and intelligence services written by a senior intelligence official, and published in 1985. For several years, it was banned in England, but available in Scotland and internationally, and English newspapers could not report on it. The author was bound by the Official Secrets Act, which he had breached by publishing the book, but the question was whether the material still remained 'confidential' given it was readily available. The House of Lords ruled that injunctions on the use of material published in *Spycatcher*, in breach of the Official Secrets Act, should be maintained long after the book was published internationally and even though the book was circulating in the UK.¹⁷ But the European Court of Human Rights ruled that maintaining the injunctions in this context was disproportionate and therefore violated Article 10.¹⁸

A number of commentators felt that the attitude of the domestic court to freedom of expression was out of line with the views of the European Court. Professor Eric Barendt noted in 1985 that the domestic judiciary's record in this area was 'far from impressive; too often ... free speech arguments are either ignored or belittled'.¹⁹ And in 1998 Professor Helen Fenwick complained that too often the courts restricted free expression 'on uncertain or flimsy grounds'.²⁰

16 *Sunday Times v. the United Kingdom* [1979] 2 EHRR 245.

17 *Attorney General v. Guardian Newspapers (No. 2)* [1990] 1 AC 109.

18 *Observer and Guardian v. the United Kingdom* [1991] 14 EHRR 153 and, similarly, *Sunday Times Ltd v. the United Kingdom* (No. 2) [1991] 14 EHRR 229.

19 E. Barendt, 1985. *Freedom of Speech*. Oxford: Clarendon Press. Page 306.

20 H. Fenwick, 1998. *Civil Liberties*. Cavendish Publishing. Page 144.

Even after the implementation of the HRA, the domestic court sometimes disagreed with the European Court about the application of Article 10. In *Goodwin v. the United Kingdom* [1996], for example, the House of Lords had required disclosure of a journalist's source believing that the source could pose a serious economic risk to the company whose information had been disclosed. But the European Court ruled that the requirement to disclose breached the journalist's article 10 rights.²¹ Nevertheless, the introduction of the HRA, and the 'domestication' of Article 10, has had a significant impact across a wide variety of areas. In the past two years, for example, Article 10 has been instrumental in relation to 'open justice', i.e. allowing media and thus public glimpses into court processes which previously took place behind closed doors. It has resulted in the High Court being persuaded to release part of a judgment detailing findings of torture by the CIA, for example.²²

Article 10 has also resulted in the national media being granted access to private hearings before the Court of Protection.²³ That Court, which is a branch of the family courts, is empowered to make 'best interests' decisions about the property, affairs, healthcare and personal welfare of adults who lack capacity. It operates with a high degree of secrecy. In March 2011 the *Independent* newspaper and other national media organisations successfully won the right to attend the court and report on cases of public interest, albeit with appropriate guarantees of confidentiality for the individuals involved.

Britain is generally a state in which freedom of expression is respected. However, we have identified a number of barriers to the full enjoyment of this right, and difficulties relating, in particular, to the balance to be struck between the enjoyment of this Article and the protection of the right to a private and family life guaranteed by Article 8 of the Convention.

²¹ *Goodwin v. the United Kingdom* [1996] 22 EHRR 123.

²² *R. (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 (Admin).

²³ *Independent News and Media v. A.* [2009] EWHC 2858 (Fam), upheld by the Court of Appeal: [2010] EWCA Civ 343.

Libel and defamation laws are weighted against writers and commentators

How freedom of expression is balanced against the laws which protect people from unjustified reputational damage

Defamation law exists to protect individuals' reputations from unfair and untrue attacks. It protects people from being discredited in the estimation of others due to false allegations. There are two types of defamation: libel and slander. The difference between them lies in the form that the allegation takes: libel is defamation by communication in permanent or lasting form (such as publication in a book or film), and slander is defamation by communication in transient form (such as a gesture or unrecorded comment).

An individual's desire to maintain a good reputation must be balanced against the right of his or her critics to freedom of expression. If defamation law is too narrow, people who have suffered harm to their reputations may be denied adequate access to justice; if it is too wide, it can prevent matters of public interest reaching the public domain.²⁴ Under Article 10(2), freedom of expression can be restricted 'for the protection of the reputation or the rights of others'. Defamation law allows the award of compensation if a person's reputation has been damaged as a result of libellous or slanderous statements.

Over the last two years there has been substantial publicity about the need to reform defamation law.²⁵ This has included campaigns by non-governmental organisations and media organisations, parliamentary reviews and inquiries on the subject. The Libel Reform Campaign, run by English PEN, Index on

²⁴ English PEN and Index on Censorship. *Free Speech is not for sale: The Impact of English Libel Law on Freedom of Expression* (10 November 2009: The Libel Reform Campaign). Available at: <http://libelreform.org/the-report>. Accessed 13/02/2012.

²⁵ See Heather Rogers QC, *Defamation: Problem? What Problem?* (20 November 2010). Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

Censorship and Sense about Science, claims that libel laws are restricting discussions and publications not only by journalists, but also by ‘scientists, campaigners, writers, academics and patients’. The campaign asserts that ‘critical and open debates are vital in medicine and the public are badly missing out without them’.²⁶

Before the 2010 general election, Jack Straw MP announced that libel reforms would be taken forward in the next parliament.²⁷ The coalition government’s ‘programme for government’ includes a promise to review libel laws to protect freedom of speech. Liberal Democrat peer Lord Lester introduced a Private Members’ Defamation Bill into the House of Lords in 2010.²⁸ In response to Lord Lester’s Bill, the new coalition government brought forward its draft Defamation Bill which was published on 15 March 2011.²⁹ In October 2011, Parliament’s Joint Committee on the draft Defamation Bill welcomed the government’s proposed reforms, but urged it to go further in a number of respects in order to better protect freedom of expression.³⁰

There have already been some welcome recent developments in relation to libel laws which recognise the importance of Article 10 rights. For example, in a number of recent cases the courts have taken a robust approach to trivial defamation claims. They have either declined to find that the relevant statements are defamatory at all, or they have made clear that there is a minimum ‘threshold of seriousness’ which must be passed for a defamation claim to succeed; or they have struck out claims as an abuse where there is no ‘real and substantial tort’.³¹

²⁶ Tracey Brown, Managing Director, Sense about Science, describing the campaign for libel reform. Available at: www.libelreform.org. Accessed 13/02/2012.

²⁷ Ministry of Justice, March 23 2010. Reform of libel laws will protect freedom of expression. Available at: <http://webarchive.nationalarchives.gov.uk/+http://www.justice.gov.uk/news/newsrelease230310b.htm>. Accessed 13/02/2012.

²⁸ A. Lester, 2010. *A Bill to amend the law of defamation; and for connected purposes*. London: The Stationery Office.

²⁹ Ministry of Justice, 2011. *Draft Defamation Bill Consultation*. Available at: <http://www.justice.gov.uk/consultations/docs/draft-defamation-bill-consultation.pdf>. Accessed 13/02/2012.

³⁰ Joint Committee on the draft Defamation Bill, 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office.

³¹ For example, in *Ecclestone v. Telegraph Media Group* [2009] EWHC 2779 (QB).

Key issues

1. The legal defences available to journalists, commentators and other defendants in defamation cases are complex and hard to use. This may create a 'chilling effect' and encourage self-censorship

There are various established defences available to those accused of defamation, none of which are particularly straightforward to use. These include the 'justification defence' (proving the statements in question were true, and therefore not defamatory); the 'fair comment defence' (which covers the expression of honest opinion, as distinct from alleged fact) and the *Reynolds/Jameel* defence, which is the nearest to a public interest defence.

A defendant who wishes to use the 'justification defence' will need to prove that the statements in question were true. This essentially protects statements of fact rather than comment or opinion. Lord Lester's recent bill proposed that this defence should be renamed as 'truth' (rather than the more technical 'justification') and proposed some amendments to address technical difficulties which have arisen with this defence in practice.³²

Defendants can also argue that their statements were 'fair comment'. The defence of fair comment is often relied upon by those expressing opinions, such as restaurant critics, or commentators on the scientific work of others. But it has been notoriously hard to rely on, in particular because of a requirement, imposed until December 2010, that the comment had to be made in circumstances which allowed the reader to judge the extent to which it was well-founded.³³

A now notorious example of how difficult it is to draw the line between 'fact' and 'comment' is to be found in the case of *British Chiropractic Association v. Singh*.³⁴

³² Clauses 4 and 5 of Lord Lester's Defamation Bill, above.

³³ See *Joseph v. Spiller* [2011] 1 AC 852. The Draft Defamation Bill attempts to address these concerns, by introducing a defence of honest opinion. A defendant will be able to rely on this defence where the statement is one of opinion and on a matter of public interest that an honest person could have held on the basis of a fact that existed at the time the statement complained of was published.

³⁴ *British Chiropractic Association v. Singh* [2010] EWCA Civ 350.

Simon Singh, a science writer, published an article in the *Guardian* in April 2008 which discussed chiropractic treatment, with reference to the British Chiropractic Association (BCA). He described the BCA's claims about the treatment of childhood ailments and stated that 'even though there is not a jot of evidence' to support such practices the BCA 'happily promotes bogus treatments'. Singh was sued personally for libel by the BCA (although the article had been published in the *Guardian*). A key issue was whether what was published was 'fact' or 'comment' – if 'comment' the defence of fair comment could apply, but if they were statements of verifiable fact Singh would have to prove they were true and could not rely on the 'comment' defence. The High Court judge and the Court of Appeal reached opposite conclusions: the judge thought it was plainly fact, but the Court of Appeal found it was plainly comment.

Dr Singh eventually won his case, but only after having appealed against the initial decision of the judge.³⁵ The appeal Court's judgment recognises a multiplicity of problems in this area of law, and demonstrates the 'chilling effect' of these anomalies in the law, that is, how they create an opportunity for individuals and organisations to stifle criticism:

'It is now nearly two years since the publication of the offending article. It seems unlikely that anyone would dare repeat the opinions expressed by Dr Singh for fear of a writ. Accordingly this litigation has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices about the possible use of chiropractic. If so, quite apart from any public interest in issues of legal principle which arise in the present proceedings, the questions raised by Dr Singh, which have a direct resonance for patients, are unresolved. This would be a surprising consequence of laws designed to protect reputation.'³⁶

The Court also noted that the BCA had proceeded against Dr Singh, not the *Guardian*, and had rejected an offer by the *Guardian* to publish an article refuting Dr Singh's contentions. This was said to have created 'the unhappy impression ... that this is an endeavour by the BCA to silence one of its critics.'³⁷

³⁵ The British Chiropractic Association subsequently filed a 'notice of discontinuance' (withdrawing their claim) on 14 April 2010: 'BCA discontinue Singh claim' (15 April 2010: 5 Raymond Buildings press release). Available at: <http://www.5rb.com/newsitem/BCA-discontinue-Singh-claim>. Accessed 13/02/2012.

³⁶ Lord Justices Judge, Neuberger and Sedley, in *British Chiropractic Association v. Singh* [2010] EWCA Civ 350. Para 11.

³⁷ *British Chiropractic Association v. Singh* [2010] EWCA Civ 350. Para 12.

The Supreme Court, too, has said that there are ‘difficult questions’ concerning the ‘fair comment defence’ which should be considered by the Law Commission or an ‘expert committee’.³⁸ The Court proposed renaming the defence ‘honest comment’ and set out five essential elements of it, including that the comment must be on a matter of public interest, and that it must be recognisable as comment, rather than an imputation of fact. This does not, however, resolve the difficulty around distinguishing between fact and comment.

It remains the case that reform is sorely needed to make this defence fully effective. The government now proposes placing the defence of ‘honest opinion’ on a statutory footing as part of the draft Defamation Bill, but the Joint Committee has expressed concern that the draft does not make the law ‘clearer, simpler or fairer to the ordinary person than it is at present’.³⁹

Another important defence for commentators is the *Reynolds/Jameel* defence. This is the closest available defence to a general public interest defence, but there remain uncertainties about its application in practice. The Reynolds defence was derived from a 1999 judgment in a case brought by the Irish Taoiseach Albert Reynolds against the *Sunday Times*.⁴⁰ In their judgment, the Lords ruled that under certain circumstances the media could mount a ‘public interest’ defence in the case of published allegations that turned out to be false.

Lord Nicholls listed 10 points for the courts to consider if this defence is raised, one of which was that the story must ‘contain the gist’ of the claimant’s story (in this particular case the *Sunday Times* had failed to ask Reynolds for his side of the story). This list of 10 issues was intended to be a non-exhaustive, illustrative indication of the types of matters which might be relevant.

Over the next seven years this defence was interpreted restrictively and failed to provide meaningful protection for responsible reporting on public interest issues. This failure was recognised by the House of Lords in the 2006 case of *Jameel v. Wall Street Journal Europe*⁴¹ in which the Law Lords held that, where the topic of a media investigation was of public importance, relevant allegations that could not subsequently be proved to be true should not generally attract libel damages if they had been published responsibly.

38 *Joseph v. Spiller* [2011] 1 AC 852. Para 117.

39 Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 43.

40 *Reynolds v. Times Newspapers* [2001] 2 AC 127.

41 *Jameel and others v. Wall Street Journal Europe* [2007] 1 AC 359.

The government's draft Defamation Bill includes a 'public interest' defence, but this has already attracted criticism. For example, the Bill provides a list of relevant factors to be taken into account in considering whether publication was responsible, but it does not refer specifically to the resources of the publisher. Lord Lester, JUSTICE and Index on Censorship have been critical of this,⁴² and the Joint Committee has recommended that a new factor be added, referring to resources, 'since it is not appropriate to expect the same level of pre-publication investigation from a local newspaper, non-governmental organisation or ordinary person as we should expect from a major national newspaper'.

2. Libel laws are out of date and do not address issues arising from publication on the internet

The development of new forms of mass communication, in particular the internet, has left defamation law lagging behind. In October 2011 the Joint Committee on the draft Defamation Bill noted that a common theme running through the evidence they had received was 'the need for the law to keep pace with developments in society'.⁴³ Many witnesses before the Committee had, 'questioned the suitability of a law designed for the written and spoken word in an age of a rapidly changing communication culture'.

The internet raises new problems and challenges for claimants in libel cases. Allegations published on the internet may result in far more permanent, lasting and wide damage to an individual's reputation than was previously the case, when publication was restricted to a hard copy of a daily newspaper which was subsequently thrown away.⁴⁴ Further, technologies such as tweeting and anonymous online message boards allow for 'instant, global, anonymous, very damaging' communications, 'potentially outside the reach of the courts'.⁴⁵

⁴² Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 65a.

⁴³ Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 15.

⁴⁴ Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 15.

⁴⁵ Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 16.

The internet has also allowed both professional writers, and also non-professional bloggers and commentators, to have instant access to an international audience. This makes the balance between freedom of expression (Article 10(1)) and the protection of the rights and reputations of others, as required, respectively, by Article 10(2) and Article 8, more precarious as false allegations can be circulated very widely, very quickly, by anyone with access to the internet.

A further issue raised by the internet concerns the ‘multiple publication’ rule, the effect of which is that there is a fresh act of publication each time someone clicks on a website. Also, because each ‘download’ constitutes a new publication, it also carries a fresh limitation period, thus extending the possible risk of being sued for libel far beyond the time when the material was placed on the internet by the publisher. Internet providers and websites, which reprint or link to an article, will also be liable for defamation.

The draft Defamation Bill proposes a ‘single publication’ rule, under which the one-year limitation period (time within which an action must be brought) runs from the date of original publication and does not restart each time the material is viewed, sold or otherwise republished. The Joint Committee has given its strong support to this proposal and praises it for strengthening freedom of speech by providing far greater protection to publishers, although the Committee and others have been critical of the fact that the proposed ‘single publication’ rule protects only the individual who originally published the material once the one-year period has expired, and does not apply to anyone else who republishes the same material in a similar manner.⁴⁶

⁴⁶ Joint Committee on the draft Defamation Bill 2011. *Draft Defamation Bill: Session 2010-12*. London: The Stationery Office. Para 59.

There has been a lack of rigour
in upholding media standards.
Greater clarity is needed about how
the right to freedom of expression
should be balanced against the
right to a private and family life

The balance between the right to press freedom and personal privacy

The last year has seen some significant and potentially far-reaching changes in the media landscape in Britain, among them the *News of the World* ‘phone hacking affair’ and the resulting Leveson inquiry, and public debates about the use of injunctions to protect privacy. The working practices of the media, its links to institutions including the government and the police, and the regulatory regime are under scrutiny as never before.

Many of these issues concern the balance to be struck between freedom of expression, as protected by Article 10, and the Article 8 rights of individuals to private and family life. This chapter looks at the balance between press freedom and personal privacy, while the chapter on Article 8 looks at the legal and regulatory framework covering surveillance and personal information.

The media attracts special protection under human rights law because of its role as a public watchdog,⁴⁷ and restrictions on freedom of expression are subjected to very close scrutiny. The right to freedom of expression is not unlimited, however. And while there is a natural tension between the Article 10 interest in openness and transparency and the Article 8 interest in privacy, the structure of these provisions is such as to permit a proportionality-based approach to be taken to the reconciliation of these rights.

⁴⁷ *Barthold v. Germany* [1985] 7 EHRR 383. Para 58.

The standard of protection provided by Article 10 varies according to the content of the expression, with political and public interest speech at the top of the hierarchy of protection and the reporting of matters of largely prurient interest towards the bottom. In addition, and controversially, the European Court of Human Rights has in recent years paid increasing attention to the extent to which journalists have complied with professional ethics in determining the parameters of Article 10, particularly in cases in which serious issues of reputation and/or privacy are at stake.

Where the values protected by the provisions are in conflict, ‘intense focus’ must be brought to bear on the comparative importance of the specific rights being claimed in the individual case.⁴⁸ The justifications for interfering with or restricting each right must be taken into account, with the proportionality test being applied to each.

The case law suggests that, in addition to questions relating to the type of expression at stake, among the factors which impact on the balance to be struck between the requirements of Article 8 and Article 10 are the following:

- **The public stature of the individual:** the European Court has ruled that the limits of acceptable criticism are wider for politicians than for ordinary citizens,⁴⁹ and that politicians have to display a greater degree of tolerance of criticism than private persons.⁵⁰ There may be a justifiable public interest in the disclosure of personal information about public figures, such as leaders of major businesses, even if they do not seek publicity, where the disclosures are relevant to public debate.⁵¹

⁴⁸ *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593. Para 17, *per* Lord Steyn.

⁴⁹ *Lingens v. Austria* [1986] 8 EHRR 407, ECtHR. See also *Oberschlick v. Austria* (No. 2) [1997] 25 EHRR 357.

⁵⁰ See, similarly, *Gorelishvili v. Georgia* [2009] 48 EHRR 36, paras 32-33.

⁵¹ *Verlagsgruppe News GMBH v. Austria* (No. 2) [2007] EMLR 413. See also *Tønsbergs Blad as and Haukom v. Norway* [2008] 46 EHRR 40. Para 87.

- **The degree of interference with privacy:** the European Court has found that public disclosure of personal information received in context of an intimate relationship may breach the right to a private and family life.⁵² The surveillance of individuals in their home,⁵³ the disclosure of information related to the home,⁵⁴ and surveillance in public spaces⁵⁵ may all amount to interferences with privacy requiring justification under Article 8(2). The way in which private information has been obtained is relevant to the degree of interference recognised and the balance to be struck between the public interest in dissemination of information and the individual's privacy interests.⁵⁶
- **Any breach of the law or of professional ethics by a reporter:** the European Court of Human rights has ruled that Article 10 does not protect reporters making false allegations against public figures who disregard the duties of responsible journalism by failing to make reasonable efforts to verify the allegations before publication.⁵⁷

Two examples demonstrate how these principles have informed court judgments in Britain that require balancing the right to a private life with the right to freedom of expression.

In *Mosley v. News Group Newspapers*, Max Mosley, former Formula 1 boss and son of a 1930s fascist leader, took legal action against *News of the World* following its publication, in 2008, of a story and clandestinely filmed video relating to his allegedly Nazi themed sado-masochistic activities with a number of prostitutes. The High Court found that the newspaper had breached Mosley's right to a private life as he 'had a reasonable expectation of privacy in relation to sexual activities (albeit unconventional) carried on between consenting adults on private property'. The judgment considered whether the intrusion into Mosley's privacy was proportionate to the public interest supposedly served by it. It found that 'the only possible element of public interest here, in the different context of privacy, would be if the Nazi role-play and mockery of Holocaust

52 *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73.

53 See, for example, *P.G. and J.H. v. the United Kingdom* [2008] 34 EHRR 1272.

54 See *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73.

55 *Niemietz v. Germany* [1992] 16 EHRR 97, *Peck v. the United Kingdom* [2003] 36 EHRR 719.

56 *Radio Twist As v. Slovakia* [2006] 22 BHRC 396 [62]. See also *McKennitt v. Ash* [2005] EWHC (QB) 3003, [2006] EMLR 10, upheld [2008] QB 73, *Prince of Wales v. Associated Newspapers* [2006] EWCA Civ 1176, [2008] Ch 57, para 68.

57 *Alithia Publishing Company v. Cyprus* [2008] ECHR 17550/03 [65]. See, similarly, *Flux v. Moldova* (No. 6) [2008] ECHR 22824/04 and, perhaps more surprising, *Ivanova v. Bulgaria* [2008] ECHR 36207/03.

victims were true. I have held that they were not'.⁵⁸ That being the case, the balance was in favour of privacy and Mosley was awarded £60,000 in damages.

In *Ferdinand v. Mirror Group Newspapers*, the balance lay with freedom of expression and MGN.⁵⁹ Rio Ferdinand, captain of the England national football team, took legal action against the *Sunday Mirror* for infringing his right to a private life and misusing his personal information. In 2010 the newspaper paid a woman for her story and published the details of their 'on and off' sexual relationship which had extended over a period of 13 years. Ferdinand had made public statements during this time about having left his 'wild man' past behind him to settle down with the mother of his children. The judge found that the newspaper story contained information about Ferdinand that was protected by Article 8, but, in determining the balance to be struck between Articles 8 and 10, he assessed whether the publication was in the public interest given Ferdinand's high profile public position. Relevant factors were Ferdinand's 'family man' image, his appointment as England team captain following the dismissal of his predecessor because of an extra-marital affair, and the expectation of the team manager and many commentators that the England captain was expected to be a role model for young fans both on and off the pitch. In this case Ferdinand's public image and role model status meant there was a public interest in the newspaper's disclosure sufficient to justify the publication and Ferdinand lost his case.

The balance between the right to a private life and freedom of expression lies at the heart of the Leveson inquiry into the culture and ethics of the media. The inquiry was established as a response to the phone hacking scandal at News International, in particular at the now defunct *News of the World*. Employees of the newspaper were accused of unlawful covert surveillance and bribery of police. The matter had been in the public eye for some time; the subjects of the alleged improper activities thought to include celebrities, politicians and members of the royal family. The paper's royal editor, Clive Gooding, had been jailed in 2007 together with a private investigator, Glenn Mulcaire, who had provided services to the newspaper.

In July 2011 it became apparent that the problem of hacking was widespread. Public uproar followed the disclosure that the phones of the family of Milly Dowler, a schoolgirl murdered in 2002, and other victims of criminal and terrorist activities had been hacked. In the same month Lord Justice Leveson was appointed as Chairman of a two-part inquiry into the role of the press and police in the phone-hacking scandal.

⁵⁸ *Mosley v. News Group Newspapers Ltd* (No. 3) [2008] EWHC 1777 (QB), [2008] EMLR 20, paras 135-136.

⁵⁹ *Rio Ferdinand v. Mirror Group Newspapers Ltd* [2011] EWHC 2454 (QB).

Part one of the inquiry will address ‘the culture, practices and ethics of the press, including contacts between the press and politicians and the press and the police ... to consider the extent to which the current regulatory regime has failed and whether there has been a failure to act upon any previous warnings about media misconduct’.⁶⁰ Part two will address ‘the specific claims about phone hacking at the News of the World, the initial police inquiry and allegations of illicit payments to police by the press’ and ‘the extent of unlawful or improper conduct within News International, other media organisations or other organisations’. This section seeks to highlight some of the main issues which arise in balancing freedom of expression and other rights in the media context, while taking care not to pre-empt the findings of the Leveson inquiry.

Key issues

1. The current regulatory approach appears to have major flaws and failings

The Press Complaints Commission (PCC) is funded by the newspaper and magazine industry and administers a system of self-regulation for the media. Its role is to serve the public by holding editors to account and to protect the rights of privacy of individuals, while at the same time preserving appropriate freedom of expression for the press. It does so primarily by dealing with complaints, framed within the terms of the Editors’ Code of Practice, about the editorial content of newspapers, magazines and their websites and the conduct of journalists. It does not have the legal power to prevent publication of material in breach of the Code.

The Editors’ Code commits editors to accuracy; the provision of opportunities to reply; respect for privacy and the avoidance of harassment; respect for the rights of children; the bereaved; hospital patients; and those affected by crime. It prohibits the use of covert surveillance, misrepresentation and subterfuge and interception of communications except where this can be demonstrated to be in the public interest.⁶¹ The PCC adjudicates on complaints made about alleged breaches of the Code by any British newspaper or magazine or their website. In the event of a finding of breach, the PCC will make a public ruling which must be published in full by the offending newspaper or magazine.

⁶⁰ The *Observer*, November 13 2011. BBC constrained by need to avoid political bias, admits Lord Patten. Available at: <http://www.guardian.co.uk/media/2011/nov/13/bbc-political-bias-lord-patten>. Accessed 21/02/2012.

⁶¹ Press Complaints Commission. *Editors’ Code of Conduct*. Available at: <http://www.pcc.org.uk/cop/practice.html>. Accessed 13/02/2012.

The PCC was established in 1991 on the recommendation of David Calcutt QC to replace the Press Council,⁶² which had come to be seen by the late 1980s as failing to curb the excesses of some sections of the press. Assessing its role, the House of Commons Culture, Media and Sport Select Committee concluded in 2003 that ‘overall, standards of press behaviour, the Code and the performance of the Press Complaints Commission have improved over the last decade’,⁶³ and in 2007 that the system of self-regulation should be maintained.⁶⁴ Similar conclusions were drawn in 2009.⁶⁵

However, the PCC has been subject to significant criticism following the phone hacking scandal. The PCC had concluded in 2007 that there was no culture of illegal interception at the *News of the World*.⁶⁶ In July 2009 the *Guardian* had published a series of reports claiming that News Group Newspapers had paid in excess of £1 million to settle legal actions which threatened to expose the use of private investigators by journalists to engage in phone hacking. A subsequent PCC investigation defended its 2007 finding, concluding that it had not been misled by the *News of the World* and that there was no evidence to suggest the practice of phone message hacking was ongoing.⁶⁷

The *Guardian* suggested in November 2009 that the ‘complacent report shows that the PCC does not have the ability, the budget or the procedures to conduct its own investigations’, commenting that ‘[t]he report ... has not produced any independent evidence of its own to contradict a single fact in our coverage’.⁶⁸ The Media Standards Trust criticised PCC’s system of self-regulation, as opaque, ineffective and in need of reform.⁶⁹

62 D. Calcutt, 1990. *Report of the committee on privacy and related matters*. London: HMSO.

63 Culture, Media and Sport Committee, 1990. *Privacy and media intrusion – Fifth report of Session 2002-03, volume 1*. London: The Stationery Office.

64 Culture, Media and Sport Committee, 2007. *Self Regulation of the Press – Seventh report of session 2006-07*. London: The Stationery Office. Para 54.

65 Culture, Media and Sport Committee, 2010. *Press Standards, Privacy and Libel – Second report of session 2009-10, volume 1*. London: The Stationery Office. Para 79.

66 Press Complaints Commission, 2009. *PCC Report on Subterfuge and Phone Tapping*. Available at: http://www.pcc.org.uk/assets/218/PCC_subterfuge_report.pdf. Accessed 31/01/12.

67 Press Complaints Commission, 2009. *PCC report on phone message tapping allegations*. Available at: http://www.pcc.org.uk/assets/111/Phone_Hacking_report_2009.pdf. Accessed 31/01/12.

68 The *Guardian*, November 9 2009. The *Guardian*’s statement in response to the ‘PCC report on phone message tapping allegations’. Available at: <http://www.guardian.co.uk/media/2009/nov/09/guardian-statement-pcc-report>. Accessed 13/02/2012.

69 See Media Standards Trust, 2009. *A More Accountable Press* and its recommendations for reform of the current system, *Can independent self-regulation keep standards high and preserve press freedom?*

Not all newspapers have been so critical of the PCC. In October 2011, former editor of the *Sun*, Kelvin MacKenzie, suggested that the Leveson inquiry was unnecessary⁷⁰ and Paul Dacre, editor of the *Daily Mail*, suggested that ‘although the PCC was “naïve” in its investigation of phone hacking, it was unfair to suggest the scandal proved the PCC did not work’. ‘The truth is that the police should have investigated this crime properly and prosecuted the perpetrators’. Dacre suggested that ‘beefed-up’ self-regulation was the ‘only way of preserving the freedom of the press’, and suggested that the appointment of a newspaper ombudsman might be a way forward.⁷¹

These criticisms about the role of the PCC call into question whether it can act as an effective watchdog of the press as it is currently funded and operated. To the extent that there are shortcomings in any system of self-regulation, the positive obligations imposed on the state by Article 8 of the Convention will require that the courts are capable of filling the gap. This is particularly so in cases where a party seeks prior restraint of publication such as by way of an injunction. The PCC in its current form does not have any legal powers to prevent publication which may breach, for example, the Article 8 rights of an individual. But there are also real difficulties for some individuals seeking injunctive relief in the courts, due to the high cost of such actions as discussed below. The Leveson inquiry will assess the effectiveness of the current regulatory system.

2. Article 8 rights to a private life are not always adequately protected against press intrusion by injunctions

The failures of self-regulation have meant that people wishing to protect their Article 8 rights from breach by the media have had to take legal action to do so. If it is to be effective, legal action has to be taken prior to publication by means of an application for an injunction. Suing after publication cannot undo the damage done to a person’s private life by unwarranted publication.

The media is generally entitled to publicise the existence of an injunction, although in privacy cases one or all of the parties’ names will often be anonymised. ‘Super injunctions’ prohibit not only the publication of the identity of the parties to whom a story relates, but also the publication of the fact that an injunction has even been granted.

⁷⁰ The *Guardian*, October 13 2011. Kelvin MacKenzie’s speech at the Leveson inquiry – full text. Available at: <http://www.guardian.co.uk/media/2011/oct/13/kelvin-mackenzie-leveson-inquiry>. Accessed 31/01/12.

⁷¹ BBC, October 12 2011. Phone hacking: *Daily Mail*’s Paul Dacre defends PCC. Available at <http://www.bbc.co.uk/news/uk-15271533>. Accessed 13/02/2012.

Super injunctions have the potential to undermine the principle of open justice⁷² but their use appears to have been rare with the first recorded use having been in 2009 and Lord Neuberger's Committee on Super-Injunctions, which reported in May 2011,⁷³ suggesting that only two super-injunctions had been issued since January 2010. Lord Neuberger recommended that super and anonymised injunctions should have a 'return' date and be kept under review by the court, and that the government consider the feasibility of collecting data on these matters so it is clear how frequently injunctions are granted.

The vast majority of injunctions are of the 'anonymised' variety. The legal principles balancing Article 8 and 10 are relatively clear. The courts can issue injunctions to protect the privacy rights of individuals, and the media is generally entitled to publicise the existence of an injunction, though not necessarily all the names of the parties' involved. However, such injunctions should not prevent the publication of material which is genuinely in the public interest. For example, the public may have a legitimate interest in information disclosing criminal activity, or wrong-doing due to the status of the individual involved and/or his or her public statements on a related issue.

Access to injunctions, however, can depend very much on the resources of a potential claimant. Many of those who would wish to prevent publication of material on grounds of privacy are celebrities and it is the fact of their celebrity status that makes the press so interested in publishing material about them. Such celebrities are likely to be wealthy and therefore in a position to consider applying for injunctive relief. Less wealthy people can, however, also find themselves in situations in which their private lives become the subject of press interest. Such people face particular difficulties in seeking injunctive relief.

One of the difficulties with the practical operation of injunctions is the costs of obtaining and challenging them. (This is also discussed below in relation to defamation and privacy.) Injunctions have to be sought at very short notice if they are to be effective, and costs effectively prevent all but the very rich from having access to them. Pre-publication injunctions are also generally granted *ex parte*, that is, without any other parties being present or represented. An injunction may be granted under these circumstances which would not have been granted after full argument about the law and the facts. In theory such

⁷² See Culture, Media and Sport Committee, 2010. *Press standards, privacy and libel Second Report of Session 2009–10*. London: The Stationery Office. Paras 94–97.

⁷³ Master of the Rolls, 2011. *Report of the Committee on Super-Injunctions: Superinjunctions, Anonymised Injunctions and Open Justice*. Available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>. Accessed 11/02/2012.

injunctions are granted on an interim basis only and may be lifted after a full hearing, but the costs associated with such hearings may mean that the interim injunction effectively settles the matter for ever.

The combination of cost and court procedure can have very damaging effects on third parties affected by injunctions. Ryan Giggs, a married footballer, was granted an injunction to prevent details of an affair being made public.⁷⁴ Neither the newspaper nor the woman with whom he had had the affair were present at the hearing. Imogen Thomas was assumed at the time to be, but was not in fact, the source of the story, and the published judgment at the first instance hearing named her and suggested that she may have blackmailed the unnamed footballer. This suggestion was then widely reported, and the media interest in the story (and, therefore, the intrusion into Ms Thomas' privacy) was prolonged by the fact of Giggs' anonymity.

Ms Thomas sought police protection in May 2011 as a result of death threats following the exposure of the relationship when Giggs was finally named.⁷⁵ In December 2011 she was vindicated when she was permitted to read an agreed statement in open court in which it was accepted that she had neither publicised the relationship nor threatened to do so. According to a report in the *Guardian*, Thomas 'claimed that she had initially been "thrown to the lions" because, unlike the soccer star, she did not have the money to pay for her name to be kept private'.⁷⁶

The Giggs case was one in which the source of the story was not the other party to the affair, as is the case with 'kiss and tells'. And while there may be reason to protect public figures from exposure by those who target them in order to sell stories to the press, there are difficulties with 'gagging' people who may have an interest in exposing wrong-doing. In May 2011, for example, *Private Eye* reported that injunctions had been granted to prevent publication of '[t]he name of the entertainment company which sacked a female employee after an executive ended an extramarital affair with her and told bosses that "he would prefer in an ideal world not to have to see her at all and that one or the other should leave"'.⁷⁷ The individual in such a case is unlikely to have the legal or financial resources to challenge the injunction imposed on her.

⁷⁴ *CTB v. News Group Newspapers* [2011] EWHC 3099 (QB).

⁷⁵ The *Daily Telegraph*, May 26 2011. Imogen Thomas receives Twitter death threats over Ryan Giggs affair. Available at: <http://www.telegraph.co.uk/news/celebritynews/8537145/Imogen-Thomas-receives-Twitter-death-threats-over-Ryan-Giggs-affair.html>. Accessed 13/02/2012.

⁷⁶ The *Guardian*, May 16 2011. Imogen Thomas claims reputation 'trashed' by gagging order. Available at: www.guardian.co.uk/media/2011/may/16/imogen-thomas-gagging-order. Accessed 13/02/2012.

⁷⁷ *Private Eye*, May 5 2011, Not So Super Injunctions. Available at: http://www.private-eye.co.uk/sections.php?section_link=street_of_shame&article=361. Accessed 13/02/2012.

The development of the internet and emergence of new ways of sharing information very rapidly, has posed particular problems with enforcing injunctions. Details of injunctions, like that awarded to Ryan Giggs, were posted on the social networking site Twitter, and in October 2011 Jeremy Clarkson voluntarily lifted an anonymised injunction, which had prevented his ex-wife from writing about their relationship, declaring that injunctions were rendered pointless by the 'legal-free world on Twitter and the internet'.⁷⁸ In November 2011, the Master of the Rolls suggested that an action for contempt of court could 'in principle' have been brought on Gigg's behalf against anyone who mentioned the injunction and who could be shown to have 'either been served with the order or clearly knew of it'.⁷⁹ But the practical difficulties associated with bringing multiple contempt proceedings against individuals, however, are significantly greater than those associated with acting against a single newspaper.

In July 2011, a new Joint Committee of the House of Commons and the House of Lords was established to consider privacy and injunctions. It will consider the statutory and common law on privacy, the balance between privacy and freedom of expression and how best to determine the public interest, the enforcement of privacy injunctions and the role of media regulation. It is due to report in March 2012.⁸⁰

⁷⁸ The *Guardian*, October 27 2011. Jeremy Clarkson lifts 'pointless' injunction against ex-wife. Available at: <http://www.guardian.co.uk/media/2011/oct/27/jeremy-clarkson-lifts-injunction>. Accessed 21/02/2012.

⁷⁹ Joint Committee on Privacy and Injunctions, 2011. *Oral Evidence – Taken before the Joint Committee on Privacy and Injunctions on Monday 21 November 2011*. Response to question 527. Available at: http://www.parliament.uk/documents/joint-committees/Privacy_and_Injunctions/ucJCPI211111ev6.pdf. Accessed 21/02/2012.

⁸⁰ <http://www.parliament.uk/business/committees/committees-a-z/joint-select/privacy-and-superinjunctions/role/>. Accessed 13/02/2012.

3. Improper reporting of criminal investigations by the media may prejudice the right to a fair trial

There is undoubtedly a public interest in the reporting of criminal investigations and trials, and this interest is likely to outweigh some Article 8 rights of those charged or convicted of crimes, and their families.⁸¹ Article 10 rights to impart and receive information are not generally in conflict with the fair trial rights protected by Article 6 of the Convention, but will have to be limited if press coverage would otherwise prejudice the chances of a person receiving a fair trial.⁸² Such prejudice is unlikely to flow from reporting the fact that someone has been questioned, arrested and/or charged. Contempt of court proceedings may be brought where a person or organisation publishes material likely to jeopardise a fair trial.

There have been occasions on which the press has overstepped the mark very seriously, most recently in the reportage of Christopher Jeffries who was arrested on suspicion of the murder of Joanna Yeates in December 2010. He was later released without charge and Vincent Tabak was convicted of the murder in October 2011. Such was the prejudicial nature of the coverage of Mr Jeffries that in July 2011 the *Daily Mirror* was fined £50,000 and the *Sun* £18,000 for contempt of court. Jeffries also settled libel actions against eight newspapers including the *Daily Mirror* and the *Sun*. The Court described the *Daily Mirror* articles as ‘extreme’ and ‘substantial risks to the course of justice’ and stated the *Sun* had created a ‘very serious risk’ that any future court defence would be damaged.⁸³

The fact that Christopher Jeffries was released without charge meant that the articles published about him caused no harm in the end to the criminal trial process (as distinct from to his reputation). Had he been charged, however, the tone of the coverage created a real danger that a fair trial would have been impossible. In other cases such reporting could lead to the collapse of trials and the acquittal of the guilty. Other examples of contempt cases include the reporting by the *Daily Mail* and the *Sun* of the murder trial of Ryan Ward which

81 See, for example, *R. v. Croydon Crown Court, ex parte Trinity Mirror* [2008] 3 WLR 51.

82 See for example *News Verlags GmbH v. Austria* [2000] 9 BHRC 625, *News Verlags GmbH and Cokg v. Austria* [2001] 31 EHRR 8.

83 The *Guardian*, July 29 2011. *Sun* and *Mirror* fined for contempt of court in Christopher Jefferies articles. Available at: <http://www.guardian.co.uk/media/2011/jul/29/sun-daily-mirror-guilty-contempt>. Accessed 13/02/2012.

resulted in fines of £15,000 each in July 2011 as a result of their accidental publication online of photographs of the defendant holding a pistol,⁸⁴ and the initiation of contempt of court proceedings against the *Daily Mail* and the *Daily Mirror* for their reporting of the trial of Levi Bellfield, convicted of the murder of Millie Dowling.⁸⁵ The trial judge in the Ryan case refused to discharge the jury but Bellfield's trial for kidnapping was halted as a result of the press reporting of his conviction of Dowling's murder.

In the fact of the contempt of court reportage and the phone hacking scandal it is tempting to call for 'something to be done'. What that may be, however, and in particular whether there is a role for more substantial curbs to be placed on publication (as distinct from newspapers being fined or sued after the fact for contempt of court and/or breaches of Article 8), is a very difficult question. In May 2011 Max Mosley failed to convince the European Court that the press should be required to give advance notice of publication to the subjects of press coverage – a requirement designed to allow applications for injunctions and a *priori* balancing by the courts of the interests involved. It is hard to conceive any non-judicial body being in a position to vet stories in advance. The PCC's Editors' Code is intended to provide exactly the type of guidance which should avoid the kind of journalistic excesses exemplified by the Christopher Jeffries and the phone hacking scandal. Whether Leveson concludes that such self-regulation, or an alternative to it, is sufficient remains to be seen.

84 *Daily Mail*, July 19 2011. Two national newspaper websites fined for contempt of court. Available at: <http://www.dailymail.co.uk/news/article-2016505/Two-national-newspaper-websites-fined-contempt-court.html>. Accessed 13/02/2012.

85 Media Ethics, November 23 2011. UK Newspapers Accused of Contempt of Court. Available at: http://www.imediaethics.org/index.php?option=com_news&task=detail&id=2363. Accessed 13/02/2012.

The high legal costs in cases related to freedom of expression may have a ‘chilling effect’ on freedom of expression

The costs of Article 10 cases

Claimants in defamation and other Article 10 proceedings have to pay their own costs and also risk ‘adverse costs orders’ – in other words, having to pay the other party’s costs in the event of losing the case. For media outlets, writers and commentators, costs can have a ‘chilling effect’, which means either that they avoid making potentially risky comments in the first place, or settle claims at an early stage simply to avoid the financial risk. And the costs of obtaining an injunction (as discussed above) can leave all but the most wealthy without access to the courts to prevent publication in breach of their Article 8 rights.

The costs of litigation in the UK are higher than in many other jurisdictions. An Oxford University report published in 2008, for example, found that libel court costs were 140 times higher in Britain than in the rest of Europe.⁸⁶ When contested, defamation cases are decided by a full trial, before a jury, involving complicated procedures and legal arguments which involve heavy legal costs. All but the most straightforward preliminary issues require a jury decision, unless there is agreement between the parties, and so this impedes active case management and adds to the costs.⁸⁷

⁸⁶ Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, 2008. *A Comparative Study in Defamation Proceedings Across Europe*. University of Oxford, December 2008. Available at: <http://pcmlp.socleg.ox.ac.uk/sites/pcmlp.socleg.ox.ac.uk/files/defamationreport.pdf>. Accessed 13/02/2012.

⁸⁷ H. Rogers, November 20 2010. Defamation: Problem – What Problem? Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

Costs in Article 10 and other cases are further raised by the practice of using conditional fee agreements (CFAs). CFAs allow lawyers to accept a case on a 'no win, no fee' basis. If a CFA is used by a successful claimant the lawyers may charge not only the normal fee for their services, but also an additional 'success fee', which may be as high as 100 per cent of the original fees. Both fees are recoverable from the defendant. CFAs are often used in combination with After the Event (ATE) insurance which guarantees that, if the claimant loses, the insurance company will pay the defendant's legal costs and expenses. If the claimant wins, the defendant must pay the insurance premium as well as the claimant's legal fees and the success fee.

Without the availability of CFA agreements, individuals may not be able to access the courts at all. But critics of CFAs say that, because claimants will not have to pay their own legal costs, there is little incentive for them to control legal expenditures and to refrain from hiring expensive solicitors or counsel.⁸⁸

The costs of litigation, in particular in defamation cases, have caused critics to argue that 'libel law has been used to protect the rich and powerful from criticism and has come to be associated with money rather than justice'.⁸⁹ For example, in November 2011 Citizens Advice told MPs that they had spent an entire year's research and campaign contingency budget to libel-proof a report on the use of civil recovery schemes by high street stores. These are schemes under which external agencies are employed to send letters demanding payment to individuals who are alleged to have shoplifted. Citizens Advice wanted to warn consumers who received such letters that the demand might breach consumer protection regulations, but the threat of libel action from the agencies involved prevented them from doing so. The CAB report has still not been published in full.⁹⁰

88 There will however be an incentive for the lawyers to limit costs in case they are unsuccessful.

89 The Libel Reform Campaign. The Report – Balancing free speech and reputation. Available at: <http://www.libelreform.org/the-report?start=3>. Accessed 21/02/2012.

90 Libel Reform Campaign, November 9 2011. Libel threats gag Citizens Advice, Nature and others. Available at: <http://www.libelreform.org/news/512-libel-threats-gag-citizens-advice-nature-and-others>. Accessed 13/02/2012.

Key issues

1. The high costs of libel cases have a chilling effect on public debate, restricting comment and leading to premature or unnecessary settlements of defamation actions

In February 2010 the Commons Culture, Media and Sport Select Committee published its report on Press Standards, Privacy and Libel. The Report considered the operation of libel law in England and Wales and its impact on press reporting, including important developments since the 1996 Act. Among the recommendations of the Select Committee were concerns about the cost of libel proceedings.⁹¹

An indication of the possible extent of the problem can be found in the case of *Naomi Campbell v. MGN*. This was a breach of confidence case in which the claimant used a CFA.⁹² The costs for the two-day hearing in the House of Lords amounted to £594,470, including a 100 per cent success fee of £279,981.35. The costs borne by the defendant MGN were totally out of proportion to the extent of damages awarded to Campbell, which were just £3,500.

In 2011, the European Court considered the case and held that the requirement that MGN pay a 100 per cent success fee was disproportionate and violated Article 10.⁹³ On this important practical issue, therefore, the domestic courts have proven to be out of kilter with Strasbourg.

Libel reformists argue that the uncertainty of libel litigation, together with the prospect of paying the opponent's astronomical legal fees, leads writers either to avoid the risk of facing legal proceedings by censoring what they write or, once proceedings are launched, to settle matters rather than run complicated

⁹¹ Culture, Media and Studies Committee, 2010. *Press standards, privacy and libel – Second Report of Session 2009-10, volume 1*. London: The Stationery Office; Culture, Media and Studies Committee, 2010. *Press standards, privacy and libel – Second Report of Session 2009-10, volume 2*. London: The Stationery Office.

⁹² *Campbell v. Mirror Group Newspapers Limited* [2005] UKHL 61.

⁹³ *Mirror Group Newspapers Limited v. the United Kingdom* [2011] ECHR 66.

defences. The issue of costs was raised by the UN Human Rights Committee as a matter of concern. It urged the UK to consider,

‘limiting the requirement that defendants reimburse a plaintiff’s lawyers fees and costs regardless of scale, including Conditional Fee Agreements and so-called “Success Fees”, especially insofar as these may have forced defendant publications to settle without airing valid defences’.⁹⁴

There are indications that defendants may feel pressurised to settle claims unnecessarily because of the financial implications of proceeding. For example, in *Dee v. Telegraph Media Group* the claimant, Robert Dee, took action over an article that described him as the ‘worst professional tennis player in the world’.⁹⁵ He had suffered 54 consecutive defeats in tennis tournaments. The court accepted that the newspaper article may well have been ‘having a laugh’ at Dee’s expense, but unequivocally concluded that the undisputed facts were sufficient to justify the statement, and ordered summary judgment in the *Telegraph’s* favour. By this time, however, Dee had reportedly recovered damages and secured apologies from a number of other media organisations. They had all conceded what turned out to be a hopeless claim, probably due to the ‘chilling effect’ of the prospect of an adverse costs order.⁹⁶

The Ministry of Justice has promised to crack down on rising legal fees. In particular, a recommendation that lawyers’ success fees and ATE insurance premiums should cease to be recoverable for all types of civil litigation now appears in the Legal Aid, Sentencing and Punishment of Offenders Bill. If adopted, this may help to ensure that unsuccessful defendants in such proceedings are not faced with a disproportionate costs liability.

On the other hand, CFAs are not only for claimants. Many defendants in defamation actions rely on CFAs to obtain legal advice and representation. Prohibiting these agreements would be likely to reduce access to justice for claimants of limited means.⁹⁷ This is discussed further on the following page.

94 Human Rights Committee, 2008. *Consideration of Reports Submitted by States Parties Under Article 40 of The Covenant. Concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland*, para 25. Available at: <http://www.5rb.com/docs/UN%20Human%20Rights%20Committee%20Report%202008.pdf>. Accessed 13/02/2012.

95 *Robert Dee v. Telegraph Media Group Limited* [2010] EWHC 924 (QB).

96 H. Rogers, November 20 2010. Defamation: Problem – What Problem? Available at: <http://inform.wordpress.com>. Accessed 13/02/2012.

97 Right Honourable Lord Justice Jackson, 2009. *Review of Civil Litigation Costs: Final Report*. London: The Stationery Office.

One way of reducing costs in Article 10 cases may emerge from a pilot scheme underway in Manchester until September 2012. It suspends the usual procedural rules and allows for active costs management by the court, based on the submission of detailed estimates of future costs. The objective is described as being, ‘to manage the litigation so that the costs of each party are proportionate to the value of the claim and the reputational issues at stake and so that the parties are on an equal footing’.⁹⁸

2. The proposed abolition of conditional fee agreements (CFAs) would undermine access to justice for claimants and defendants of limited means, potentially breaching Articles 8 and 10

As noted above, the government wishes to stop the use of CFAs, or ‘no win no fee’ agreements. Under the Legal Aid, Sentencing and Punishment of Offenders Bill, any costs will have to be paid out of the final award for damages. Some commentators have suggested that this will protect or enhance freedom of expression, as defendants will not be faced with a disproportionate costs liability if they lose.

However, the picture is far more complex than this. Groups such as Hacked Off, which are opposed to the changes, warn that this will mean that the cost of seeking redress through the courts will no longer be financially viable for most individuals, restricting their access to justice. As above, many defendants in defamation actions rely on CFAs to obtain legal advice and representation. Without the possibility of success fees they would struggle to find lawyers to represent them. Similarly, claimants of limited means often rely on CFAs to take claims.

In October 2011, a wide range of claimants and defendants joined together to oppose the plan to end such funding arrangements, arguing that this reform would deny justice to people ‘of ordinary means’, preventing them from either taking action to vindicate their rights, or defending themselves in court.⁹⁹ This group includes Christopher Jefferies, the retired Bristol teacher defamed by the

98 Ministry of Justice. Practice Direction 51D: Defamation Proceedings Costs Management Scheme. Available at: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part51d.htm. Accessed 13/02/2012.

99 The *Guardian*, October 31 2011. Milly Dowler parents join Yeates’s landlord to oppose end to no win-no fee agreements. Available at: <http://www.guardian.co.uk/uk/2011/oct/31/milly-dowler-legal-aid-cuts>. Accessed 21/02/2012.

tabloids during the Yeates murder inquiry; the parents of murdered schoolgirl Milly Dowler; Peter Wilmshurst, a cardiologist sued for criticising research at a US medical conference; and Robert Murat, who lived near the scene of Madeleine McCann's disappearance in Portugal and who sued British TV stations and newspapers for libel. The group stated that:

'We are all ordinary citizens who found ourselves in a position of needing to obtain justice by taking or defending civil claims against powerful corporations or wealthy individuals. We would not have been in a position to do this without recourse to a "no win, no fee" agreement with a lawyer willing to represent us on that basis. As was made clear to each of us at the beginning of 35 our cases, we were liable for tens if not hundreds of thousands of pounds if we lost. Without access to a conditional fee agreement (CFA), which protected us from this risk, we would not have been able even to embark on the legal journey.'

The group have called on MPs to support an amendment tabled by the Liberal Democrat MP Tom Brake, which would exclude privacy and defamation cases from the reform of CFAs. In privacy cases, there is a particular issue as damages awards are often small and would rarely cover the cost of what might be a protracted legal case. Hacked Off claim that if the changes go ahead in their current form they will 'be making justice impossible for all but the rich'.¹⁰⁰

¹⁰⁰ The *Guardian*, October 31 2011. Milly Dowler parents join Yeates's landlord to oppose end to no win-no fee agreements. Available at: <http://www.guardian.co.uk/uk/2011/oct/31/milly-dowler-legal-aid-cuts>. Accessed 21/02/2012.

Counter-terror laws potentially criminalise free expression

How counter-terror laws impact upon freedom of expression

Article 10(2) permits interferences with freedom of expression which are prescribed by law and which are necessary in a democratic state¹⁰¹ and proportionate to the pursuit of one or more of the legitimate aims set out in Article 10(2). These aims include „national security, territorial integrity or public safety’, ‘the prevention of disorder or crime’ and ‘the rights of others’. As Lester, Pannick and Herberg point out:

““Necessary” has been strongly interpreted: it is not synonymous with “indispensable”, neither has it the flexibility of such expressions as “admissible”, “ordinary”, “useful”, “reasonable” or “desirable”.¹⁰² One must consider whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under art 10(2).’¹⁰³

As pointed out above, restrictions on freedom of expression may also be justified under Article 17 which prevents the ‘abuse of rights’.¹⁰⁴ Article 17 does not prevent those who are regarded as ‘criminals’ or ‘terrorists’ from relying on their Convention rights in general.¹⁰⁵ Rather, it prevents the attempt to rely on those very Convention rights to deny the rights of others. An example of this would

¹⁰¹ See, for example, the dicta of Lord Bingham in *R. v. Shayler* [2003] 1 AC 247. Para 23.

¹⁰² Lester, Pannick, and Herberg, 2009. *Human Rights Law and Practice*. Para 4.10.28, citing *Handyside v. the United Kingdom* [1976] 1 EHRR 737. Para 48.

¹⁰³ Above, citing *Sunday Times v. the United Kingdom* [1979] 2 EHRR 245. Para 62.

¹⁰⁴ See, for example, *Le Pen v. France* [2010] ECHR. Application No. 18788/09, 20 April 2010; *Féret v. Belgium* [2009] ECHR. Application No. 15615/07, 16 July 2009. Judgments available in French only.

¹⁰⁵ *Lawless v. Ireland* (No. 3) [1961] 1 EHRR 15.

arise if those campaigning to deny the rights of others to freedom of expression, or equality under the law, sought to use Article 10 against restrictions imposed by the state.¹⁰⁶

The government has a duty to protect people from terrorist threats and freedom of expression may be restricted to protect public order and national security. However, campaign groups including Article 19 and Liberty, have argued that counter-terrorism powers have been used to restrict legitimate forms of protest, political expression and other activities such as journalism and photography.¹⁰⁷ Article 19 has argued that the unnecessarily broad reach of several statutory measures and absence of adequate safeguards, has a chilling effect on debate on matters of public interest.¹⁰⁸

The right to protest is separately considered in the chapter on Article 11. This chapter looks at the potential impact of counter-terrorism legislation on freedom of speech.

Over the past decade parliament has introduced several pieces of legislation to put in place a permanent approach to counter-terrorism.¹⁰⁹ The three key pieces of legislation relevant to this chapter are the Terrorism Act 2000, the Terrorism Act 2006 and the Counter-Terrorism Act 2008. The 2000 Act consolidated existing anti-terror measures, but proved controversial for a number of reasons, including its broad definition of terrorism. The Terrorism Act 2006, passed in the aftermath of the London bombings of 7 July 2005, introduced a number of new criminal offences, including the encouragement of terrorism (for example, through making or publishing statements that glorify terrorism) and the sale, loan, distribution or transmission of terrorist publications.

¹⁰⁶ *Glimmerveen and Hagenbeek v. Netherlands* [1982] 4 EHRR 260.

¹⁰⁷ See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012. See also: <http://www.liberty-human-rights.org.uk/human-rights/free-speech/index.php>. Accessed 13/02/2012.

¹⁰⁸ See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012.

¹⁰⁹ The current counter-terror laws replaced temporary legislation which was first introduced in the 1970s and aimed at terrorism in Northern Ireland. This temporary regime was renewed annually, and expanded on two occasions (1984 and 1989) to include international terrorism.

As with any limitations on human rights, restrictions of the right to freedom of expression based on counter-terrorism concerns must comply with the general requirements of the law. Further, the European Court has repeatedly made it clear that, while states can and must act to protect their citizens from terrorist threats, their actions must be necessary and proportionate.¹¹⁰

The UK government signed the Council of Europe Convention on the Prevention of Terrorism in 2005, although it has yet to ratify the Convention.¹¹¹ The Convention includes a requirement that states introduce adequate ‘national prevention policies’ ‘with a view to preventing terrorist offences and their negative effects while respecting human rights obligations’ and details a number of criminal offences which are required to deal with terrorism. It also recognises that anti-terrorism laws are required to respect the rights to freedom of expression and the right to protest; and be necessary, proportionate and non-discriminatory.

Key issues

1. The definition of ‘terrorism’ is too broad and potentially criminalises lawful activity as well as activity which is unlawful, but not properly regarded as terrorism

Terrorism is defined in the Terrorism Act 2000, as subsequently amended by the 2006¹¹² and 2008¹¹³ Acts.¹¹⁴ According to this definition, terrorism is the use or threat of action where the intention is to ‘influence the government or an international governmental organisation or to intimidate the public’, and ‘the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause’. The action used or threatened is not confined to serious violence against the person/damage to property, endangerment to life or serious health and safety risk but includes, controversially, that ‘designed seriously to interfere with or seriously to disrupt an electronic system’.¹¹⁵

¹¹⁰ See, for example, *Incal v. Turkey* [2000] 29 EHRR 449.

¹¹¹ Joint Committee on Human Rights, 2006 *The Council of Europe Convention on the Prevention of Terrorism, First Report of 2006-2007*. Para 1. Available at: <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/26/2602.htm>. Accessed 13/02/2012.

¹¹² The Terrorism Act 2006 added ‘international governmental organisations’ to the list of targets whom the action is designed to influence (s.1(1)(b)).

¹¹³ The Counter-Terrorism Act 2008 added ‘racial’ to the causes being advanced (s.1(1)(c)).

¹¹⁴ This is the main definition. A different definition is contained in the Reinsurance (Acts of Terrorism) Act 1993, s.2(2).

¹¹⁵ S.1(2) Terrorism Act 2000.

The definition has been criticised as ‘both vague and excessively broad in its reach’, with free speech campaigning organisation, Article 19, pointing out that ‘it criminalises not only acts that are widely understood to be ‘terrorist’ in nature, but also lawful gatherings and demonstrations as well as many forms of behaviour that, while unlawful, cannot be regarded as “terrorism”’.¹¹⁶

Liberty has repeatedly submitted that the definition of terrorism should be drawn as tightly as possible, given the important consequences which flow from the question whether or not an action amounts to ‘terrorism’.¹¹⁷ Actions which would normally fall within the realm of the ordinary criminal law will constitute more serious offences, with graver punishments, if they are defined as ‘terrorism’; and the threat of terrorist acts triggers broad and sweeping powers under other legislation, such as the Civil Contingencies Act 2004.

In response to the criticisms regarding the scope of the definition of terrorism in the 2000 Act,¹¹⁸ in 2005 the then government asked Lord Carlile to review the definition. Lord Carlile completed this task in March 2007.¹¹⁹ He raised particular concerns regarding the definition’s reference to the intention to ‘influence’ the government or an international governmental organisation. Lord Carlile agreed with many submissions to his review that the use of the word ‘influence’ sets the bar too low in the definition.¹²⁰ Rather, he recommended that, ‘the existing law should be amended so that actions cease to fall within the definition of terrorism if intended only to *influence* the target audience; for terrorism to arise there should be the intention to *intimidate* the target audience’.¹²¹

116 Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression: Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights*, April 2006. Available at: <http://www.article19.org/data/files/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 13/02/2012.

117 For example, Liberty’s response to Lord Carlile’s review of the definition of terrorism, June 2006. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy06/response-to-carlile-review-of-terrorism-definition.pdf>. Accessed 13/02/2012.

118 See, for example, Article 19, *The Impact of UK Anti-Terror Laws on Freedom of Expression*, above. See also: <http://www.liberty-human-rights.org.uk/human-rights/free-speech/index.php>.

119 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office.

120 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 59.

121 Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(11).

Lord Carlile's recommendation in this respect was in keeping with the practice elsewhere which emerged from his international comparative review. This review revealed that anti-terrorism laws generally required intentions or motivations to 'intimidate', 'coerce', 'compel', or 'subvert'.¹²² In June 2007 the then Home Secretary, John Reid MP, responded to Lord Carlile's report on behalf of the government, stating that:¹²³

'We do not consider that the bar is set too low by the use of the word *influence*. We consider that there may be problems in terms of using the word intimidate in relation to governments and inter-governmental organisations.'

The term 'influence' remains in the Act.

A second concern with the definition of terrorism in the 2000 Act is the geographical reach: it is sufficient to amount to 'terrorism' that the action used or threatened is intended to influence *any* government across the world and regardless of context. This reach is particularly problematic given the absence of any 'reasonable excuse' defence for particular offences based upon the definition. This could lead to the stifling of legitimate debate, and the criminalisation of those supporting and encouraging reform in anti-democratic states.

The Court of Appeal examined this issue in the case of *R. v. F.*¹²⁴ 'F', the appellant, was opposed to the Gaddafi regime in Libya. He had fled from Libya to the UK and had been granted asylum. F was subsequently charged with contravening the 2000 Act, as it was alleged that he was in possession of documents that gave details of how explosive devices could be made and terrorist cells set up. F wished to argue that he had a 'reasonable excuse' for possessing the documents as they 'originated as part of an effort to change an illegal or undemocratic regime'. At a preliminary hearing on the interpretation of the 2000 Act (sections 1 and 58), the Crown Court judge forbade him from advancing such a defence. The Judge held that all governments, including, for example, a dictatorship, or a military junta, or a usurping or invading power, were included within the protective structure of the Act.

¹²² Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 58.

¹²³ HM Government, 2007. *The Government Reply to the Report by Lord Carlile of Berriew QC Independent Review of Terrorism Legislation – The Definition of Terrorism*. London: The Stationery Office. Government states that influence is suitable for government, where the intention is get it to act in a particular way, and intimidation is more appropriate for the public where there is the intention to scare (communication with the Commission, 16 January 2012).

¹²⁴ *R. v. F.* [2007] EWCA Crim 243.

On F's appeal the Court of Appeal concluded that the judge had been correct to hold that the terrorism legislation applied equally to democracies and to countries that were governed by tyrants or dictators. Lord Carlile reviewed this issue in his 2007 report. He did not consider a specific statutory defence of 'support for a just cause' to be practicable¹²⁵ but he did recommend that there be a new statutory obligation requiring the exercise of discretion to use counter-terrorism laws in extra-territorial matters to be subject to the approval of the Attorney General, having regard to (a) the nature of the action or threat of action under investigation, (b) the target of the action or threat, and (c) international legal obligations.¹²⁶

In its response, the government indicated that this matter was under review, but again, the scope of the definition remains as it was when Lord Carlile criticised it and recommended change. Four years later, nothing has changed.

2. A number of terrorism offences are overly vague and threaten freedom of expression

The Terrorism Act 2006 introduced two offences which went further than merely prohibiting direct acts of terrorism or incitement to commit such acts. One criminalised the 'encouragement of terrorism' (section 1) and the other the 'dissemination of terrorist publications' (section 2).¹²⁷ These offences are overly broad in their drafting, and have attracted widespread criticism. Liberty complained that the (then proposed) offences 'do not require any intention to incite others to commit criminal acts'; that '[t]he Terrorism Act 2000 (TA) and existing common law means there is already very broad criminal law' and that '[a]ny difficulty in bringing prosecutions can be largely attributed to factors such as the self imposed ban on the admissibility of intercept evidence'.¹²⁸ And prominent criminal jurist Alex Conte has criticised the provisions on the basis that they are 'linked to existing definitions of terrorist acts ... which go beyond the proper characterisation of terrorism'.¹²⁹ And freedom of expression expert

¹²⁵ Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(14).

¹²⁶ Carlile, 2007. *The Definition of Terrorism: A Report by Lord Carlile of Berriew QC, Independent Review of Terrorism Legislation*. London: The Stationery Office. Para 86(15).

¹²⁷ Terrorism Act 2006, section 20(2).

¹²⁸ See <http://www.liberty-human-rights.org.uk/media/press/2005/alarm-as-terrorism-bill-rushed-through-parliament.php>. Accessed 27/02/2012.

¹²⁹ A. Conte, 2010. *Human Rights in the Prevention and Punishment of Terrorism*. Springer. Page 643.

Professor Eric Barendt has drawn attention to the fact that, under section 1 of the Act, a person can be convicted on the basis of a statement which, though not intended to encourage the commission of offences, was made *recklessly* with regard to this effect.¹³⁰

The CPS website lists all successful prosecutions since 2007 under sections 1 and 2 of the 2006 Act.¹³¹ A number of convictions under section 2 have been of people also convicted of the preparation of (violent) terrorist acts¹³² and/or collecting information likely to be of use to a person preparing such acts.¹³³ Others concerned distribution of material calling on readers to join the ranks of Osama bin Laden;¹³⁴ or praising bin Laden and stating that ‘you are right to kill infidels’ and suggesting targets to bomb;¹³⁵ or selling material which was found to have been intended to induce young British Muslims to be recruited to terrorism.¹³⁶ Only one section 1 conviction is reported which was of someone also convicted of fundraising for terrorist purposes and inciting acts of terrorism overseas. The defendant came to police attention following speeches made at Regents Park Mosque. He had been involved in attempts to raise money to be sent to Iraq to support the insurgents, and inciting others to join the jihad in Iraq.¹³⁷

The cases reported above do not appear to indicate that the application of sections 1 or 2 by the Courts has resulted in breaches of Article 10 to date. But it is impossible to determine the extent to which section 1 and 2 of the 2006 Act have exercised a ‘chilling effect’ on expression falling outside the type of conduct which has resulted in conviction. These provisions certainly have the capacity to criminalise conduct which does not consist of or include incitement to violence.

¹³⁰ E. Barendt, 2009. ‘Incitement to, and Glorification of, Terrorism’ in I. Hare and J. Weinstein, *Extreme Speech and Democracy*. Oxford: Oxford University Press. Page 447.

¹³¹ The Counter-Terrorism Division of the Crown Prosecution Service (CPS). Available at: <http://www.cps.gov.uk/publications/prosecution/ctd.html>. Accessed 13/02/2012.

¹³² Abdul Rahman, www.cps.gov.uk/publications/prosecution/ctd_2007.html. Accessed 13/02/2012; Abbas Iqbal, www.cps.gov.uk/publications/prosecution/ctd_2010.html. Accessed 13/02/2012.

¹³³ Michael Heaton, www.cps.gov.uk/publications/prosecution/ctd_2010.html. Accessed 13/02/2012. Heaton, a member of the Aryan Strike Force, was also convicted in respect of stirring up racial hatred contrary to s.18 Public Order Act 1986.

¹³⁴ Shella Roma, www.cps.gov.uk/publications/prosecution/ctd_2009.html. Accessed 13/02/2012.

¹³⁵ Hodges, www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

¹³⁶ Bilal Mohammed, www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

¹³⁷ Brooks (Saleem and Others), www.cps.gov.uk/publications/prosecution/ctd_2008.html. Accessed 13/02/2012.

The European Court of Human Rights has repeatedly made clear that Article 10 not only protects the expression of views and ideas which are favourably received or populist; it also protects the expression of controversial, shocking or offensive views and ideas. Individuals, the media and other organisations have a right to air such views and ideas, and the public has a right to hear them.

The offences created by sections 1 and 2 of the 2006 Act do not appear to be compatible with these rights.¹³⁸ Section 1, for example, prohibits any statements which encourage ‘acts of terrorism’, with ‘terrorism’ having the same meaning in this context as the very broad definition given in the Terrorism Act 2000. Verbally indicating support for the Libyan rebels against Gaddafi could amount to ‘encouraging terrorism’ under this definition, as could the indication of support for a campaign of civil disobedience whose impact is likely to create a serious health and safety risk.

The Joint Committee on Human Rights (JCHR) was sharply critical of the offence created by section 1 of the 2006 Act, suggesting that ‘by using the definition of terrorism contained in the Terrorism Act 2000, the offence of encouragement of terrorism ... is much wider than the offence which is required to be criminalised by Article 5 of the Convention [on the Prevention of Terrorism]. We remain of the view ... that the definition of terrorism used in the 2006 Act is too broad and therefore carries with it a considerable risk of incompatibility with the right to freedom of expression in Article 10 ECHR, particularly when taken in combination with the other respects in which the UK offence is wider than what is required by Article 5 of the Convention.’¹³⁹ It noted that all bodies and individuals who had submitted evidence to them shared this concern, with the single exception of the Home Office.¹⁴⁰ Among these critics were the Mayor of London, Boris Johnson, who argued that the broad definition is fundamentally flawed in a number of respects,

‘It is expansive and indiscriminate, it does not reflect commonly held notions of terrorism, it undermines basic human rights, it makes no allowance for legitimate protest and struggles and therefore criminalises people who cannot properly be regarded as terrorists.’¹⁴¹

¹³⁸ See, for example, the approach taken by the European Court of Human Rights in *Zana v. Turkey* [1997] 4 BHRC 241, paras 58–60; *Kilic & Anor v. Turkey*. Application No. 43807/07. [2011] ECHR 43807/07; *Sürek and another v. Turkey* [1999] 7 BHRC 339.

¹³⁹ Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 29.

¹⁴⁰ Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office.

¹⁴¹ Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 27.

The broad drafting also criminalises the inherently vague concept of ‘glorification’. The JCHR concluded that this was particularly problematic, and that there would be ‘genuine difficulty’ in distinguishing between expressions of understanding, explanation or commemoration on the one hand, and encouragement on the other.¹⁴² The JCHR expressed concern about the likely ‘chilling effect’ that the ‘glorification’ provision would have on freedom of expression, and specifically the impact on minority communities critical of government foreign policy.¹⁴³ In their submissions to the JCHR, Liberty and the Muslim Council of Britain believed that people would fear the new offence of encouragement of terrorism and prefer to keep quiet rather than risk prosecution for the new offence.¹⁴⁴

There has recently been a welcome development in relation to the dissemination offence. In May 2011 an important legal ruling was handed down by the Crown Court at Kingston.¹⁴⁵ The Judge ruled that, in order to be compatible with Article 10, the ‘dissemination’ offence must be read in a particular and narrow way. This reasoning is likely to apply equally to the ‘encouragement’ offence.

¹⁴² Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Para 39.

¹⁴³ Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office.

¹⁴⁴ Joint Committee on Human Rights, 2007. *The Council of Europe Convention on the Prevention of Terrorism First Report of Session 2006-07*. London: The Stationery Office. Appendix 3: Memorandum from Liberty. The Muslim Council of Britain held an informal meeting with JCHR on 23 November 2006 with Dr Muhammad Abdul Bari, Secretary General, and Mr Khalid Sofia, Chair of its Legal Affairs Committee.

¹⁴⁵ *R v. Faraz*, unreported, 27 May 2011, Kingston Crown Court, summarised in Archbold: Criminal Pleading, Evidence and Practice 2012. Sweet and Maxwell. Paras 25-186.

Case study:**Freedom of expression*****Financial Times Ltd & Ors v. the United Kingdom*
(Application No. 821/03 - 15.12.2009)**

In 2001, a journalist at the *Financial Times* (FT) received a copy of a leaked document about a possible company takeover of South African Breweries by a Belgian brewer called Interbrew. The FT subsequently published a story and three other newspapers – the *Times*, the *Independent* and the *Guardian* – as well as the news agency Reuters, also reported on the issue, each referring to the leaked papers.

Following these reports, Interbrew brought proceedings against the news groups, seeking to obtain the leaked document in order to identify who gave it to the *Financial Times*. Ruling in favour of Interbrew, judges at the High Court, and later at the Court of Appeal, ordered the newspapers to disclose the document which would, in turn, reveal the journalist's source.

In response, Financial Times Ltd, Independent News & Media Ltd, Guardian Newspapers Ltd, Times Newspapers Ltd and Reuters Group plc applied to the European Court of Human Rights. They alleged violations of Article 10 and Article 8, as disclosing the documents would result in the identification of journalistic sources.

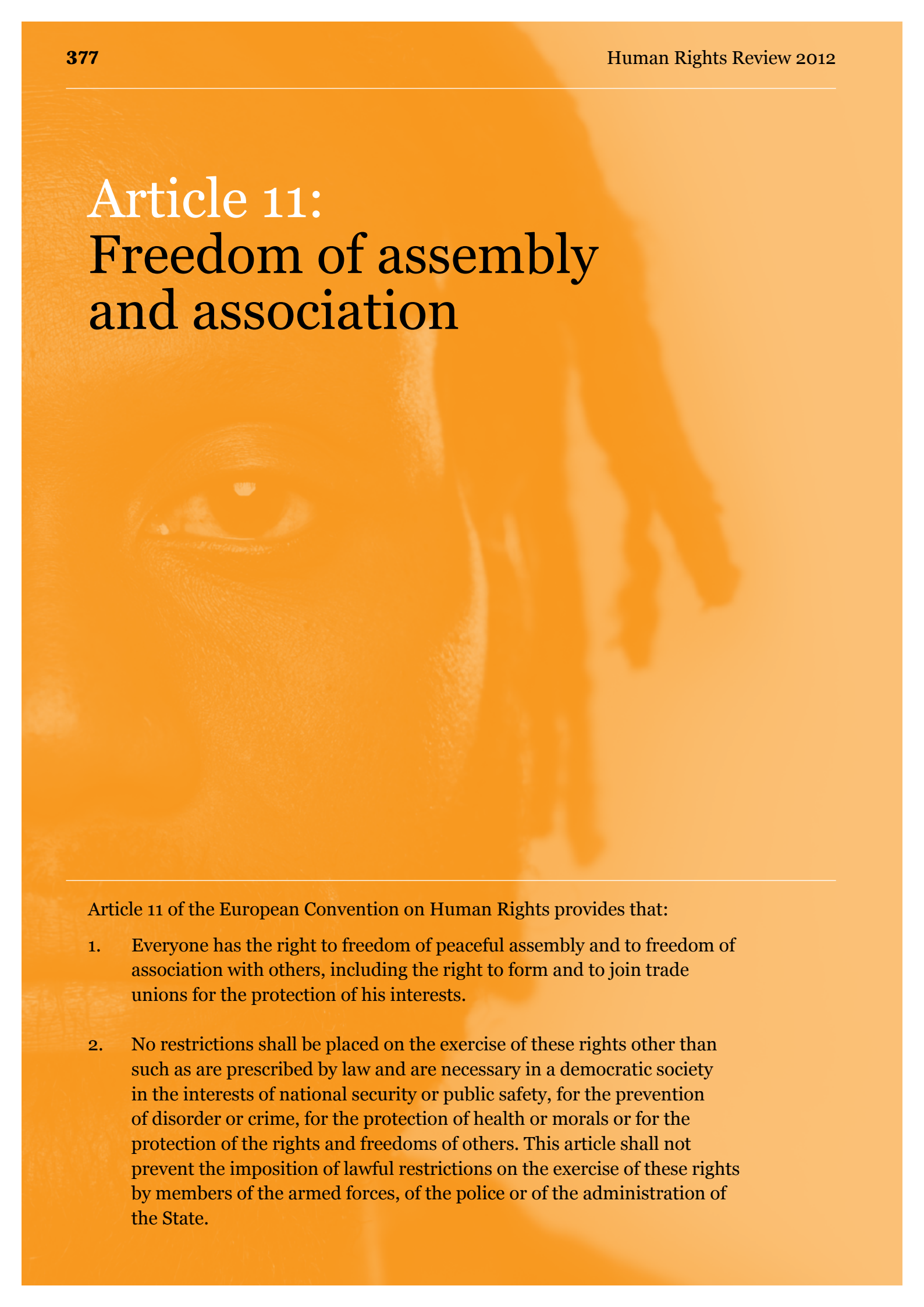
The European Court found that there had been a violation of Article 10 and said that protection of journalists' sources is one of the basic conditions of press freedom in a democratic society.

The Court said that the interest of Interbrew in preventing threat of damage through future dissemination of confidential information had been insufficient to outweigh the public interest in protecting journalists' sources. Any order for disclosure of a source cannot be compatible with Article 10 unless it is seen as an overriding requirement in the public interest. In its ruling, the Court commented on "the chilling effect of journalists being seen to assist in the identification of anonymous sources".

“In its ruling, the Court commented on the ‘chilling effect of journalists being seen to assist in the identification of anonymous sources.’ ”

At one point during the legal case, Interbrew threatened to seize the *Guardian*’s assets in contempt of court proceedings in a move that was condemned by MPs and international press organisations as a serious threat to freedom of the press. An early day motion was tabled in the House of Commons at the time which said: “that this house believes a free and fair press is vital to democratic life; and considers journalists to be under moral and professional obligations to protect their sources.” The motion, extolling the value of a free and fair press to democracy and stating that journalists are under a moral and professional obligation to protect their sources, was endorsed by parties across the political spectrum.

“We were delighted to have finally been vindicated by the European Court of Human Rights, as it is fundamental in a democracy that journalists can go out and obtain information free from the threat of being forced to reveal their sources,” says Gill Phillips, Director of Editorial Legal Services, Guardian News & Media. “The Interbrew case represented a serious threat to freedom of the press.”



Article 11: Freedom of assembly and association

Article 11 of the European Convention on Human Rights provides that:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Summary

Article 11 is one of the foundations of a democratic society. It provides that everyone has the right to freedom of peaceful assembly and freedom of association with others. The right to freedom of peaceful assembly means the right to protest in a peaceful way. It lies at the heart of a democratic society, as peaceful protest is an important way to promote change. The right to freedom of association protects the right to join or form associations, such as political parties, as well as the right to form and join a trade union as a way of protecting one's interests. This right is vital to the functioning of democratic societies.

Britain has a strong tradition of civil protest, but only with the Human Rights Act 1998 (HRA) were the rights to freedom of peaceful assembly and freedom of association directly and fully guaranteed in domestic law for the first time.

Britain has an extensive legal framework regulating public processions and assemblies. Freedom of association is governed in domestic law through a range of statutory provisions, including legislation giving individuals the freedom to choose whether to join a trade union and protection from discrimination if they do so.

The key issues we address in this chapter are:

Public order legislation is complex, overbroad and risks eroding the right to peaceful protest

The police have a vast range of statutory and common law powers and duties in relation to the policing of protest. However there are questions about the impact of overbroad legislation on the ability of police to manage peaceful protest effectively.

The review shows that:

- The police do not adequately understand their powers and duties.
- The police do not always strike the appropriate balance between the rights of different groups involved in peaceful protest.
- Introducing more legislation may unnecessarily expand police powers and have a negative impact on the right to protest.
- Protests in and around parliament are subject to a restrictive authorisation regime.
- Counter-terrorism powers to proscribe organisations are too broad and may interfere with Article 11 rights of non-violent organisations.

Police use of force and containment in managing protests may risk breaching a number of articles

The tactic of containment or ‘kettling’ is sometimes used to manage protests. It has become a major public order issue in the past decade, focused on the degree to which it is legitimate and proportionate. Given the possible interference with the right to liberty, breaches of Article 5 may happen.

The Criminal Law Act 1967, the Police and Criminal Evidence Act 1984 and the common law require that any use of force should be ‘reasonable’ in the circumstances. This means that the use of force must be the minimum appropriate in the circumstances to achieve the lawful objective. Excessive use of force is unlawful and, as well as interfering with protestors’ rights to freedom of expression and assembly under Articles 10 and 11, may also constitute a violation of Article 2, the right to life, Article 3, freedom from torture, inhumane and degrading treatment, or Article 8, the right to private life.

The review shows that:

- The police tactic of containment or ‘kettling’ of protestors has an impact upon the liberty of protestors and a chilling effect on protest.
- The police do not always use the minimum level of force when policing protests.
- There is no common view among police forces of the meaning of ‘reasonable force’.

Police misuse of surveillance, stop and search powers, and other pre-emptive legal action by the police and private companies inhibits peaceful protest

The police rely on information and intelligence to plan effectively for large scale protest events and to establish the potential for disorder or violence. Yet the inappropriate and disproportionate use of surveillance of protesters who have not committed any criminal offence has the potential to deter people from taking part in peaceful protest. The police also have a range of stop and search powers under domestic law which are used during public order operations related to protests. These powers raise important human rights issues, notably the question of whether police action is compatible with the right to private life protected by Article 8.

The review shows that:

- The inappropriate use of surveillance powers violates the right to privacy, and undermines confidence in policing and risks being disproportionate and unlawful.
- Blanket use of stop and search powers breaches Articles 8, the right to private life, Article 10, the right to freedom of expression, and Article 11. There is misuse of police powers to stop and search without reasonable suspicion.
- Pre-emptive legal action by the police stifles peaceful protest.
- The use of civil injunctions against protesters by private companies inhibits the right to protest.

Britain may not be meeting some of its obligations in relation to freedom of association

Article 11 protects the right of people to choose whether or not to form and join associations such as political parties, trade unions and other private organisations if they want, and for these associations to be recognised legally. It explicitly recognises trade union freedom as one form or a special aspect of freedom of association.

The review shows that:

- Regulations to protect employees involved in trade union activity from blacklisting may not meet Britain's Article 11 obligations.
- The procedural rules governing the right to strike make it too easy for employers to challenge the lawfulness of proposed strikes.

The UK's obligations under Article 11

Article 11 provides that everyone has the right to freedom of peaceful assembly and freedom of association with others. The right to freedom of peaceful assembly means the right to protest in a peaceful way, and includes static protests, parades, processions, demonstrations and rallies. The right to freedom of association protects the right to join or form 'associations', such as political parties, as well as the right to form and join a trade union. These rights are fundamental in a democracy. Protest allows individuals to unite in support of a common belief to express their opinions and voice their frustrations, and to criticise and voice opposition to opinions or beliefs they do not share.

Article 11 imposes two different types of obligations on the state:

- **a negative obligation**, which means that public authorities must not prevent, hinder or restrict peaceful assembly except to the extent allowed by Article 11(2), and must not arbitrarily interfere with the right to freedom of association
- **a positive obligation**, so that in certain circumstances public authorities are under a duty to take reasonable steps to protect those who want to exercise their right to peaceful assembly. The state must also take reasonable and appropriate measures to secure the right to freedom of association under domestic law.¹

The right to freedom of peaceful assembly and association under Article 11 is a qualified right, and balances the rights of the individual against the broader interests of the community and society. Article 11(2) provides that the right to freedom of peaceful assembly and freedom of association can be restricted in certain ways. The restriction must be lawful, and in pursuit of a legitimate aim such as national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others, and is 'necessary in a democratic society'. The restriction must also be proportionate, meaning that the measures taken are the least restrictive necessary to achieve the legitimate aim.²

¹ *Wilson, National Union of Journalists and Others v The United Kingdom* [2002] ECHR 552.

² *Handyside v. the United Kingdom* [1976] 1 EHRR 737.

For example, in 1986 the decision was taken by English Heritage to close Stonehenge and the surrounding area during the summer solstice period following trouble between police and festival goers the previous year. Authorities tried and failed to find a suitable alternative site for the festival. The European Court ruled that the decision was lawful due to risk of harm to the public.³

Article 11 protects the right to **peaceful** assembly. This means that, unless there is clear evidence that the organisers or participants will use, advocate or incite imminent violence,⁴ public authorities have a positive duty to take reasonable steps to protect peaceful assemblies.⁵

The right to peaceful assembly is not taken away even if violent counter-demonstrations are possible, or if extremists with violent intentions who are not part of the organising group join the protest.⁶ Similarly a protest does not fall outside the protection guaranteed by Article 11 merely because there is a risk of disorder that is beyond the control of the organisers.

Relation to other articles

Article 11 is intrinsically linked to the right to freedom of expression (Article 10).⁷ It is also closely linked to the right to manifest a religion and belief (Article 9). The protection of personal opinion guaranteed by Articles 9 and 10 is also one of the purposes of freedom of assembly and association.⁸

The regulation of the right to peaceful assembly and association may engage a number of other rights. For example, police operations in relation to protests or strike action may engage the right to liberty (Article 5), the right to respect for private life (Article 8) and rights protecting physical integrity (Articles 2, 3 and 8).

³ *Chappell v. the United Kingdom* [1988] 10 EHRR CD 510.

⁴ OSCE Office for Democratic Institutions and Human Rights, 2007. *Guidelines on Peaceful Assembly*. Poland: Sungraf.

⁵ The term 'peaceful' should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that a particular assembly is seeking to promote: *Plattform Ärzte Für das Leben v. Austria* [1988] EHRR 204. See also *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* [2001] Application No. 29221/95 and 29225/95, Judgment from 2 October 2001, ECHR. The burden of proof must rest with the state authorities: *Christian Democratic People's Party v. Moldova* (No. 2) [2010] Application No. 25196/04.

⁶ *Christians Against Racism and Fascism v. the United Kingdom* [1980] 21 DR 138.

⁷ *Young, James and Webster v. the United Kingdom* [1983] IRLR 35.

⁸ See *Öllinger v. Austria* [2006] BHRC 25; *Tsonev v. Bulgaria* [2006] 46 EHRR 95 and *Jehovah's Witnesses of Moscow v. Russia* [2010] 53 EHRR 4.

The development of Article 11 in Britain

The right to peaceful protest is a vital expression of British democracy. Every year tens of thousands of people march and assemble on public streets to commemorate, celebrate or demonstrate against all manner of events, causes and issues. Over 5,000 protests take place in London alone each year.⁹ The vast majority of protests pass off peacefully across the country.

The UK has ratified a number of binding international human rights instruments which guarantee the right to freedom of peaceful assembly, including the International Covenant on Civil and Political Rights,¹⁰ and the Charter of Fundamental Rights of the European Union.¹¹ The introduction of the Human Rights Act 1998 (HRA) gave domestic effect to Articles 10 and 11 of the Convention, and represented a ‘constitutional shift’¹² in the domestic protection of the right to freedom of expression and peaceful assembly.

However, these protections are a relatively recent development. As the House of Lords noted in 2006, the approach of British common law to freedom of assembly has historically been ‘hesitant and negative, permitting that which was not prohibited’.¹³ Until the mid-19th century, public protests of any kind were rarely tolerated for long by the authorities. The Riot Act of 1714 – only repealed entirely in 1973¹⁴ – gave magistrates the power to disperse any gathering of 12 or more people deemed to be ‘unlawfully, riotously, and tumultuously assembled together’ by reading a proclamation of riotous assembly.

⁹ The Metropolitan Police Service recorded 5,234 protests between 1 April 2008 and 31 March 2009: Her Majesty’s Inspectorate of Constabulary, 2009. *Adapting to protest*. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf>. Accessed 20/02/2012.

¹⁰ International Covenant on Civil and Political Rights, Article 21.

¹¹ Charter of Fundamental Rights of the European Union, Article 11.

¹² *R.(on the application of Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105 per Lord Bingham, para 34, citing *Sedley LJ in Redmond-Bate v. Director of Public Prosecutions* [1999] 163 JP 789, 795.

¹³ *R.(on the application of Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55, [2007] 2 AC 105 per Lord Bingham, para 34.

¹⁴ Criminal Law Act 1967, Schedule 3 Part III.

In the absence of a modern police force, soldiers untrained in crowd control were deployed to quell protests, sometimes with lethal results. The most notorious example was the Peterloo massacre in Manchester in 1819 – so named because witnesses said it brought to mind the Battle of Waterloo – when charging cavalry killed up to 15 participants in a peaceful mass demonstration for parliamentary reform. Hundreds of others were injured. Most of the protestors who were subsequently convicted said they had not heard the proclamation of the Riot Act.

For most of the 20th century, the right to peaceful assembly continued to be at the discretion of the courts. In a 1936 case on breach of the peace, the then Lord Chief Justice summed up the legal position when he declared: ‘The right of assembly ... is nothing more than a view taken by the court of the individual liberty of the subject. A liberty ... is only as real as the laws and bylaws which negate or limit it.’¹⁵ In similar fashion, it is only in the last 15 years, in anticipation of the HRA, that the common law has recognised that peaceful assembly is an ‘ordinary and reasonable’ use of the public highway.¹⁶

Public processions and assemblies are regulated primarily by the Public Order Act 1986.¹⁷ The Act establishes a notification procedure for processions,¹⁸ and describes the circumstances where the police may impose conditions on processions¹⁹ and assemblies taking place.²⁰ In addition, the Act defines a number of public order offences, including riot and violent disorder²¹ and gives the Home Secretary the power to ban public processions in defined circumstances.

Within the modern human rights framework, the policing of protest today is much more carefully balanced than at any time in the past. The police draw on a wide range of statutory and common law powers to police protests, including the Criminal Law Act 1967, the Police and Criminal Evidence Act 1984, the Criminal Justice and Public Order Act 1994, the Regulation of Investigatory

15 *Duncan v. Jones* [1936] 1KB 218, per Lord Hewart CJ.

16 In the case *Director of Public Prosecutions v. Jones and Another* [1999] 2 WLR 625 [1999] 2 AC 240.

17 Replacing the Public Order Act 1936.

18 Public Order Act 1986, s.11.

19 *Ibid.*, s.12.

20 *Ibid.*, s.14.

21 Others include, affray (s.3), causing fear or provocation of violence (s.4) and causing alarm and distress (s.5).

Powers Act 2000, the Terrorism Act 2000, and the Serious Organised Crime and Police Act 2005. Taken together, these laws allow the police to use reasonable force, to stop and search without reasonable suspicion, to arrest, to use overt and covert surveillance, and to take action to prevent breaches of the peace. Since the introduction of the HRA, the use of all these police powers must comply with Article 11.

At a local level, individual forces have shown they are committed to adopting a human rights approach to policing protest. During 2010 and 2011, West Yorkshire Police, Leicestershire Police, Cambridgeshire Constabulary and Bedfordshire Police appointed an independent human rights lawyer to advise on the legality and human rights implications of large scale public order operations for controversial protests in their force areas.²²

However, it remains apparent that Britain may not always be meeting its obligations under Article 11 to respect and protect the right to peaceful assembly, and to police peaceful protests in a proportionate and legitimate way.

Inspection and regulation of the police is the responsibility of Her Majesty's Inspectorate of Constabulary (HMI Constabulary), which describes its role as monitoring and reporting on '[police] forces and policing activity with the aim of encouraging improvement'.²³ In April 2009 the death of Ian Tomlinson, a bystander at demonstrations against the G20 Summit in London, prompted the Metropolitan Police Commissioner to ask HMI Constabulary to conduct a national review of public order policing. In 'Adapting to Protest – Facilitating Peaceful Protest', published in November 2009, HMI Constabulary established a new starting point for policing peaceful demonstrations – the presumption in favour of facilitating peaceful protest. At the end of 2010, the Association of Chief Police Officers published new guidelines that reflect this approach.²⁴ The guidelines seek to ensure that the policing of peaceful protest complies with relevant human rights principles, in tandem with a new public order training curriculum issued by the National Policing Improvement Agency.²⁵

22 Respectively, EDL protests and associated counter protests in Bradford (August 2010), in Leicester (October 2010), in Peterborough (December 2010), and in Luton (February 2011).

23 See <http://www.hmic.gov.uk/>.

24 Association of Chief Police Officers, 2010. *Manual of guidance on keeping the peace*. London: National Policing Improvement Agency.

25 Ibid. Page 11.

Following the riots across England in August 2011, the Home Secretary asked HMI Constabulary to conduct a further review of public order policing. HMI Constabulary has indicated that it will look at the current system for supporting public order policing requirements, examining in particular the need for further guidance, mutual aid, pre-emptive action, tactics, training and arrest policies.²⁶ In the wake of the riots, it is essential that the HMI Constabulary's review maintains the distinction between peaceful protest, which is protected under Article 11, and rioting and criminal violence in a public space, which are not.

The issues we have chosen for this chapter illustrate how over-complex public order legislation, a lack of clarity among different police forces around the meaning of 'reasonable force,' and the inappropriate use of pre-emptive legal action, have the potential to interfere disproportionately with the right to peaceful protest and to create a 'chilling effect' on protest in Britain.²⁷ We draw conclusions about the key issues which must be tackled if Britain is to fully meet its human rights obligations under Article 11.

²⁶ Her Majesty's Inspectorate of Constabulary, 2011. *The rules of engagement – A review of the August 2011 disorders*. Available at: <http://www.hmic.gov.uk/media/a-review-of-the-august-2011-disorders-20111220.pdf>. Accessed 21/02/2012.

²⁷ BS – *R. (Wood) v. Commissioner of Police for the Metropolis* [2009] EWCA Civ 414.

Public order legislation is complex, overbroad and risks eroding the right to peaceful protest

The police have a wide range of statutory and common law powers and duties in relation to the policing of protest. During 2008 and 2009, the parliamentary Joint Committee on Human Rights (JCHR) conducted an inquiry into the right to peaceful protest in Britain, which was published in May 2009. This was in response to the case of Lois Austin (discussed below), protests around parliaments and calls for further public order legislation. It investigated whether there was an emerging trend towards the erosion of the right to protest, or whether new public order legislation and police responses to protest were a necessary reaction to increased security concerns.²⁸ Although the JCHR found ‘no systematic human rights abuses in the policing of protest’,²⁹ it reported a ‘significant mismatch between the perceptions of protesters and the police about the way in which protest is managed’ which ‘could serve to diminish, rather than facilitate, protest’.³⁰

In 2009-10, HMI Constabulary conducted a comprehensive national review of the policing of protest, established in response to concerns regarding the Metropolitan Police Service (MPS) policing of protest in the City of London on 1 and 2 April 2009 during the G20 London Summit. HMI Constabulary criticized the ‘complex and multi-layered legislative framework for public order policing’, and noted that ‘it is not a straightforward task to decipher police powers and duties’. It also described the growing pressure on the police to absorb new legislation. For example, HMI Constabulary observed that since the Public Order Act 1986 had come into force, 29 pieces of legislation amounting to 90 amendments had been introduced.³¹ Significantly, HMI Constabulary defined the starting point for the policing of protest as the presumption in favour of

²⁸ Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office. Para 5.

²⁹ Ibid. Summary.

³⁰ Ibid. Para 66

³¹ HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 122. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

facilitating peaceful protest.³² This is the first time that the police as a service has explicitly recognised its legal obligations under Article 11, which is a positive and important step. However, as shown below, evidence still indicates that overbroad legislation impacts upon the ability of police to manage peaceful protest effectively.

Key issues

1. The police do not adequately understand their powers and duties

HMI Constabulary's national review highlighted confusion regarding the legal framework for the policing of protest, in particular the obligations of the police under Article 11.³³ The review concluded that this confusion resulted in inadequate planning of policing operations to facilitate peaceful protest and a failure to minimise the impact of certain public order policing tactics, such as containment.

HMI Constabulary also considered the national framework for the policing of protest, and identified a wide variation across police forces in levels of understanding of the law, including the use of force.³⁴ Of particular concern to HMI Constabulary was 'the low level of understanding of the human rights obligations of the police under the Human Rights Act 1998. It is hard to overestimate the importance for officers to understand the law when each individual officer is legally accountable for exercising their police powers, most particularly the use of force.'³⁵ To provide practical guidance to police officers in this area, HMI Constabulary published three flow diagrams on their powers and duties to ensure an approach to public order policing that complies with human rights.³⁶

32 HMI Constabulary, 2009. *Adapting to protest*. Pp. 40 and 47. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf>. Accessed 20/02/2012.

33 HMI Constabulary, 2009. *Adapting to protest*. Pp. 40 and 47. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf>. Accessed 20/02/2012.

34 HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Pp. 121-134. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

35 HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 14. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

36 HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Pp. 136-141. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012. These three decision-making diagrams have been incorporated into the new national public order manual of guidance. The diagrams integrate the POA 1986 and the HRA 1998.

2. The police do not always strike the appropriate balance between the rights of different groups involved in peaceful protest

In its 2009 inquiry, the JCHR recognised the difficult balance to be struck in law and in practice between the rights of different groups involved in peaceful protest. However, it said there was ‘evidence that the police do not always get this balance right, perhaps by failing to identify the fundamental liberties at stake’.³⁷ The JCHR emphasised,

‘...the balance should always fall in favour of those asserting their right to protest, unless there is strong evidence for interfering with their right. Inconvenience or disruption alone are not sufficient reasons for preventing a protest from taking place ... a certain amount of inconvenience or disruption needs to be tolerated.’³⁸

HMI Constabulary subsequently reported in November 2009 that positive action had been taken to ensure police compliance with Article 11. It stated that ‘[t]he police as a service has recognised and adopted the correct starting point for policing protest as the presumption in favour of facilitating peaceful protest’. HMI Constabulary further cited ‘committed attempts by the police to facilitate contentious protests and counter-protests in Derbyshire, Birmingham, Manchester, Gwent and Leeds over recent months’.³⁹

Nevertheless, in its latest report on policing public order in February 2011, HMI Constabulary recorded that:

‘The character of protest is evolving in terms of the numbers involved; spread across the country ... this is a new period of public order policing – one that is faster moving and more unpredictable ... The fine judgement required to strike the balance between competing rights and needs is getting harder.’⁴⁰

³⁷ Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office. Para 67.

³⁸ Ibid. Para 148.

³⁹ HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 16. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

⁴⁰ HMI Constabulary, 2011. *Policing Public Order: An overview and review of progress against the recommendations of Adapting to Protest and Nurturing the British Model of Policing*. Page 3. Available at: <http://www.hmic.gov.uk/media/policing-public-order-20110208.pdf>. Accessed 21/02/2012.

3. Introducing more legislation may unnecessarily expand police powers and have a negative impact on the right to protest

Disruption or disorder associated with large scale or high profile protests is routinely met with calls for further legislation and additional police powers. The violence that followed the largely peaceful Trades Union Congress demonstration in London on 26 March 2011 resulted in the Home Secretary announcing her support for the use of ‘protester banning orders’ similar to those imposed upon football fans. She also expressed her willingness ‘to consider powers which would ban known hooligans from rallies and marches’.⁴¹ The riots which spread across England in August 2011 also prompted calls for more ‘robust’ policing⁴² and yet another review of public order policing. In the wake of the riots, the Home Secretary published a consultation document in October on police powers to promote and maintain public order.⁴³ The consultation sought views on proposals for new police powers to impose curfews,⁴⁴ and the extension of existing powers to require the removal of face coverings.⁴⁵ The consultation closed in January 2012 and it is expected that it may be followed by proposed changes to the law. There is a risk that introducing new powers of curfew would have a significant negative impact on the right to peaceful protest in Britain.

4. Protests in and around parliament are subject to a restrictive authorisation regime

Recent legislation has also severely curtailed the right to peaceful demonstrations in the vicinity of parliament, where the legal framework governing protests differs from the rest of the country.⁴⁶ Until 2011, sections 132-138 of the Serious Organised Crime and Police Act 2005 (SOCPA) required anyone wishing to demonstrate within one kilometre of Parliament Square to notify the Metropolitan Police Service (MPS) in advance for authorisation of their protest. SOCPA gave police wide powers to impose restrictive measures

41 The *Guardian*, 28 March 2011. Police may be given new powers after cuts protest, says home secretary. Available at: <http://www.guardian.co.uk/uk/2011/mar/28/police-new-powers-cuts-protest-home-secretary>. Accessed 20/02/2012.

42 The *Telegraph*, 9 August 2011. London riots: David Cameron says police must be more ‘robust’. Available at: <http://www.telegraph.co.uk/news/uknews/crime/8690819/London-riots-David-Cameron-says-police-must-be-more-robust.html>. Accessed 20/02/2012.

43 Home Office, *Consultation on Police Powers to Promote and Maintain Public Order*, October 2011. The consultation opened on 13 October 2011 and closed on 13 January 2012.

44 *Ibid.*, pp. 10-11.

45 *Ibid.*, pp 12-16.

46 Section 14 of the Public Order Act 1986 does not apply in relation to a public assembly which is also a demonstration in the designated area.

on protests around parliament to prevent a security risk or any hindrance to the operation of parliament.⁴⁷ Protesters who failed to follow the correct procedure could be arrested, however small or peaceful their demonstration.

The first individuals to be prosecuted and convicted under SOCPA were Maya Evans, 25, and Milan Rai, 40, both from Hastings, East Sussex.⁴⁸ They were arrested in October 2005 for holding a two-person protest at the Cenotaph in Whitehall, where they read out the names of military and civilian victims of the Iraq war.⁴⁹ Evans received a conditional discharge and a fine, while Rai was sentenced to 14 days in prison in 2007 for refusing to pay his fine.⁵⁰ In July 2007, the anti-war protester Brian Haw, who had set up his own peace camp on Parliament Square in 2001, successfully challenged his removal under SOCPA by arguing that his demonstration pre-dated the law.⁵¹ Haw – who died in June 2011 – continued his camp until 2010, when he was diagnosed with lung cancer.

Haw's case, in particular, increased criticism that the strict legal requirements for protest around parliament imposed by SOCPA were disproportionate. The Police Reform and Social Responsibility Act 2011⁵² has repealed sections 132-138 of SOCPA.⁵³ The new legal framework for Parliament Square aims to prevent encampments and other disruptive activity, giving powers to police officers to prohibit people from engaging in certain activities in the central garden area and adjoining pavements of Parliament Square. These include the unauthorised use of loud speakers, or erecting or using a tent or structure to attempt to sleep or stay for any length of time. A positive effect of the repeal of sections 132-138 of SOCPA is that section 14 of the Public Order Act 1986 (powers to impose conditions on assemblies) will once again apply to static protests held in the area around parliament, bringing the policing of protests back in line with the policing of protests in the rest of the country. The relevant provisions of the 2011 Act came into force in December 2011 and March 2012 and are as yet to be tested for compliance with Article 11.

47 Home Office, 2007. *The Governance of Britain – Managing Protest around Parliament*. London: The Stationery Office.

48 BBC news, 20 December 2006. Parliament Protesters lose appeal. Available at: <http://news.bbc.co.uk/1/hi/england/london/6196185.stm> Accessed 22/02/2012.

49 Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office. Para 115.

50 The *Telegraph*, 23 August 2007. Parliament war protestor jailed over £600 fine. Available at: <http://www.telegraph.co.uk/news/uknews/1561096/Parliament-war-protester-jailed-over-600-fine.html>. Accessed 21/02/2012.

51 *Director of Public Prosecutions v. Haw* [2007] EWHC 1931 (Admin).

52 The bill received Royal Assent on 15 November 2011.

53 Part 3, Controls on activities in Parliament Square Garden and adjoining pavements.

5. Counter-terrorism powers to proscribe organisations are too broad and may interfere with Article 11 rights of non-violent organisations

To protect public safety, government must sometimes restrict the activities of organisations that threaten or use violence. Under section 3 of the Terrorism Act 2000 the Secretary of State may proscribe an organisation if she believes it is ‘concerned in terrorism’. This wide definition includes committing or participating in terrorist acts, and preparing for, promoting or encouraging terrorism. Encouraging terrorism includes the unlawful glorification of terrorism.⁵⁴ An order to proscribe an organisation must be confirmed by statutory instrument passed by parliament. Once an organisation is proscribed it is illegal to be a member or provide it with financial or other support. The assets of the organisation can be defined as ‘terrorist property’ and be frozen and seized.⁵⁵

Lord Carlile, a former independent reviewer of counter-terrorism measures noted that ‘the proscription of organisations is at best a fairly blunt instrument’,⁵⁶ but ‘produces real, if modest, gains in terms of convictions and has the ability to disrupt harmful organisations and to change their behaviour’.⁵⁷ The most commonly charged offences for terrorism are proscription offences. Between 2001 and 2010 in Britain there were 31 prosecutions with this legislation as the principle offence and 17 convictions.⁵⁸

However, the proscription powers are too broad. When deciding to proscribe an organisation, the Secretary of State considers the nature and scale of an organisation’s activities, and the specific threat it poses to the UK, British nationals overseas, its presence in the UK and the ‘need to support other members of the international community in the global fight against terrorism’.⁵⁹ It is the last factor, notes the independent reviewer of counter-terrorism measures that ‘fuels the widespread belief’ that proscription is ordered ‘not because of any credible threat to the safety of the United Kingdom or its citizens, but in order to further United Kingdom foreign policy goals by pleasing other governments’.⁶⁰

54 Terrorism Act 2000, s.3 (5).

55 Ibid., s.14.

56 Carlile, 2010. *Report on the operation in 2009 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. London: The Stationery Office. Para 73.

57 D. Anderson, 2011. *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. London: The Stationery Office. Para 4.18.

58 Ibid. Para 4.15.

59 Ibid. Para 4.2.

60 Ibid. Para 4.6.

Currently 62 organisations are proscribed under the Terrorism Act 2000. Of these, 14 are connected to Northern Ireland; the remaining 46 are international terrorist organisations (mostly regarded as Islamic fundamentalist organisations).⁶¹ Liberty argues that the broadness of the Act opens up the possibility that government might ban non-violent organisations on the basis that it disagrees with its opinions.⁶²

The independent reviewer has stated that the process of making proscription orders may be too restrictive given it has a direct impact on the right to freedom of association.⁶³ Orders are made by the Home Secretary on the basis of her belief that an organisation is concerned with terrorism, rather than on the basis of proof that it is involved in terrorism. Parliament does not have access to any secret material informing her decision when confirming the order and has never refused an application. There is also no judicial oversight of a decision to proscribe an organisation. However, the independent reviewer of counter-terrorism concluded that there was no need to change the system for proscription, given there is a process for deproscription.

The Secretary of State keeps the proscription of organisations under review. However, the Home Secretary has not deproscribed any organisation to date and has refused the applications for deproscription of 11 organisations between 2001 and 2010.⁶⁴ The independent reviewer of counter-terrorism measures has recommended strengthening the review function, and introducing a requirement for expiry dates for proscription orders after which the Secretary of State would have to reapply to parliament to continue an order.⁶⁵

If a proscribed organisation applies for deproscription, it can appeal a refusal by the Home Secretary to the Proscribed Organisations Appeal Committee (POAC). The POAC hears the appeal using judicial review principles and involves the use of closed material and special advocates (for discussion of closed material procedures, see the chapter on Article 6). Only one organisation has achieved deproscription in the last 10 years after appealing to the POAC. The appeal

61 Ibid. Para 4.9.

62 Liberty, *From Law to War*. Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010. Pp 90-92, paras 151, 153, 154. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf> Accessed 24/02/2012.

63 D. Anderson, 2011. *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. London: The Stationery Office. Paras 4.22, 4.23.

64 Ibid. Para 4.11.

65 Ibid. Para 4.34

involved scrutiny of open and closed material to establish whether there were reasonable grounds for believing the organisation was concerned with terrorism. The approach in this case was endorsed by the Court of Appeal⁶⁶

However, the independent reviewer of counter-terrorism legislation was critical of the process, noting that proscribed organisations could not afford an expensive legal case, as their assets are frozen and they are prohibited from fundraising. Proscribed organisations needed to have a realistic chance of achieving deproscription without embarking on POAC proceedings if they had moved away from terrorism.

⁶⁶ *Secretary of State for the Home Department v. Lord Alton of Liverpool and Others* [2008] EWCA Civ 443.

Police use of force and containment when managing protests may risk breaching a number of articles

Managing modern protest can be difficult and challenging, with the police required to engage directly with protesters in fast-moving and volatile situations which may be provocative, intimidating and sometimes violent. The tactic of containment or ‘kettling’ is sometimes used, which involves enclosing a large number of protesters within police cordons and holding them in that space, preventing others from joining them and stopping those ‘kettled’ from leaving. The police justify using the tactic of containment as necessary to prevent breaches of the peace, disorder, violence, and damage to property. On occasion, the use of the tactic has prevented violence between two conflicting groups of protesters,⁶⁷ yet it can affect thousands of people who may be present at a protest. Containment has become a major public order issue over the past decade, focused on the degree to which the tactic is legitimate and proportionate. Given the possible interference with the right to liberty, breaches of Article 5 may happen.

On occasions, the police may use force to maintain public order or to protect people from harm or prevent damage to property. The use of force by police officers is governed by the common law,⁶⁸ the Criminal Law Act 1967, and the Police and Criminal Evidence Act 1984 (PACE). To be compliant with Article 11 the police are required to use force that is ‘reasonable’ and proportionate in the circumstances, meaning that it is the minimum appropriate to achieve the lawful objective. However, as demonstrated below, this is not always the case. If excessive force is used, this is unlawful and may be a breach of Articles 2 (right to life), 3 (prohibition against torture, inhuman and degrading treatment) or 8 (right to respect for private life, which includes the right to physical integrity). This is in addition to possible breach of Articles 10 and 11, given the interference with and adverse effect upon freedom of expression and assembly.

⁶⁷ For example, during a series of demonstrations and counter-demonstrations by the English Defence League and Unite Against Fascism in Bradford, Bolton, Leicester and other towns in 2010 and 2011.

⁶⁸ The common law entitles a person to use such force as is reasonably necessary to protect himself or herself or another or property: *R. v. Duffy* [1967] 1 QB 63.

Key issues

1. The police tactic of containment or 'kettling' of protestors has an impact upon the liberty of protestors and a chilling effect on protest

There have been a number of court judgments on the containment or 'kettling' of protestors, and in the majority the tactic was upheld as lawful.⁶⁹ Although containment is legally justified, the practice has been criticised by a range of commentators including the human rights organisation, Liberty, and protest groups such as Climate Camp, as a disproportionate response to peaceful protest.

In the containment case of *R. (on the application of Laporte) v. Chief Constable of Gloucestershire* the court ruled that the police had not acted lawfully in preventing coach passengers reaching the site of a demonstration, because it could not be concluded that a breach of the peace was 'imminent' at the time the coaches were stopped. The court ruled that the action was an interference with the protestors' rights under Article 11 and was a disproportionate response.⁷⁰

The case of *Lois Austin* considered the use of containment of protestors at Oxford Circus in central London by the Metropolitan Police during May Day protests in 2001 which resulted in disorder and violence. Lois Austin joined the May Day protest and was one of many contained at Oxford Circus. She had an 11-month-old baby who was in a crèche. She had planned to be on the demonstration for two or three hours before collecting her, but because she was held in the containment, she was prevented from doing so. She brought the action against the Metropolitan Police.⁷¹

The House of Lords noted in its judgment in 2009 that the need for measures of crowd control, adopted in the public interest, was not new. It referred to football matches, where such measures are imposed to 'ensure that rival fans do not confront each other in situations that may lead to violence' as an example. It found that the use of containment by the Metropolitan Police lawful. The case was referred to the Grand Chamber of the European Court, which heard the appeal on 14 September 2011.⁷² A decision has yet to be reached on whether the police tactic of containment breaches the right to liberty under Article 5, with the judgment expected in 2012.

⁶⁹ See, for example, *Austin v. Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564 and *R. (on the application of Moos) v. Commissioner of Police of the Metropolis* [2012] EWCA Civ 12.

⁷⁰ *R. (on the application of Laporte) v. Chief Constable of Gloucestershire* [2006] UKHL 55.

⁷¹ *Austin v. Commissioner of Police of the Metropolis* [2009] UKHL 5, [2009] 1 AC 564.

⁷² *Austin and Others v. the United Kingdom*. Application Nos 39692/09, 40713/09 and 41008/09.

A second high profile case challenged the Metropolitan Police's containment of the Climate Camp protest held at Bishopsgate in London on 1 April 2009 during the G20 summit.⁷³ The police contained the camp to prevent it being joined by violent protesters from the nearby Royal Exchange, rather than because the camp itself could result in an imminent breach of the peace. About four hours after imposing the containment, the police dispersed the camp. The Divisional Court held that containing the camp for this length of time was unlawful. They considered that containment was not justified by the conduct of the protestors at the Climate Camp itself, and so was not justified in law. They expressed the view that the test of necessity would only be met in 'truly extreme and exceptional circumstances'.⁷⁴

However the appeal court overturned this ruling, and the tactic of containment used during the G20 protests has been upheld as lawful.⁷⁵ A decision to contain a substantial crowd of demonstrators, whose behaviour did not justify containment, was justifiable on the ground that containment was the least drastic way of preventing what the police officer responsible for the decision reasonably decided would otherwise be imminent and serious breaches of the peace.⁷⁶ The Court ruled that this was a reasonable view for the police to have formed in the light of the information available at the time.⁷⁷

Even when containment can be justified, the police must seek to reduce its impact on peaceful protesters and other innocent and vulnerable persons inadvertently caught up in the action, following recommendations by HMI Constabulary in 2009.⁷⁸ The HMI Constabulary stated there should be:

- No surprises: protesters and the public should be made aware of likely police action in order to make informed decisions.
- A release plan to allow vulnerable or distressed persons or those inadvertently caught up in the police containment to exit.
- Easy access to information for protesters and the public regarding the reason for, likely duration of, and exit routes from any police containment.⁷⁹

⁷³ *R. (McClure & Moos) v. Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin).

⁷⁴ *Ibid.* Para. 56.

⁷⁵ *R. (on the application of Moos) v. Commissioner of Police of the Metropolis* [2012] EWCA Civ 12.

⁷⁶ *Ibid.* Para 94.

⁷⁷ *Ibid.* Paras. 90, 93.

⁷⁸ Her Majesty's Inspectorate of Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012; Her Majesty's Inspectorate of Constabulary, 2009. *Adapting to protest*. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf>. Accessed 20/02/2012.

⁷⁹ Her Majesty's Inspectorate of Constabulary, 2009. *Adapting to protest*. Pp. 10-11. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-20090705.pdf>. Accessed 20/02/2012.

These recommendations are incorporated in the new Association of Chief Police Officer's manual of guidance on public order and the National Policing Improvement Agency's public order training courses. Both explicitly refer to the requirements for the lawful use of containment.

Yet police officers still do not appear to receive adequate instructions or training on the legal framework for the use of the tactic of containment. For example, the Joint Committee on Human Rights (JCHR) noted a lack of clarity about what level of violence justified containment when it reviewed the use of 'kettling' during the protests in November and December 2010 against education cuts and tuition fee increases. The JCHR also criticised the lack of opportunity at these protests for the peaceful and vulnerable to leave the containment zone and the lack of information about how this was possible. It concluded that '[t]here remains considerable room for improving understanding of frontline officers of the ACPO guidelines on the use of the tactic'.⁸⁰

2. The police do not always use the minimum level of force when policing protests

During large scale protests in London between 2009 and 2011, police used significant levels of force against protesters. One of the most controversial incidents occurred in April 2009, during the course of the G20 protests, when Ian Tomlinson, a 47-year-old bystander, collapsed and died after he was hit by a baton and pushed to the ground. The inquest jury decided in May 2011 that Mr Tomlinson's death was caused by 'excessive and unreasonable force' in striking him.⁸¹

The inquest returned a verdict of unlawful killing, and in May 2011, the Crown Prosecution Service decided the police officer should be charged with manslaughter. The trial date is set for June 2012; PC Simon Harwood is pleading not guilty.⁸² Following the G20 protests the Independent Police Complaints Commission (IPCC) received 136 complaints alleging the use of excessive force by the police.⁸³

⁸⁰ Joint Committee on Human Rights, 2011. *Facilitating Peaceful Protest. Tenth Report of Session 2010-11*. London: The Stationery Office.

⁸¹ BBC, 3 May 2011. Ian Tomlinson unlawfully killed by PC at G20 protests. Available at: <http://www.telegraph.co.uk/news/uknews/1561096/Parliament-war-protester-jailed-over-600-fine.html>. Accessed 21/02/2012.

⁸² See <http://www.iantomlinsonfamilycampaign.org.uk/> for more information.

⁸³ HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 110. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

Another incident occurred in December 2010 during protests in London against education cuts and higher tuition fees.⁸⁴ Jody McIntyre, a 20-year-old disabled wheelchair user and student activist, complained that the police assaulted him with a baton, tipped him out of his wheelchair and dragged him across the road. An internal Metropolitan Police Service (MPS) investigation, supervised by the IPCC, concluded that Mr McIntyre had been inadvertently hit with a baton and then tipped out of his wheelchair and pulled across the road for his own safety. It said that the officers' actions were justifiable given their risk assessment, and the fact that violent disorder was taking place.⁸⁵

In its March 2011 report on facilitating peaceful protest,⁸⁶ the JCHR welcomed police training on the use of force, but expressed concern that there was no specific guidance on when a baton might be used to strike the head. The JCHR recommended specific guidance on the use of batons.

Against this background, the evidence indicates that there is a risk that police planning of operations, use of tactics, and officer training on the use of force are not always adequate to ensure the minimum level of force is used when required to maintain public order and protect people from harm, or prevent damage to property.⁸⁷

84 Joint Committee on Human Rights, 2011. *Facilitating Peaceful Protest. Tenth Report of Session 2010-11*. London: The Stationery Office.

85 Metropolitan Police, 2011. *Investigation into police involvement with Jody McIntyre*. Available at: <http://content.met.police.uk/News/Investigation-into-police-involvement-with-Jody-McIntyre/1260268989354/1257246745756>. Accessed 21/02/2012.

86 Joint Committee on Human Rights, 2011. *Facilitating Peaceful Protest. Tenth Report of Session 2010-11*. London: The Stationery Office.

87 See, for example, HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Chapter 6. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

3. There is no common view among police forces about the meaning of 'reasonable force'

In its national review of policing protest, published in 2009, HMI Constabulary concluded that 'there is no consistent doctrine articulating the core principles around the police use of force'.⁸⁸ Among other recommendations, HMI Constabulary proposed that the Home Office, Association of Chief Police Officers and the National Policing Improvement Agency adopt an overarching set of principles on the use of force which should inform every area of policing and are fully integrated into all policing codes of practice, policy documents, guidance manuals and training programmes. They entrench the fundamental legal concepts of necessity, proportionality and the minimum use of force, in particular:

- In carrying out their duties, police officers should as far as possible apply non-violent methods before resorting to any use of force.
- Police officers should use force only when strictly necessary and where other means remain ineffective or have no realistic chance of achieving the lawful objective.
- Any use of force by police officers should be the minimum appropriate in the circumstances.
- Police officers should use lethal or potentially lethal force only when absolutely necessary to protect life.
- Police officers should plan and control operations to minimize, to the greatest extent possible, recourse to lethal force.
- Individual officers are accountable and responsible for any use of force and must be able to justify their actions in law.⁸⁹

However, this recommendation has still to be fully implemented.⁹⁰

⁸⁸ Ibid. Pp. 116-117.

⁸⁹ Ibid. Page 117.

⁹⁰ HMI Constabulary, 2011. *Policing Public Order: An overview and review of progress against the recommendations of Adapting to Protest and Nurturing the British Model of Policing*. Available at: <http://www.hmic.gov.uk/media/policing-public-order-20110208.pdf>. Accessed 21/02/2012.

Misuse of surveillance, stop and search powers and other pre-emptive legal action by the police and private companies inhibits peaceful protest

The police rely on information and intelligence to plan effectively for large scale protests and establish the potential for disorder or violence. It is a key resource to enable them to facilitate peaceful protest and provide a proportionate operational response. The police therefore use overt surveillance, such as stop and search powers, video recording and photographing protestors. Overt surveillance by police officers is governed by the common law⁹¹ and statutory provisions such as the Police and Criminal Evidence Act (PACE), while the use of covert surveillance is governed by the Regulation of Investigatory Powers Act 2000.⁹² Police also use covert surveillance, such as undercover officers infiltrating protest groups, to prevent criminal activity.

Despite this regulatory framework, the use of both overt and covert surveillance by the police raises fundamental human rights concerns. These powers, when used inappropriately and disproportionately against protesters, have the potential to violate individual rights to privacy and might deter people from taking part in peaceful protest.⁹³

The use of stop and search powers to manage protests also raises questions about compatibility with Article 8 (the right to private life) and Article 10 (freedom of expression), as well as Article 11. Stop and search actions may also breach Article 14, which prohibits direct and indirect discrimination, and is discussed in the chapter on Article 5.

⁹¹ The taking of photographs is lawful at common law in pursuit of the common law powers of the police to detect and prevent crime: *R. (Wood) v. Commissioner of Police for the Metropolis* [2009] EWCA Civ 414 per Lord Justice Laws, paras 50-55 (relying on *Murray v. the United Kingdom* [1994] 19 EHRR 193) and Lord Collins, paras 98-99.

⁹² For codes of practice see: <http://www.homeoffice.gov.uk/counter-terrorism/regulation-investigatory-powers/ripa-codes-of-practice/>.

⁹³ Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office. Para 49.

Key issues

1. The inappropriate use of surveillance powers violates the right to privacy, undermines confidence in policing, and risks being disproportionate and unlawful

The case of Mark Kennedy, an undercover police officer who infiltrated an environmental campaign group called Earth First from 2003 to 2010, has prompted intense public debate and official scrutiny of the legitimacy and proportionality of the use of undercover officers to gather intelligence on protest groups. The *Guardian* reported that for seven years, Kennedy fed back detailed reports to his police commanders as he participated in high-profile demonstrations, and that in April 2009 police were tipped off – presumably by Kennedy – that some activists planned to break into the nearby Ratcliffe-on-Soar power station. The night before the operation, police arrested 114 activists including Kennedy, 20 of whom were eventually convicted for the minor crime of conspiracy to commit trespass.⁹⁴ Their convictions were over-turned by the Court of Appeal when it became apparent that prosecutors and police had failed to ensure that crucial surveillance recordings made by Kennedy were given to lawyers representing the activists. The material would have exonerated the activists.⁹⁵

Such covert surveillance of protesters raises fundamental issues under Article 6 (the right to a fair trial) and Article 8 (the right to private and family life). In April 2011 HMI Constabulary announced a review of the work of the national units⁹⁶ that obtain intelligence on the criminal activities of protesters in response to serious concerns about the proportionality and legality of covert police surveillance of protesters and political activists. The review will consider, among other things, the legality and proportionality of use of undercover officers and the management of covert intelligence gathering by these units.⁹⁷ This is an important step, given the potentially corrosive effect of state surveillance on the right to peaceful protest.

The police routinely video or take photographs of individuals during public order events to enable them to identify those committing criminal offences, and

94 The *Guardian*, 10 January 2011. Mark Kennedy: A journey from undercover cop to 'bona fide' activist. Available at: <http://www.guardian.co.uk/environment/2011/jan/10/mark-kennedy-undercover-cop-activist>. Accessed 21/02/2012.

95 *R. v. Barkshire* [2011] EWCA Crim 1885.

96 The National Public Order Intelligence Unit, the National Domestic Extremism Team and the National Extremism Tactical Coordination Units.

97 HMIC Review of the National Public Order Intelligence Unit Terms of Reference 10 April 2011. Available at: <http://www.hmic.gov.uk/publication/npoi-review-terms-of-reference/>. Accessed 29/02/12.

take action against them. Evidence gathering teams are deployed to locations where disorder or violence is anticipated or is taking place, to obtain this evidence. In its national policing review, HMI Constabulary noted that the use of evidence gathering teams by the police was well established. However, it stated that there was a lack of clarity around the role and function of forward intelligence teams, which creates the possibility of interfering with individuals' rights to privacy guaranteed under Article 8.⁹⁸ The original intention was that forward intelligence team officers would act as a link between protestors and police, and pass information on the changing mood, dynamics, and intent of protest crowds back to the control room or intelligence centre to assist in the appropriate deployment of resources. HMI Constabulary was critical that 'the role of forward intelligence team officer has shifted significantly over the past few years; they are now often deployed in personal protective equipment and accompanied by photographers'.

Police use of overt photography raises the question of whether such action is compatible with the right to private life, which is protected by Article 8. In 2009, the Court of Appeal decided that the Metropolitan Police Service had acted unlawfully, and in breach of Article 8, when it retained photographs of Andrew Wood, an anti-arms trade campaigner. The court noted the potential 'chilling effect' which similar police actions would have on future peaceful campaigners and stated there were:

'...very serious human rights issues which arise when the State obtains and retains the images of persons who have committed no offence and are not suspected of having committed any offence.'⁹⁹

More recently, there has been criticism over police use of CCTV images taken from university and college campuses following student protests in November and December 2010 against higher tuition fees. According to the *Independent* newspaper, the police who questioned students 'already knew their names without being told who they were'.¹⁰⁰ Organisations such as Fitwatch,¹⁰¹ which monitors the activities of police forward intelligence teams, have also criticised what they perceive to be the ever-increasing collection of intelligence on peaceful protesters, and the methods used to gain such material.

98 HMIC, *Adapting to Protest – Nurturing the British Model of Policing*, November 2009. Page 128.

99 BS – *R. (Wood) v. Commissioner of Police for the Metropolis* [2009] EWCA Civ 414.

100 The *Independent*, 30 May 2011. 'Spy cameras' are used to target student protesters Available at: <http://www.independent.co.uk/news/uk/home-news/spy-cameras-are-used-to-target-student-protesters-2290783.html>. Accessed 29/02/12.

101 For more information see: <http://www.fitwatch.org.uk>.

2. Blanket use of stop and search powers breaches Articles 8, 10 and 11

Under the Police and Criminal Evidence Act 1984, a police officer may search an individual and his or her vehicle in any public place if the officer has reasonable grounds to suspect the person has stolen goods, prohibited articles (such as might be used to damage or destroy property),¹⁰² bladed or sharply pointed articles,¹⁰³ or articles used for burglary or theft in his or her possession.

In 2009 Dave Morris, an activist, and two 11-year-olds, challenged the legality of the use of stop and search powers by Kent police, and seizures of protesters' camping equipment and personal possessions, during a Camp for Climate Change demonstration against the planned development of a coal-fired power station at Kingsnorth Power Station in Kent.¹⁰⁴ At the height of the week-long camp in August 2008, the number of protesters was estimated at 1,800 to 2,000. Police required people who wanted to join the protest to pass through a cordon of multiple stops and searches, with officers conducting a total of 8,218 such actions.¹⁰⁵ In January 2010, Kent Police settled the claim, consenting to a court order which stated that:

- (i) each stop and search of the three individuals was unlawful in that the searching officers exceeded their powers under s.1 of PACE 1984¹⁰⁶ and had no reasonable grounds for searching the individuals and no other lawful basis for stopping and searching; and
- (ii) each stop and search of the three individuals was unlawful in that it violated their rights under Article 8 (respect for private life), 10 (freedom of expression) and 11 (freedom of assembly).

¹⁰² Criminal Justice Act 2003, s.1 extended police powers of stop and search to include items made or adapted for use in connection with offences of destroying or damaging property.

¹⁰³ Criminal Justice Act 1988, s.140(1)(c) extended police powers of stop and search to include bladed or sharply pointed articles.

¹⁰⁴ *R. (Morris, E. and T.) v. Chief Constable of Kent Police* [2009] EWHC 2264 (Admin).

The submission of each of the three claimants was that there was no reasonable suspicion to carry out the stop and search and that the approach of the police to them and the general approach of the police to the stop and search of other people on the ground demonstrated that there was a blanket policy of searching individuals without there being reasonable suspicion as required by s.1 of the Police and Criminal Evidence Act 1984.

¹⁰⁵ HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 55. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

¹⁰⁶ Police and Criminal Evidence Act 1984 (PACE 1984), s.1.

The police paid damages of more than £1,000 each to the three claimants and apologised to them.¹⁰⁷ In light of this case, in its national public order policing review of 2009, HMI Constabulary made a recommendation that chief officers should monitor the use of stop and search powers during public order operations in their force area to ensure stops and searches are conducted under the correct legislation and all officers (including those providing mutual support to the local force) are adequately briefed on, and understand, the legal powers under which they are exercising their stop and search powers.¹⁰⁸

3. There is misuse of police powers to stop and search without reasonable suspicion

Under section 60 of the Criminal Justice and Public Order Act 1994, a police officer of the rank of inspector or above may authorise the search of all persons and vehicles within a locality if the officer reasonably believes that incidents involving serious violence may occur, or that individuals are carrying dangerous instruments or offensive weapons without good reason. The stop and search powers can be exercised for a specified period of up to 24 hours. Once the senior officer has authorized the action, a police officer does not need to have reasonable suspicion to search individuals or vehicles within the specified locality.

In its 2009 review of policing protest, HMI Constabulary said it had received reports of the use of section 60 of the Act to detain individuals and require them to provide their name and address and be photographed by the police.¹⁰⁹ HMI Constabulary noted that '[t]his is a misuse of police stop and search powers under section 60 and is likely to be found to be unlawful'.

The Terrorism Act 2000 also provides the police with wide powers of stop and search. Under sections 44 and 45 of the Act, which as we note below were recently amended, once a police officer of the rank of assistant chief constable has granted an authorisation,¹¹⁰ a police officer has the power to stop a person or vehicle in an area or at a place specified without reasonable suspicion.¹¹¹

¹⁰⁷ *R. (Morris, E. and T.) v. Chief Constable of Kent Police* [2009] EWHC 2264 (Admin). See also, P. McLeish and F. Wright, *Policing of the Kingsnorth Climate Camp: Preventing Disorder or Preventing Protest?* March 2009. Available at: http://climatecamp.org.uk/get-involved/working-groups/legal/Kingsnorth_Policing_Report.pdf. Accessed 29/02/12.

¹⁰⁸ HMI Constabulary, 2009. *Adapting to protest – nurturing the British model of policing*. Page 125. Available at: <http://www.hmic.gov.uk/media/adapting-to-protest-nurturing-the-british-model-of-policing-20091125.pdf>. Accessed 20/02/2012.

¹⁰⁹ Ibid. Page 124.

¹¹⁰ On the grounds that such an authorization is expedient for the prevention of acts of terrorism: Terrorism Act 2000, s.44(3).

¹¹¹ Terrorism Act 2000, ss.44 and 45.

In recent years, these powers have increasingly been used to police lawful activities, including peaceful protests. Examples include:

- The detention of more than 600 people during the 2005 Labour Party conference, including an 82-year-old activist who had earlier been evicted from the conference for heckling the then Foreign Secretary Jack Straw MP.
- The stopping and searching of an 11-year-old girl who participated in a peaceful protest at an RAF base.
- The detention of an 80-year-old RAF veteran who carried a placard and wore a T-shirt with 'anti-Blair info'.¹¹²

In 2008, Lord Carlile, the Independent Reviewer of the Terrorism Act 2000, recorded problems with the use of section 44 by the police around the country. He noted in particular that chief officers had an inconsistent approach regarding why, and when, section 44 should be used, and recommended that:

'[Section 44] should not be used where there is an acceptable alternative under other powers. Before each section 44 decision is made the chief officer concerned should ask him/herself very carefully if it is really necessary, without reasonable alternative...'¹¹³

In 2009 the JCHR also criticized the police's use of counter-terrorism powers against peaceful protesters,¹¹⁴ and in January 2010, the European Court found the powers to stop and search under sections 44-47 of the Terrorism Act 2000 to be a clear breach of Article 8,¹¹⁵ whereas no breach had been found by the House of Lords.

¹¹² Article 19, The Impact of UK Anti-Terror Laws on Freedom of Expression, Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights (April 2006). Available at: <http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>. Accessed 29/02/12.

¹¹³ Carlile, 2008. *Report on the Operation in 2007 of the Terrorism Act 2000 and of Part I of the Terrorism Act 2006*. London: The Stationery Office.

¹¹⁴ Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office.

¹¹⁵ *Gillan and Quinton v. the United Kingdom* [2009] ECHR 28.

In response, the Coalition Government has made proposals to reform this part of the Terrorism Act 2000. The Protection of Freedoms Bill, presented to parliament in February 2011, repeals sections 44-47 and introduces a more tightly circumscribed regime for stops and searches under the Act. Pending the passage of the bill, the Home Secretary has made the Terrorism Act 2000 (Remedial) Order 2011, which replaces the section 44 powers with powers similar to those set out in the bill. The JCHR¹¹⁶ and the Independent Reviewer of Terrorism Legislation¹¹⁷ have both criticized this order on the ground that the discretion conferred on individual officers remains too broad and therefore continues to carry the risk of arbitrariness.

4. Pre-emptive legal action by the police stifles peaceful protest

On occasions, the police take pre-emptive action against protesters, arresting or detaining individuals who are suspected either of planning or intending to commit an offence, or of involvement with other suspected individuals. This type of action helps police to remove potentially violent elements from protests, but also has the potential to interfere directly with an individual's right to freedom of peaceful assembly and association. It may also interfere with his or her right to liberty under Article 5. The European Court has made clear that the containment of a speculative danger, as a preventive measure, will be unlikely to be seen as a 'pressing social need' under Article 11(2) of the Convention.¹¹⁸

In April 2009, for example, Nottinghamshire police arrested 114 environmental protesters for conspiracy to commit criminal damage and aggravated trespass at one of Britain's biggest power stations at Radcliffe-on-Soar. As discussed earlier, only 20 of the 114 protesters were subsequently prosecuted and convicted for conspiracy to commit aggravated trespass. Subsequently, all 20 protesters had their convictions overturned at the Court of Appeal in light of the non-disclosure of material relating to the activities of an undercover police officer.¹¹⁹

¹¹⁶ Joint Committee on Human Rights, 2011. *Terrorism Act 2000 (Remedial) Order 2011: Stop and Search without Reasonable Suspicion – Fourteenth Report of Session 2010-12*. London: The Stationery Office.

¹¹⁷ D. Anderson, 2011. *Report on the operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006*. London: The Stationery Office.

¹¹⁸ *Vajnai v. Hungary* [2010] 50 EHRR 44.

¹¹⁹ *R. v. Barkshire* [2011] EWCA Crim 1885.

In March 2011, during the ‘March for the Alternative’ Trades Union Congress protest in London, the police arrested around 145 members of UK Uncut, an anti-austerity campaigning group, who were peacefully occupying Fortnum and Mason food shop, and charged 139 with aggravated trespass. The Crown Prosecution Service later dropped charges against 109 of those arrested on the grounds that prosecution was not in the public interest. Prosecutions are continuing against 30 protesters who were charged. According to a newspaper report, police admitted to deception in the lead-up to the mass arrest by assuring protesters that they would be free to go home after leaving the store.¹²⁰

Pre-emptive arrest was used again in May 2011, in the hours before the royal wedding, when the police arrested 55 people for a variety of offences, including 25 for breach of the peace. Of the 55 arrested, 37 were subsequently released and only 5 were charged with offences.¹²¹

5. The use of civil injunctions by private companies against peaceful protesters inhibits the right to protest

In recent years, a growing number of companies have also taken pre-emptive action against protesters by obtaining civil injunctions under the Protection from Harassment Act 1997, which was originally designed to protect individuals – especially women – from stalkers.¹²²

An injunction is a court order requiring a party to do or refrain from doing certain acts, and failure to obey it is a contempt of court, and the punishment can include imprisonment. In 2008-9, the JCHR heard evidence of how the Act had been used to obtain wide-ranging injunctions against peaceful protesters,¹²³ some of them unnamed, and the difficulties of attempting to challenge these court orders.¹²⁴ Examples included an injunction obtained by RWE NPower

¹²⁰ The *Guardian*, Monday 18 July 2011 *Fortnum & Mason protest: CPS drops charges against 109 UK Uncut activists*. Available at: <http://www.guardian.co.uk/uk/2011/jul/18/fortnum-mason-uk-uncut-charges-dropped>. Accessed 22/02/2012.

¹²¹ Metropolitan Police Force Press Release 03 May 2011. Available at: <http://content.met.police.uk/News/Five-charges-following-Royal-Wedding/1260268895260/1257246745756>. Accessed 29/02/2012.

¹²² Article 19, Submission to the 91st Session of the United Nations Human Rights Committee on Respect for Freedom of Expression in the United Kingdom of Great Britain and Northern Ireland. October 2007. London. Available at: <http://www.unhcr.org/refworld/publisher,ART19,,GBR,4756cffbo,o.html>. Accessed 29/02/2012.

¹²³ Amendments to the Act by the Serious Organised Crime and Prevention Act 2005 mean that single acts of protest can come within this legislation.

¹²⁴ Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office.

to prevent protests against its proposal to dump waste in a beauty spot,¹²⁵ and injunctions obtained by E.On, the energy supplier, against unnamed protesters in anticipation of Climate Camp protests at Kingsnorth Power Station.¹²⁶

In its 2009 report, the JCHR said that it was concerned that the Act has developed over time to encompass protest activity, and has the potential for ‘overbroad and disproportionate application’.¹²⁷ It found no evidence of any pressing need for applications for injunctions against protesters to be made without providing them with the opportunity to challenge an order. The JCHR recommended that the government should amend the current legislation in two ways. Firstly, applications for injunctions relating to protest activities should not be made without notifying any individuals or organisations named on the application; and secondly, the presumption that hearings for protection from harassment injunctions are held in private should be reversed when they relate to the activities of protesters.¹²⁸

125 Liberty’s response to the Joint Committee on Human Rights: Policing and Protest, June 2008. Available at: <http://www.liberty-human-rights.org.uk/pdfs/policy08/response-to-jchr-re-protest-2.pdf>. Accessed 29/02/2012.

126 Kent Online, 22 February 22 2012, Energy giant’s High Court Victory against climate campaigners. Available a <http://www.kentonline.co.uk/kentonline/newsarchive.aspx?articleid=44068>. Accessed 29/02/2012.

127 Joint Committee on Human Rights, 2009. *Demonstrating respect for rights? A human rights approach to policing protest. Seventh Report of Session 2008-09, Volume I*. London: The Stationery Office. Para 100.

128 Ibid. Para 99.

Britain may not be meeting some of its obligations in relation to freedom of association

The UK's obligations to protect freedom of association

The essence of freedom of association, which is guaranteed by Article 11, is that 'citizens should be able to create a legal entity in order to act collectively in a field of mutual interest'.¹²⁹ This means that people have the right to choose whether or not to form and join associations such as political parties,¹³⁰ trade unions and other private organisations if they want, and for these associations to be recognised legally.

Where the state has a national registration system to allow political parties, trade unions or private organisations to exist or carry out certain activities, a decision to refuse registration is an interference with freedom of association and must be justified.¹³¹ A state's refusal to register an organisation also does not necessarily justify a blanket ban on all its meetings or activities.¹³² Prohibition or dissolution of political parties or other associations is justified only if there is concrete evidence that a party is engaged in activities threatening democracy or fundamental freedoms. This includes any party that advocates violence or a party aiming to overthrow the existing constitutional order through armed struggle or terrorism.¹³³

Under Article 11, the right to form and join trade unions for the protection of one's interests is reinforced by two guiding principles. First, the European Court of Human Rights takes into consideration 'the totality of the measures taken in

¹²⁹ *Gorzelik and Others v. Poland* [2004], NQHR 2004 22(2), 272-274.

¹³⁰ *United Communist Party of Turkey v. Turkey* [1998] 26 EHRR 121. Political parties are entitled to a high degree of protection because of their important role in a democracy.

¹³¹ *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* [2001] Application No. 29221/95 and 29225/95, Judgment from 2 October 2001, ECHR.

¹³² *Ibid.*

¹³³ Guidelines on the Prohibition and Dissolution of Political Parties and Analogous Measures adopted by the Venice Commission, 41st plenary session, Venice, 10-11 December 1999; *Emin and Others v. Greece*, Application No. 341344/05.

order to secure trade union freedom, subject to its margin of appreciation',¹³⁴ and second, the court will not accept restrictions that affect the essential elements of trade union freedom, 'without which that freedom would become devoid of substance'.¹³⁵

The right of association consists of several specific elements including:

- The right to form and join a trade union for the protection of one's interests: Article 11(1) explicitly recognises trade union freedom as one form of freedom of association¹³⁶ and includes the positive obligation on the state to protect, through legislation, the union rights of workers in the public and private sectors.¹³⁷
- The prohibition of closed shop agreements that mean that workers cannot be employed in a particular trade unless they are members of a particular union.¹³⁸
- The right for a trade union to be heard¹³⁹ and to be free to seek to persuade an employer to listen to what it has to say on behalf of its members¹⁴⁰ to protect its members' interests.
- The right to collective bargaining.¹⁴¹
- The right to strike:¹⁴² this right is subject to certain conditions and restrictions, but any state interference must be justified in accordance with Article 11(2). The European Court has suggested that justifications for restrictions on the right to strike should be informed by international

¹³⁴ *Demir v. Turkey* [2009] 48 EHRR 54. Para 144.

¹³⁵ *Ibid.*

¹³⁶ See *National Union of Belgian Police v. Belgium* [1979-80] EHRR 578. Para 38.

¹³⁷ *Gustafsson v. Sweden* [1996] 22 EHRR 409. Para 45.

¹³⁸ *Sorensen and Rasmussen v. Denmark* [2008] 46 EHRR 29. Paras 72-75. Both applicants objected to being required to join a trade union as a condition of their employment.

¹³⁹ *National Union of Belgian Police v. Belgium* [1979-80] EHRR 578.

¹⁴⁰ *Wilson, National Union of Journalists and Others v. the United Kingdom* [2002] ECHR 552. Para 44.

¹⁴¹ *Demir v. Turkey* [2009] 48 EHRR 54. Para 153.

¹⁴² *Enerji Yapi-Yol Sen v. Turkey*, Application No. 68959/01. The case concerned a blanket prohibition on industrial action by public sector trade unions. Members of the trade union who ignored the prohibition were disciplined. The court rejected the Turkish government's preliminary objection that the ban on strike action did not amount to an interference with the union's right to freedom of association within the meaning of Article 11 (para 24). It held that the ban was too wide a restriction and the disciplinary action was 'capable of discouraging trade union members and others from exercising their legitimate right to take part in such one-day strikes or other actions aimed at defending their members' interests' and therefore amounted to a disproportionate interference with rights guaranteed under Article 11 (paras 32-33).

understanding of this issue. For example, the International Labour Organisation (ILO) sets out in its International Labour Standards that the right to strike is an intrinsic part of the right of trade union association.¹⁴³

Article 11(2) provides that a state may impose lawful restrictions on the exercise of these rights on members of the armed forces, the police or the administration of the state. Civil servants, although they administer the state, will not normally fall within this last category.¹⁴⁴

The development of freedom of association in Britain

Since 1940, when the government outlawed the British Union of Fascists, no political party contesting elections in Britain has been banned, although in 1988 the government banned Sinn Féin and 10 other republican and loyalist organisations from directly broadcasting on television and radio. This widely-criticised ban was lifted in 1994 when the IRA declared a ceasefire.

The extreme rarity of placing limitations upon or banning political parties illustrates how freedom of association for political parties is well-protected in Britain, provided they do not advocate violence. By contrast, historically the right to form trade unions and to take part in union activities, including strike action, has proved more controversial. For example, in 1832 the ‘Tolpuddle martyrs’, six farm workers from Tolpuddle in Dorset, founded a society to protest against low wages. The men were sentenced to transportation to Australia. Three years later they were pardoned and granted a passage home following huge public protests and a petition of 800,000 signatures. The Tolpuddle Martyrs are now remembered as an early step in the path towards trade union rights in Britain.

In common law, trade unions were illegal because they were regarded as being in restraint of trade, or limiting the freedom to conduct business. Following years of political pressure for reform, unions were first legalised by the Trade Union Act 1871. Over the next century, trade union membership in Britain

¹⁴³ Ibid. Para. 24 (referring to the Court’s approach to reliance on other international texts and instruments in *Demir v. Turkey* [2009] 48 EHRR 54. Paras 65-86). The European Court of Human Rights also cites the express right to strike contained in Articles 5(4) and 6(4) of the European Social Charter 1961 (revised 1996).

¹⁴⁴ *Demir v. Turkey* [2009] 48 EHRR 54. Paras 97 and 107.

increased steadily to a peak of about 13 million in the late 1970s. During the 1970s and early 1980s a series of landmark industrial disputes intensified the political controversy about union power. These two decades of industrial conflict were the context for extensive reform to legislation covering trade unions' rights and duties, the rights of trade union members, collective bargaining and industrial action. The Trade Union and Labour Relations (Consolidation) Act 1992 (the 1992 Act), the Trade Union Reform and Employment Rights Act 1993, the Employment Relations Act 1999 and the Employment Relations Act 2004 made considerable changes to the statutory framework for the protection of workers' trade union rights.

Today, domestic law gives individuals the freedom to join a trade union or not, and to carry out union activities or use union services. Any discrimination on grounds of membership or non-membership of a trade union on recruitment is unlawful.¹⁴⁵ Dismissal where the principal reason is the employee's union membership or non-membership, or his or her participation in union activities or use of union services at an appropriate time, is automatically unfair for workers with 'employee' status,¹⁴⁶ while other workers also have the right to bring a claim if they are dismissed on the same grounds.¹⁴⁷ Both employees and other workers are protected from detriment on those grounds¹⁴⁸ and from positive inducements to join or not to join a union or to participate in union activities or use union services at an appropriate time.¹⁴⁹ The confidentiality of trade union membership is protected during ballots.¹⁵⁰ Dismissing an employee under a closed shop agreement is also considered unfair and affords a right of action.¹⁵¹

Until the Human Rights Act 1998 (HRA), the right to form and join trade unions to protect one's interests was a negative right, dependent on immunity granted by statute. The HRA recognised the right as a positive right under Article 11. The right to association is also protected through a number of binding international human rights instruments. Britain has ratified the International Convention on Civil and Political Rights,¹⁵² the International Covenant on Economic, Social and Cultural Rights,¹⁵³ Conventions of the International

¹⁴⁵ The Trade Union and Labour Relations (Consolidation) Act 1992, ss.137-138 (hereafter, the 1992 Act).

¹⁴⁶ 1992 Act, s.152.

¹⁴⁷ *Ibid.*, s.146.

¹⁴⁸ *Ibid.*, s.146

¹⁴⁹ *Ibid.*, s.145A.

¹⁵⁰ *Ibid.*, s.24A

¹⁵¹ *Ibid.*, s.152(1)(c). A closed shop is where persons are required to join a particular union as a precondition to employment and to remain union members for the duration of their employment.

¹⁵² Article 22.

¹⁵³ Article 8.

Labour Organisation, the European Social Charter,¹⁵⁴ and the Charter of Fundamental Rights of the European Union.¹⁵⁵

Despite the significant range of domestic legislation protecting workers' rights and trade union freedom introduced in the past two decades, there is evidence that Britain may not be fully meeting its obligations in relation to freedom of association under Article 11, specifically in relation to blacklisting and the right to strike.

Key issues

1. Regulations to protect employees involved in trade union activity from blacklisting may not meet Britain's Article 11 obligations

Article 11(1) explicitly recognises trade union freedom as one form or a special aspect of freedom of association.¹⁵⁶ It gives individuals the freedom to join a trade union or not, and to carry out union activities or use union services and includes the positive obligation on the state to protect, through legislation, the union rights of workers in the public and private sectors.¹⁵⁷

This freedom is threatened by the illegal practice of 'blacklisting', where an organisation collects information on trade union members to enable it to treat workers or job applicants less favourably because of their union membership or activities.¹⁵⁸ For a list to be a 'blacklist' it must contain details of current or former trade union members or activists and have been compiled to be used by employers or employment agencies to discriminate on grounds of trade union membership or activities in the recruitment or treatment of workers.

In 2009, the Information Commissioner's Office uncovered secret blacklisting of union members by employers in the construction industry. In this case, Ian Kerr, a private investigator based in Droitwich, Worcestershire, pleaded guilty to running a blacklisting service on building workers, using a database that contained details of the trade union and political affiliations of some 3,200

154 Articles 5 and 6.

155 Articles 12 and 28.

156 See *National Union of Belgian Police v. Belgium* [1979-80] EHRR 578. Para 38.

157 *Gustafsson v. Sweden* [1996] 22 EHRR 409. Para 45.

158 Employment Relations Act 1999 (Blacklists) Regulations 2010, reg. 3(2).

construction industry employees.¹⁵⁹ Kerr was fined £5,000, his consulting company was closed down, and 14 of his clients were given warning notices.¹⁶⁰

In response to the Information Commissioner's findings, the government brought forward legislation to protect union members against blacklisting. In March 2010, the Employment Relations Act 1999 (Blacklist) Regulations 2010 came into force. The regulations make it unlawful for any individual, business or other organisation to compile, supply, sell or use a blacklist. In addition, it is unlawful for an employer to refuse an individual employment, dismiss an individual or subject an individual to any other detriment for a reason related to a blacklist. It is also unlawful for an employment agency to refuse its services to an individual for the same reason.

Some trade unions, including BECTU, NASUWT and the RMT were critical, arguing that blacklisting should be a criminal rather than civil offence, suggesting that enforcement would be more effective if this were the case.¹⁶¹ Individuals are unlikely to know if they are on a blacklist, and if they suspect it, may not have the resources to investigate. To take a civil action they must wait until they can show they are affected adversely. By contrast, if compiling and/or using a blacklist were a criminal offence, police would have a right to investigate and prosecute if they suspected an offence. This would be a more effective way of discovering, and deterring, use of 'blacklists' than expecting individuals to bring after-the-event civil claims. In their current form, the regulations may not fulfil the state's positive obligation to provide effective protection of the Article 11 rights in this area.

¹⁵⁹ Information Commissioner, 2009. Data Protection Act 1998, Supervisory Powers of the Information Commissioner. Enforcement Notice to Mr Ian Kerr. Available at: http://www.ico.gov.uk/upload/documents/library/data_protection/notices/tca_enforcement_notice.pdf. Accessed 17/02/2012.

¹⁶⁰ The *Guardian*, 16 July 2009. Construction firms co-operated with secret jobs 'blacklist' court hears. Available at: <http://www.guardian.co.uk/uk/2009/jul/16/construction-firms-jobs-blacklist?INTCMP=ILCNETTXT3487> Accessed 17/02/2012.

¹⁶¹ Department for Business, Innovation and Skills, 2009. *Government Response to the Public Consultation. The Blacklisting of Trade Unionists: Revised Draft Regulations*. Available at: <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/blacklist-response.pdf>. Accessed 17/02/2012.

2. The procedural rules governing the right to strike make it too easy for employers to challenge the lawfulness of proposed strikes

There is no right to strike in British domestic law. The 1992 Act is framed in terms of immunities of unions and their members from legal liability for such action, rather than in terms of rights or freedoms. Although this effectively provides a limited right to strike,¹⁶² protection under the Act is subject to a number of strict procedural steps. For example, the right to strike is conditional on a union following detailed rules for holding a ballot among potential participants to gain approval for proposed industrial action.¹⁶³ Failure to comply with the rules means that industrial action will probably be unlawful and a union and its members will not be protected from legal liability in claims by employers (or others) for damages or injunctions to prevent the proposed action taking place.

The JCHR has criticised domestic legislation. In 2004, it noted that while employees have the freedom to engage in industrial action, engaging in strike action constitutes a breach of the employment contract, which may in certain circumstances result in dismissal.¹⁶⁴ The International Labour Organisation (ILO) in its most recent 2011 report on Britain stated that the provisions of the 1992 Act failed to protect the right to strike adequately. It criticised the Act for not providing protection from dismissal for people involved in secondary action or sympathy strikes. It also noted that the possibility of unions being liable for large damages could lead to a situation where union members could not exercise the right to strike. The ILO recommended that the government work with trade unions and employers to review the operation of the 1992 Act.¹⁶⁵

¹⁶² Section 219(4) states that if the ensuing provisions of the Act are complied with, statutory protection comes into force.

¹⁶³ Trade Union and Labour Relations (Consolidation) Act 1992, s.219(4). The rules are contained in ss.226-232A and ss.233-234A. They include detailed provision about participation in and conduct of ballots (ss.226B-232A), requiring notice to be given to an employer before a ballot is held (s.226A) and again before industrial action commences (s.234A). It has been said that 'on any view, the ballot provisions are detailed and legalistic' (*Metrobus Ltd v. Unite* [2010] ICR 173, CA, para 119) and that they are characterised by 'inordinate complexity' (*British Airways plc v. Unite the Union* (No. 1) [2009] EWHC 3541 (QB), Para 27).

¹⁶⁴ Joint Committee on Human Rights, 2004. *The International Covenant on Economic, Social and Cultural Rights: Twenty-first Report of Session 2003-04*. London: The Stationery Office; International Labour Organisation, 2011. *Report of the Committee of Experts on the Application of Conventions and Recommendations*. Available at: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_151556/index.htm. Accessed 21/02/2012. The 2011 Report of the Committee of Experts on the Application of Conventions and Recommendations provides an impartial and technical evaluation of the state of application of ILO Conventions and Recommendations in member states.

¹⁶⁵ International Labour Organisation, 2011. *Report of the Committee of Experts on the Application of Conventions and Recommendations*. Available at: http://www.ilo.org/ilc/ILCSessions/100thSession/reports/lang--en/WCMS_151556/index.htm. Accessed 21/02/2012.

However, the view of the domestic courts (so far) is that the information and balloting provisions of the 1992 Act, considered as a whole, are not disproportionate and do not breach Article 11.¹⁶⁶ The courts have found that the highly prescriptive information and balloting rules in the 1992 Act may be made less severe in several ways. The House of Lords has held that the rules should be given a ‘likely and workable construction’ and not strictly interpreted against unions and their members seeking the benefit of immunity for strike action.¹⁶⁷ The Court of Appeal has also emphasised that there is no presumption that the immunity for trade unions and their members should be narrowly construed.¹⁶⁸ The 1992 Act expressly provides that small accidental failures can be disregarded where these relate to identifying the people who can vote in a ballot, or to providing an opportunity to vote to everyone entitled to do so.¹⁶⁹ The Court of Appeal has suggested that, even where that express exception does not apply, other small accidental breaches of the information and balloting rules may not result in a loss of immunity as long as there has been ‘substantial compliance’ by the union.¹⁷⁰

However, recent decisions of the domestic courts illustrate that the procedural rules of the 1992 Act may nevertheless enable employers to mount successful challenges to the lawfulness of proposed strikes and to obtain injunctions preventing industrial action.

The 1992 Act requires that as far as is reasonably practicable, a person who is entitled to vote must be offered an opportunity to do so.¹⁷¹ In 2009, British Airways secured an injunction against a strike planned by cabin crew who were members of Unite. Unite had included in the ballot a number of members whom, the Court held, the union should have known were due to leave their employment with British Airways before the strike took place. The High Court held that this error was not accidental and breached the requirement¹⁷² to ensure, so far as reasonably practicable, that only those entitled to vote are offered an opportunity to do so, even though the numbers were too small to affect the outcome of the ballot. In granting the injunction, the High Court warned:

¹⁶⁶ *Metrobus Ltd v. Unite* [2010] ICR 173, CA. Para.113; *R.M.T. v. Serco Ltd*; *ASLEF v. London Midland* [2011] ICR 848, para 8.

¹⁶⁷ *P. v. National Association of Schoolmasters/ Union of Women Teachers* [2003] ICR 386, para 7.

¹⁶⁸ *R.M.T. v. Serco Ltd*; *ASLEF v. London Midland* [2011] ICR 848, para 9.

¹⁶⁹ 1992 Act, s.232B.

¹⁷⁰ *British Airways plc v. Unite the Union* (No. 2) [2010] ICR 1316, para 153; *R.M.T. v. Serco Ltd*; *ASLEF v. London Midland* [2011] ICR 848, para 87.

¹⁷¹ 1992 Act, s.230(2).

¹⁷² 1992 Act, s.230(2).

‘Sooner or later, the extent to which the current statutory regime is in compliance with [Britain’s] international obligations ... will fall to be carefully reconsidered.’¹⁷³

The 1992 Act also obliges unions to provide figures for the number of members whom it intends to ballot, together with an explanation of how it arrived at the figures.¹⁷⁴ In recent cases¹⁷⁵ considering this requirement, the Court of Appeal has recognised that the explanation may be provided in ‘formulaic’ and ‘not very informative’ terms which will be ‘of limited benefit to the employer’. Nevertheless, failure to provide such an explanation – even though it might not provide any real benefit to an employer – will result in a union losing its protection and will enable the employer to obtain an injunction restraining the industrial action.

The 1992 Act also imposes a duty on a union to inform an employer of the ballot results ‘as soon as is reasonably practicable’.¹⁷⁶ In *Metrobus Ltd v. Unite*, the union delayed by a day after it received the ballot result. The court did not find that the delay caused any detriment to the employer, but nevertheless found it sufficient to grant an injunction preventing the strike.¹⁷⁷

The 1992 Act also imposes a duty on a union to inform members entitled to vote in a ballot of the results ‘as soon as is reasonably practicable’.¹⁷⁸ In a second case involving the dispute between British Airways and Unite, British Airways sought an injunction arguing that the union had failed to comply with this requirement.¹⁷⁹ The Court of Appeal held that, in the particular circumstances of that case, the union had complied with its obligation and therefore declined the injunction. However, the Court nevertheless recognised that a breach of the requirement would make the strike unlawful and entitle the employer to an injunction, even though the provision was intended to protect the interests of the union’s own members rather than the employer’s, and even though there was no complaint by any worker, or any evidence of detriment to any worker.¹⁸⁰

173 *British Airways plc v. Unite the Union* (No. 1) [2009] EWHC 3541 (QB), para 27.

174 1992 Act, s.226A.

175 See *Metrobus Ltd v. Unite* [2010] ICR 173, CA, paras 93-94, 109-110, 124; *R.M.T. v. Serco Ltd*; *ASLEF v. London Midland* [2011] ICR 848, para 95.

176 1992 Act, s.231A.

177 *Metrobus Ltd v. Unite* [2010] ICR 173, CA, paras 80-83, 120.

178 1992 Act, s.231.

179 See *British Airways plc v. Unite the Union* (No. 2) [2010] ICR 1316, paras 20, 62 and 103.

180 *Ibid.*

Therefore, although the domestic courts have so far held that the information and balloting provisions of the 1992 Act are compatible with Article 11, these recent cases raise questions about the proportionality of the provisions as a whole. If an employer can obtain an injunction to prevent a strike going ahead based on a breach of one of these provisions, even where the democratic mandate for the strike is clear, there is no demonstrable detriment to the employer and/or the obligation is for the benefit of union members rather than employers, then the 1992 Act risks not being regarded as ‘necessary in a democratic society’ for the purposes of Article 11(2). This issue is being considered in *R.M.T. v. the United Kingdom* which is pending before the European Court. The application will also challenge the absolute prohibition on secondary action under the 1992 Act.¹⁸¹

¹⁸¹ *R.M.T. v. the United Kingdom* application March 2010.

Case study:**Policing protest in
West Yorkshire**

After the 2009 review of the policing of protest by Her Majesty's Inspectorate of Constabulary, the police recognised their legal obligations to facilitate peaceful protest under Article 11.

West Yorkshire Police adopted a new approach that aims to facilitate peaceful protest, in compliance with the Human Rights Act 1998, while ensuring that any restrictions are proportionate and legitimate.

In August 2010, West Yorkshire Police (WYP) facilitated a protest in Bradford that was unwelcome to some local people and accompanied by the risk of disorder. The English Defence League (EDL), which describes itself as a peaceful protest group against “Islamic extremism”, planned a demonstration on a bank holiday, prompting a counter-protest by Unite Against Fascism (UAF), which campaigns against what it views as racism and fascism. Several EDL protests in other cities had ended in confrontations with police after supporters became involved in violence and racist and Islamophobic chanting.

Mark Milsom, Assistant Chief Constable of WYP, explains how his force managed the situation in accordance with Article 11. “We carry out human rights impact assessments on everything now and in particular with regards to protests,” says Milsom. Before the EDL protest, Milsom gave presentations about the rights of people to have processions and assemblies under the Public Order Act 1986, and the corresponding requirement for the police to facilitate protests and engage with all parties. For this event, Milsom reached out specifically to the Muslim community, “as there was a perception that we should be banning the EDL protest”. Unless there is clear evidence that organisers of a protest will use violence, the police have a duty to protect the protest.

“We carry out human rights impact assessments on everything now and in particular with regards to protests...”

Milsom wanted in particular to avoid a repeat of Bradford’s ethnic riots in 2001. “Although some people were initially upset, they realised we had to allow the protest and deal with it,” recalls Milsom. “So the discussion then changed as to how to persuade young people not to get involved in anything criminal.”

WYP has since successfully dealt with several events covered by Article 11, including student demonstrations in Leeds in November 2011 against higher tuition fees. “Human rights legislation brings a sharper focus to the positive duty to facilitate protests, as opposed to adopting just a pragmatic approach to minimise risk,” says Milsom.

The First Protocol

The First Protocol to the European Convention on Human Rights contains three further fundamental rights:

Article 1: Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2: Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3: Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Summary

Protocol 1 consists of three rights: the right to enjoy property and possessions, the right not to be denied an education, and the obligation on governments to hold free elections.

The key issues we address in this chapter are:

Britain's legal system generally prevents arbitrary and unfair interference with property and possessions and meets the requirements of the Protocol, and also provides effective remedies when property rights are violated.

Britain has a national system of state education that meets the requirements of the Protocol. The disproportionate levels of permanent exclusion among Black Caribbean, Mixed White/Black Caribbean and Gypsy and Traveller students and those with special educational needs are more likely to be tackled effectively through the Equality Act 2010 than through the Protocol.

Britain generally observes the right to free elections and the right to vote. However, the current electoral law which prohibits voting rights for prisoners is not compliant with Article 3 Protocol 1, as found by the Grand Chamber of the European Court of Human Rights. The British government has so far failed to comply with this judgment.

The UK's obligations under Protocol 1

Protocol 1 to the European Convention on Human Rights was opened for signature in March 1952, 16 months after the Convention itself was finalised. It contains three rights that the Committee of Ministers could not agree upon in time to include in the original Convention, despite parallel rights already appearing in the Universal Declaration on Human Rights.¹ These rights to education, to free elections and, in particular, to property proved somewhat controversial. Nevertheless, Protocol 1 has now been ratified by every member of the Council of Europe except Monaco and Switzerland.

Article 1 Protocol 1 recognises the right to peaceful enjoyment of property and possessions, and only permits a person to be deprived of his or her possessions under certain conditions. It also recognises that states are entitled to control the use of property in the general interest, by enforcing appropriate laws, such as on taxation or planning permission.² ‘Property and possessions’ has a very wide meaning under Article 1 Protocol 1, including, but not limited to, physical goods, land and contractual rights, pension entitlements, shares, and patents. The protection extends, in some circumstances, to corporate bodies as well as to individuals.

Interference with this right may be justified if it can be shown to be in the public or general interest, and is a proportionate interference given its intended aim. Given the complexity of social and economic policy that affects property rights, the European Court of Human Rights may be reluctant to intervene and generally allows national authorities a wide ‘margin of appreciation’, meaning a degree of leeway to interpret its judgments in accordance with their domestic culture and traditions.

¹ See Articles 17, 21 and 26.

² See *Sporrong and Lönroth v. Sweden* [1982] 5 EHRR 35 para 61, where the three elements of A1P1 are clearly set out.

Article 2 Protocol 1 says that no one shall be denied the right to education. Unlike most rights in the Convention, this is expressed in negative rather than positive terms, reflecting the comparatively weak protection it provides. It requires every signatory to guarantee that individuals can take advantage of existing educational institutions, but it does not guarantee an education of a particular kind or quality, or that the education will be provided by a particular institution.³

The second part of Article 2 Protocol 1 concerns the rights of parents and provides that they are able to ensure that their children's education conforms with their own religious or philosophical convictions. This obviously covers religion, but any other conviction must be seriously held and of importance before it will merit the same protection.⁴ The parents' right need only be 'respected', which does not mean that their wishes must always be granted.

Interferences with the right to education will only be justified if they are foreseeable and pursue a legitimate aim, such as protecting children from harm.⁵ Interferences must also be proportionate to the legitimate aim. Yet there is no exhaustive list of legitimate aims as is found in other qualified rights under the Convention.

Article 3 Protocol 1 embodies two distinct individual rights: the right to stand for election⁶ and the right to vote in elections.⁷ Both imply the obligation on the state to ensure free expression of the opinion of the people in the choice of the legislature.⁸ The right to vote is of prime importance as it provides individuals with the ability to remove a government to which they object. However, despite the significance of this right, the European Court of Human Rights has held that the standards to be applied for establishing compliance with Article 3 Protocol 1 are not as strict as those which relate to the qualified rights in the main body of the Convention: for example, Articles 8 (the right to respect for private and family life, home and correspondence), 10 (the right to freedom of expression), and 11 (the right to freedom of assembly and association). In reaching a decision on compliance, the Court will concentrate on whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people.⁹

³ See Lord Bingham's summary of the relevant legal principles in *R. (Ali) v. Head Teacher and Governors of Lord Grey School* [2006] 2 AC 363.

⁴ See *Campbell and Cosans v. the United Kingdom* [1982] 4 EHRR 293.

⁵ See the discussion of the ban on corporal punishment in schools below.

⁶ Known as the 'passive' aspect of the right.

⁷ Known as the 'active' aspect of the right.

⁸ *Mathieu-Mohin and Clerfayt v. Belgium* [1987] 10 EHRR 1. Paras 46-51.

⁹ See *Ždanoka v. Latvia* [2007] 45 EHRR 17, GC. Paras 102-115.

Relation to other articles

As the possessions protected under Article 1 Protocol 1 include land, there may be an overlap with the right to respect for the home guaranteed under Article 8. However, Article 1 Protocol 1 and the same element of Article 8 can also come into direct conflict when a dispute arises between the owner of a property and the person living in it.¹⁰

Article 2 Protocol 1 protects the right to education, which many would argue is a prerequisite for identity and self-determination (Article 8) and the ability ‘to receive and impart opinions and ideas’ (Article 10). The right of parents protected by this Protocol has associations with the right to freedom of thought, conscience and religion under Article 9. In fact, it can be seen as an extension of Article 9.¹¹

The rights guaranteed under Article 3 Protocol 1 are supported by the right to freedom of association under Article 11 and free expression under Article 10. It would be hard to stand for election, and to decide how to cast one’s vote, if political parties and gatherings were prohibited.

Is Britain meeting its Protocol 1 obligations?

Article 1 Protocol 1: Protection of property

This Protocol protects a right that has been recognised in UK law for centuries. The UK has a strong and effective legal system that generally prevents arbitrary and unfair interferences with the right to peaceful enjoyment of possessions, ranging from criminalizing theft to upholding freely agreed contracts. Peaceful enjoyment of land is protected by the common law right to sue for ‘nuisance’, which deals with any disturbance or annoyance that impairs the enjoyment of a person’s ownership or occupation of land (or other right over it). In addition, common law protects the right to take legal action against trespassers. Even ideas and designs receive protection in the form of intellectual property law.¹²

¹⁰ In *J. A. Pye v. the United Kingdom* [2008] 46 EHRR 45, the Grand Chamber considered whether the doctrine of adverse possession (i.e. that after a certain period of time a squatter gains rights over the land which he occupies) violated A1P1. In that case the squatter was not resident, but if he had been his Article 8 right to a home would have been weighed in the balance.

¹¹ In *R. (Begum) v. Governors of Denbigh High School* [2007] 1 AC 100 the claimant relied upon both Article 9 and A2P1 when challenging the decision to refuse her permission to wear a jilbab to school.

¹² Obviously the strength of these legal protections depends on the ability to access court, and thus an effective system of civil legal aid, but this is an issue for a different section of this review.

In the UK, arbitrary appropriation of private property by the state is not a common concern. However, the state occasionally requires private parties to give up their land. The use of compulsory purchase is perhaps the most obvious and potentially controversial interference with property by the state. This process is controlled by detailed legislation which is designed to ensure that compulsory purchase is justified and that the compensation provided is adequate, in accordance with Article 1 Protocol 1.¹³ Thus in general, the British legal system provides protection for the right to property that is consistent with the requirements of the Convention. Where a property right is denied, the common law usually offers a solution. There have been some cases where this Protocol has been relied upon successfully to protect individual rights to property. For example, in *Thomas v. Bridgend County Borough Council* [2011] 862 claimants seeking compensation for the noise and nuisance arising from a newly built road successfully argued that a three year limitation on bringing their claim under the 1973 Act operated unfairly and in breach of the Protocol.¹⁴

The Protocol is also important because when an issue touches upon the right to property, the protection against discrimination provided by Article 14 may also come into play. Significantly, state benefits (whether or not any contribution has been made towards them) are protected possessions under this Protocol.¹⁵ Article 14 may therefore be violated if a benefit is provided in a discriminatory manner. This was the basis for ultimately unsuccessful claims brought by widowers in 2005 in respect of the widow's bereavement allowance¹⁶ and benefits including the widow's pension.¹⁷

These allowances and benefits have now all been scrapped or replaced by payments that are the same for men and women, to prevent discrimination on the basis of gender under Article 14 and Article 1 Protocol 1 taken together.

13 Acquisition of Land Act 1981, Land Compensation Act 1961.

14 *Thomas and others v. Bridgend County Borough Council* [2011] W.L.R. (D) 254.

15 See *Stec v. the United Kingdom* [2005] 41 EHRR SE 18.

16 *R. (Wilkinson) v. Inland Revenue Commissioners* [2005] 1 WLR. 1718.

17 *R. (Hooper) v. Secretary of State for Work & Pensions* [2005] 1 WLR 1681.

Article 2 Protocol 1: Right to education

In the discussions that preceded the adoption of the First Protocol, the UK's delegate on the Council of Europe's Consultative Assembly confirmed that the UK had no objection in principle to Article 2 Protocol 1 because 'it does no more than state what we have already put into our own Education Act [of 1944]'.¹⁸

Britain has had a national system of state education since the Education Act of 1870. This introduced schooling for children aged five to 12, and by the end of the 19th century state-funded schooling was both effectively free and compulsory. Over the past century there have been consistent efforts to increase the number of children benefitting from the education system. Today all children are required to attend school or to receive appropriate home schooling up to the age of 16. Recent legislation will make it compulsory to be involved in education or training up to the age of 17 in 2013 and 18 in 2015.¹⁹ The right, and indeed the requirement, to receive an education extends to children with disabilities, and has done for many years. Under the Education (Handicapped Children) Act 1970 it was accepted that no child should be labelled as impossible to educate. Every child is now entitled to full-time education suitable to his or her age, ability and aptitude.²⁰

At least in theory, every child is also entitled to assistance for any special educational needs. However, the limitations on this legal right were confirmed by the Supreme Court in *A v. Essex County Council* [2011].²¹ This case was brought in 2005 on behalf of a child with autism and severe learning difficulties who was withdrawn from his school because it could not handle his very challenging behaviour. The local authority was unable to find a home tutor who could meet his needs, and it took 18 months to provide him with a place at a different school. The plaintiff argued that the local authority had breached his rights under Article 2 Protocol 1 by failing to provide him with an education. The Law Lords, in rejecting the claim, did not accept that Article 2 Protocol 1 imposed an obligation on the state to provide a minimum level of education to students with special educational needs. They argued that the right is to an 'effective' education, which provides only a guarantee of access without discrimination to whatever system of education the state has put in place.

¹⁸ Travaux Préparatoires for A2P1, CDH (67) 2 at page 116.

¹⁹ Education and Skills Act 2008.

²⁰ Section 7, Education Act 1996.

²¹ *A. v. Essex County Council* [2011] 1 AC 280.

The Education Act 1996 arguably exceeds the requirement under the Protocol for uninhibited access ‘to educational institutions existing at a given time’.²²

The Act requires that even those children who cannot access mainstream education must be provided with a ‘suitable education’. Nevertheless, there remain issues in the fair provision of education. In 2009/10 a disproportionate number of Black Caribbean, Mixed White/Black Caribbean and Gypsy and Traveller pupils were excluded from school.²³ More than 70 per cent of all permanent exclusions in 2009 and 2010 involved students with special educational needs, even though they represented only about 21 per cent of the total school population.²⁴

Issues such as discriminatory school exclusions clearly concern the right to education. Yet given the relative weakness of Article 2 Protocol 1, they are more likely to be tackled effectively using equality legislation. For example, section 85 of the Equality Act 2010 prohibits schools – amongst other matters – from discriminating against students in respect of admissions and exclusions.

The second sentence of Article 2 Protocol 1, concerning the right of parents to have their children educated in accordance with their beliefs, has been relied upon to argue unsuccessfully in favour of corporal punishment in schools. In *R. (Williamson) v. Secretary of State for Education and Employment* [2005]²⁵ 15 teachers and parents of children at various Christian independent private schools argued that the ban on corporal punishment contained in the Education Act 1996 interfered with their belief that such punishment was an integral part of education. The House of Lords accepted that Article 2 Protocol 1 was engaged, but found that the interference was justified to protect children from harm. By banning smacking and caning of children, British schools were compliant with Article 2 Protocol 1 and Article 3 (right to freedom from torture, inhumane and degrading treatment) and Article 8.

²² *Belgian Linguistic Case (No. 2)* [1968] 1 EHRR 252.

²³ Department for Education, 2010. *Permanent and Fixed Period Exclusions from School in England 2009/10, Statistical First Release*.

²⁴ Taken from Department of Education, 2010. *Children with Special Educational Needs: An Analysis – 2011*. Department for Education. Available at: <http://www.education.gov.uk/rsgateway/DB/STR/do01032/index.shtml>. Accessed 24/01/2012.

²⁵ *R. (Williamson) v. Secretary of State for Education and Employment* UKHL 15 [2005] 2 AC 246.

Article 3 Protocol 1: Right to free elections

The right to free elections and the right to vote, which are protected by this Protocol, seem commonplace today. Yet less than two centuries ago only a minority of British men could vote, while women were totally disenfranchised. The Representation of the People Act 1832 (the Great Reform Act) significantly extended the right to vote, but only to male householders meeting a property qualification. Between 1838 and 1859, the Chartist movement campaigned for universal male suffrage, which was gradually widened through amendments to the Act in 1867 and 1884. The campaign for votes for women, led by the suffragettes in the early 20th century, culminated in the Representation of the People Act of 1918 which enfranchised women over the age of 30 who met a property qualification. This act also removed the property qualification for men over 21. Universal suffrage for men and women over 21 was achieved in 1928 with the Representation of People (Equal Franchise) Act, and the voting age was lowered to 18 in 1969.

Therefore, by the time the Protocol was drafted in 1952, the UK already provided an adequate system of ‘free elections’. Nevertheless, Article 3 Protocol 1 still has a role to play when individuals or groups are denied the opportunity to exercise their right to vote.

Key issues

1. Exclusion of prisoners from eligibility to vote does not comply with Article 3 Protocol 1

Historically, voting rights were dependent upon the ownership of property. Until 1870, any person convicted of treason or felony forfeited their property rights, which simultaneously excluded them from voting. Persons convicted of and imprisoned for misdemeanours or less serious crimes did not have their property forfeited and were therefore still able to vote, unless they were physically prevented by being in jail on the day of the election. This approach continued until the Forfeiture Act 1870, where people convicted of treason or felonies no longer forfeited their property, but nonetheless lost the right to vote if the duration of their sentence exceeded 12 months. In 1918, the Representation of the People Act extended this disenfranchisement by making all people in custody, prisons or asylums, ineligible to vote for the duration of their incarceration. The Representation of the People Act of 1969 and 1983

barred convicted and detained people from voting during their detention, as well as those unlawfully at large, and this remains in force today.²⁶ Prisoners remanded in custody are not barred from voting.

The UK is not in step on this issue with many of the other countries in the Council of Europe. Of the 37 countries in the Council of Europe who responded to a survey on the matter, 14 have no restrictions on prisoners voting,²⁷ while others only ban some sentenced prisoners. The UK is among a handful of countries that automatically disenfranchise sentenced prisoners,²⁸ who currently number about 73,000 in England and Wales.²⁹

In 2001 the High Court rejected a challenge to the ban brought by John Hirst, a prisoner then serving a sentence for manslaughter.³⁰ Later that year, Mr Hirst lodged an appeal with the European Court of Human Rights. He argued that the ban violated Article 3 Protocol 1 because it served no legitimate purpose, was not linked to the prevention of crime, undermined rehabilitation and civic responsibility, and was disproportionate because of its blanket nature. In March 2004 the Court found in his favour, agreeing that the ban contained in the 1983 Act violated the Protocol.

The government appealed to the Grand Chamber of the European Court of Human Rights, arguing that the judgment had failed to allow Britain a proper degree of discretion over how it dealt with the issue. It said:

‘Convicted prisoners had breached the social contract and so could be regarded as (temporarily) forfeiting the right to take part in the government of the country.’³¹

26 Ministry of Justice, 2009. *Voting Rights of Convicted Prisoners Detained within the United Kingdom*. Pages 46-47. Available at: <http://www.justice.gov.uk/consultations/docs/prisoner-voting-rights.pdf>. Accessed 21/11/2011.

27 Isobel White, 2011. *Prisoners' Voting Rights*. House of Commons Library. Page 45. Available at: <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf>. Accessed 21/11/2011. Of the 47 countries in the Council of Europe, data are only available for 37.

28 Prison Reform Trust, 2010. *Barred from voting: the right to vote for sentenced prisoners*. Pages 6-7. Available at: <http://www.prisonreformtrust.org.uk/uploads/documents/votesbriefingfeb2010.pdf>. Accessed 22/11/2011.

29 There were 87,749 prisoners in England and Wales as at 5 November 2011. Of those 72,637 were sentenced prisoners and denied the right to vote, see G. Berman, 2011. *Prison Population Statistics*, House of Commons Library.

30 *Hirst v. HM Attorney General* [2001] EWHC Admin 239.

31 *Hirst v United Kingdom* (No. 2) [2006] 42 EHRR 41, Application No. 74025/01. Para 33.

Nevertheless, in October 2005 the Grand Chamber upheld the Court's previous ruling, accepting the legitimate aims of the government, but maintaining that the bar was disproportionate.³² It underlined 'that prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty', and described the relevant provision of the 1983 Act as 'a blunt instrument' which:

'strips of their Convention right to vote a significant category of persons and ... does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.'³³

The chamber's 2005 decision in *Hirst v. the United Kingdom* reflects the principle that the human rights guaranteed under the Convention apply to everyone, even unpopular minorities. Offenders may be punished for their crimes with a prison sentence, which means a denial of their right to liberty. Article 5 (the right to liberty and security) of the Convention expressly permits imprisonment for crimes, while holding that such punishment is limited to loss of liberty. Prisoners are otherwise entitled to enjoy all the rights and freedoms that are not necessarily disrupted by imprisonment, including the right to vote. The chamber's judgment recognized that treating the right to vote as a privilege to be removed for bad behaviour is a disproportionate interference with a fundamental right.

³² The Court accepted the legitimate aims pursued by the government of 'preventing crime by sanctioning the conduct of convicted prisoners and also the aim of enhancing civic responsibility and respect for the rule of law, *Hirst* (ibid.). Para 74.

³³ *Hirst v. the United Kingdom* (No. 2) [2006] 42 EHRR 41.

2. Progress by the British government is slow in complying with the European Court of Human Rights judgment

Judgments by the European Court of Human Rights are essentially declaratory in nature, in that the Council of Europe cannot compel states to implement them. However, Article 46 of the Convention obliges states to comply with the judgments³⁴ and the UK would be in breach of its Convention obligations if it ignored the Court's decisions. In the past the UK has consistently complied when judgments have gone against it.³⁵ However, following the chamber's ruling in *Hirst v. the United Kingdom* in October 2005, the government did not announce any immediate change to the law allowing prisoners the right to vote. Instead, in December 2006 it began a two-stage consultation about options for change which concluded in September 2009. Yet so far there has been no formal response from the government.³⁶

In June 2009 the Council of Europe's Committee of Ministers, which oversees the response of states to the court's rulings, 'expressed concern about the significant delay in implementing the action plan and recognised the pressing need to take concrete steps to implement the [Hirst] judgment.'³⁷

In March 2010 the cross-party parliamentary Joint Committee on Human Rights declared its 'overriding disappointment ... at the lack of progress' on this matter and noted that the delay over the consultation 'appears to show a lack of commitment on the part of the Government to propos[e] a solution for Parliament to consider'.³⁸ It noted:

'Where a breach of the Convention is identified, individuals are entitled to an effective remedy by Article 13 ECHR. So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation.'

34 Article 46 of the ECHR obliges states to comply with judgments, 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.'

35 See, for example, the introduction of the Sexual Offences (Amendment) Act 2000 equalising the age of consent for homosexual acts at 16 following *Sutherland v. the United Kingdom* (25186/94); changes to the courts martial system following *Findlay v. the United Kingdom* [1997] 24 EHRR 221; and lifting of the ban on homosexuals in the armed forces following *Smith & Grady v. the United Kingdom* [2000] 29 EHRR 493.

36 Consultation Paper CP6/09 'Voting rights of convicted prisoners detained within the United Kingdom'.

37 Decision of the Deputies: 1059th DH meeting – 5 June 2009 Section 4.2.

38 Joint Committee on Human Rights, 2010. *Enhancing Parliament's role in relation to human rights judgments, 15th Report of 2009-10*. London: House of Commons. Paras 108, 117.

On 20 December 2010, the government announced that it would bring forward legislation to allow offenders sentenced to less than four years in custody the right to vote in elections for parliament and the European parliament, unless the sentencing judge considered this inappropriate. Yet no such legislation has been introduced.

On 10 February 2011, the House of Commons held a non-binding backbench debate on the issue. The motion, which supported the continuation of the current ban, was agreed by a majority of 234 votes to 22,³⁹ indicating that there is still significant cross-party resistance to the *Hirst* judgment.

The European Court of Human Rights has not sought to dictate how the government should change the law in order to achieve compliance with Article 3 Protocol 1. However, in November 2010 it imposed a six month deadline 'to introduce legislative proposals to bring the disputed laws in line with the Convention' following another claim brought by a prisoner for the right to vote.⁴⁰ In March 2011 the government lodged an appeal against this decision, which was dismissed.⁴¹

In September 2011, the government sought again to overturn the Court's findings on prisoner voting, by intervening in a challenge brought against Italy by Scoppola, a convicted murderer.⁴² As a result of the intervention the Court has again extended the deadline for the UK's compliance to six months after the date of the new judgment. The case was heard in November 2011 and the Attorney General attended the hearing, to put the UK's views to the Court. He argued that it should be for parliament to decide the way forward on prisoner voting rights. The judgment is expected some time in 2012.

Subject to the outcome of *Scoppola v. Italy*, the UK is obliged to remedy its legal framework when the Court identifies an incompatibility with the Convention. But the Court does not dictate the form that the remedy takes, leaving that role to parliament. It can change the law in a way that is appropriate to domestic legal traditions, complies with the UK's treaty obligations, and reflects the Court's judgment. As of November 2011, the UK has yet to fulfil this obligation.

³⁹ See *Hansard* HC Debate cols 493–586 (10 February 2011).

⁴⁰ Para 115, *Greens & MT v. the United Kingdom* [2010] ECHR 1826.

⁴¹ The Grand Chamber refused to hear the appeal.

⁴² *Scoppola [No. 3] v. Italy* was heard by the Grand Chamber on 2 November 2011.

Conclusion

Human rights principles are recognised universally as a framework which protects everyone and limits arbitrary action by a state against individuals. The principles also balance the rights of individuals so as to promote tolerance, equality, dignity and respect in a democratic society. Britain ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1951 and incorporated it into domestic law through the Human Rights Act (HRA) in 1998. So for the past 60 years Britain's legal frameworks and institutions of government have gradually incorporated stronger protections for human rights.

This review has assessed public authorities' compliance with the Convention and, on the whole, the picture is very positive and there is plenty to be proud of. Much of what we take for granted as the 'British way of life' – our form of government, our legal system, our institutional structures – is based on human rights principles.

Human rights are part of our everyday life and history

Britain is a democratic society, in which most people have the right to vote and freely elect a government, a right protected in Protocol 1, Article 3. Government allows peaceful public protests reflecting the right to free assembly and association (Article 11). Britain has a vibrant free press and media, and people can express their thoughts and opinions. This fosters public debate and investigations about topical issues – values based on freedom of thought, conscience and religion (Article 9) and the right to freedom of expression (Article 10). We all benefit from having a human rights framework that ensures that government is tolerant of diverse viewpoints and public criticism and is publically accountable and transparent. As individuals we benefit from having these rights to exercise, and from knowing that our laws seek to balance the interests of individuals so we respect the rights of others, even if we disagree with them.

Britain has a strong legal system with clear civil, criminal and public legal codes and judicial processes to ensure that individuals are not arbitrarily deprived of their liberty (Article 5), and have a right to a fair trial (Article 6). We all benefit from living in a society where offenders, no matter how severe their crimes, have the right to a fair and open trial, and if convicted, face punishment, but if wrongly accused, go free. If two parties dispute a civil matter, they also know their cases will be heard impartially and in a reasonable time.

Government operates through laws, but also through institutions, such as hospitals, prisons and young offenders' institutions. The government recognises its obligation not to take life arbitrarily and to safeguard the lives of people in its care (Article 2, the right to life) and that torture and inhuman and degrading treatment are prohibited (Article 3) so our institutions are regulated and inspected, and follow guidelines and codes of practice to prevent arbitrary abuses of power. Britain has numerous independent bodies which subject institutions to scrutiny should something go wrong, and provide an avenue of redress for individuals. These regulatory and inspection services and independent investigatory bodies are meant to ensure that public services meet minimum standards, abuses do not occur and that when abuses or deaths occur they are investigated. They form a valuable part of the infrastructure protecting human rights in Britain.

Most people living in Britain can largely live their lives as they wish, confident that they can create relationships and families without arbitrary interference from government, and their personal privacy is protected under Article 8. People are free to hold any belief and follow their conscience, as long as this does not harm the rights of other people, as protected by Article 9.

Finally, Britain is based on a free labour market, and the vast majority of people do not have to fear slavery or forced labour which are prohibited under Article 4, and know they have the right to join unions to protect their rights through collective action, as protected by Article 11.

The review also shows that the human rights set out by the Convention and incorporated into domestic law through the HRA, reflect and consolidate traditional British common, civil and criminal law. Human rights principles are part of British history, traditions and culture – the things which make Britain unique and distinctive. So, for example, the Magna Carta, drafted in 1215, introduced the concepts of habeas corpus and trial by jury, and the Petition of Right of 1628 restricted the monarch's right to imprison subjects without cause – rights which now lie at the heart of Article 5. The 1701 Act of Settlement set out the right to be heard in front of an impartial judiciary, free from government influence – a right which has been refined by Article 6. The Bill of Rights of 1689 and Treason Act of 1709 prohibited cruel and unusual punishment and torture – rights embodied in Article 3.

Other articles reflect Britain's proud tradition of striving for civil liberty which over time persuaded parliament to introduce new laws to embrace the changes in social attitudes. Our laws have protected free speech by MPs in parliament since 1689 and publication of parliamentary proceedings since 1868. Article 4 prohibiting slavery and forced labour is related to the first laws abolishing the slave trade in Britain and its colonies in the 18th century following decades of public protest and parliamentary lobbying by the abolition movement, a forerunner of our human rights NGOs of today. Article 9 protecting religious freedom is related to 19th century laws which emancipated Catholics and later Jews, and allowed them to take on public office. And the most recent civil liberty movements for the rights of gay men and lesbians, and the rights of transgender people finally saw their battles for equality and dignity enshrined in Article 8 and protected through a raft of domestic legislation over the past 10 years.

Human rights principles are also protected in the way government designs our laws. At a parliamentary level, one of the roles of the Joint Committee on Human Rights (JCHR), a select committee of the House of Commons and the House of Lords, is to scrutinise all new bills for their human rights implications. The JCHR also looks at government action to deal with judgments of the UK courts and the European Court of Human Rights where breaches of human rights have been found. As part of this work, the Committee looks at Remedial Orders, the legislative route that allows the government to correct Acts of Parliament in response to these judgments. These scrutiny roles benefit all people living in the UK who are subject to the laws of the land.

However, this review also appraises evidence which shows that public authorities could be doing more to meet their obligations to implement the protections of human rights in full. The review assessed the compliance of British laws, institutions and institutional processes with each article of the Convention. The review identifies 10 areas where legislation, institutions, policy or services could protect human rights more fully.

1. Health and social care commissioners and service providers do not always understand their human rights obligations and the regulator's approach is not always effective in identifying and preventing human rights abuses

Almost everyone in Britain will use health and social care at some point in their lives, and we have the right to expect we will be treated with dignity and respect. However, the evidence shows that some users of health and social care services, such as older or disabled people, experience poor treatment which is undignified and humiliating. At its most extreme, abusive, cruel and degrading treatment is similar to torture. This is in breach of Article 8 and Article 3 rights.

The reason for this may lie partly with the scope of the HRA and agencies' poor understanding of their HRA responsibilities. People who receive health or social care from private or voluntary sector providers do not have the same guaranteed level of direct protection under the HRA as those receiving it from public bodies. However, their rights may be protected indirectly as the public authorities that commission health and social care services from independent providers have positive obligations to promote and protect the human rights of individual service users. Yet the Commission's recent inquiry into home care showed that many local authorities and primary care trusts have a poor understanding of their positive obligations under the HRA and do not include human rights in

the commissioning criteria around the quality and delivery of care. Frontline staff also do not always make the link between human rights and the care they provide, and their lack of awareness can lead to abuse and neglect of patients.

Our evidence also questions the effectiveness of inspections by the Care Quality Commission (CQC). As the regulator for the health and social care sector, the CQC has a central role in protecting the human rights of disabled and older people in regulated care settings. However its approach has sometimes failed to identify and prevent abuses of human rights. It is currently reviewing its approach in order to strengthen its regulatory model of monitoring and inspecting providers.

An effective complaints system is also an essential element to protect service users against undignified, abusive and inadequate treatment. However some service users do not know how to make complaints, or do not do so, as they fear this will adversely affect their care.

2. The justice system does not always prioritise the best interests of the child. Children will not receive a fair trial if they do not understand the gravity of charges against them or are unable to participate in court procedures. The juvenile secure estate resorts too easily to control and restraint procedures for discipline

As a signatory to the European Convention on Human Rights and the UN Convention on the Rights of the Child (UNCRC) Britain is obliged to ensure that, in the courts of law, the best interests of the child are a priority. The European Court of Human Rights makes clear that a child must understand and participate in court proceedings to have a fair trial. There have been many positive changes in Britain to ensure that young people tried in court understand the gravity and consequences of charges against them, and understand the court process to ensure they participate effectively. However, the review found that children with learning or communication difficulties often do not receive sufficient ‘special measures’, or adaptations to court procedure, to ensure a fair trial. Children who are tried in Crown Courts are also at risk of Article 6 breaches, if insufficient consideration is given to their age and maturity and measures to enable a child to understand and participate are not implemented. The UNCRC has also urged the UK to raise the age of criminal responsibility in England and Wales which is lower than international guidelines to minimise the risks of an unfair trial.

Children detained in young offenders' institutions, secure training centres or secure children's homes are under the full control of the authorities, so the responsibilities of the state are enhanced. However the review found that authorised control and restraint procedures were used extensively, and sometimes for disciplinary purposes (rather than for safety, or when absolutely necessary) and were a means to intentionally cause pain. This risked breaching Article 3's prohibition on inhuman or degrading treatment or punishment. The use of some restraint techniques has led to the deaths of young people in young offenders' institutions in breach of Article 2's obligation on the state to safeguard the lives of people in its care.

3. Police custody and prisons do not always have sufficient safeguards and support when dealing with vulnerable adults

The review examined the treatment of vulnerable adults in police custody, prisons and immigration removal centres. It found that the government risked not complying with its Article 2 obligation to safeguard the lives of those in its care. Some police forces lack safe facilities to look after people who are drunk, intoxicated by drugs or have mental health problems, who are admitted to police custody. Police officers also sometimes fail to identify individuals at risk or to share this information. In some cases this has contributed to deaths in custody.

Some prisons did not meet the mental health needs of prisoners as policies to prevent suicide and self-harm are not consistently implemented, and care plans are poorly co-ordinated. Immigration removal centres can detain people suffering from serious mental illness as long as their condition can be satisfactorily managed within detention. However provision of mental health services is not always adequate given some individuals' high level of need.

Unsafe use of restraint remains a problem across all forms of detention and there have been cases where restraint has led to the death of a prisoner or detainee. Article 2 is violated when deliberate or negligent acts of restraint by police or prison officers, or private contractors, lead to the death of a detainee, and when failings in management, instruction and training combine to produce an unnecessary or excessive use of force because it has not been tailored to minimise the risk to life. Custodial authorities do not appear to share information about restraint and fatalities, with the result that techniques deemed unsafe in one environment may continue to be used in another.

4. Investigations into deaths of people under protection of the state are not always independent, prompt or public, potentially breaching right to life investigative requirements

Britain has a strong investigative framework to meet its Article 2 obligation to investigate deaths and near deaths of children and adults resulting from the use of force by police, prison or other officers. The government regards the inquest system as the principal means for meeting its obligation under Article 2 to investigate deaths in custody and failures by the state to protect lives. Depending on the circumstances of the death, other organisations may also conduct an investigation. The Independent Police Complaints Commission (IPCC) conducts independent investigations of deaths following contact with the police and inquiries into the serious complaints and allegations of police misconduct in England and Wales. The Prisons and Probation Ombudsman (PPO) is responsible for investigating all deaths in prison, probation service approved premises, secure training centres, young offenders' institutes, and of immigration detainees.

To be effective, investigations should be independent, open to public scrutiny and involve the family of the deceased. However, the review found that Britain's investigative frameworks did not always meet these requirements. Inquests are not as effective as they could be as lengthy delays diminish the relevance of any learning, and also mean that investigations may not be completed promptly enough to satisfy Article 2 requirements. The PPO is not formally independent of government and this could lead to a challenge of its compliance with Article 2. The review suggested that investigative powers were not sufficiently far-reaching. For example, the IPCC has limited authority to investigate deaths of people which occur in the custody of private contractors who carry out 'police-like' functions.

When a child or young person dies in the youth justice system the obligation to carry out an Article 2 compliant investigation is mainly met through the inquest procedure. The PPO has responsibility for investigating the death of a young person in a young offenders' institution or secure training centre, but not in secure children's homes. Ofsted and local safeguarding children boards are obliged to carry out a review following any unexpected death of a child or young person in a secure children's home. Such a review does not meet Article 2 requirements as it does not establish the cause of death, involve the family, is not carried out in public and is not institutionally independent.

There is no single person or agency automatically responsible for investigating deaths of patients in mental health settings. To meet Article 2 requirements, an inquest may need information that is obtained from an independent investigation immediately after the death. Investigations by strategic health authorities may not meet this requirement and the coronial system is not sufficiently responsive or properly resourced to undertake effective investigations. The Article 2 safeguarding duty should also cover mental health patients who are not formally detained.

5. Providing a system of legal aid is a significant part of how Britain meets its obligations to protect the right to a free trial and the right to liberty and security. Changes to legal aid provision run the risk of weakening this

Article 6 of the European Convention on Human Rights includes the provision that anyone charged with a criminal offence should be given free legal assistance if they do not have sufficient means to pay for it themselves, when this is required in the interests of justice. This aims to ensure that defendants have a fair trial, even if they do not have the financial means to defend themselves. For civil cases, the right to a fair hearing may require the state to provide legal aid for complex matters or where someone would have difficulty representing themselves. The Legal Services Commission provides means-tested funding for advice and representation. However, the current ‘fixed fees’ system – a standard payment regardless of time taken for social welfare cases – creates incentives for lawyers and advisers to choose more straightforward cases. This means that people with complicated or unusual cases may be less likely to receive high quality advice.

Access to legal advice and assistance is a particular difficulty for immigration detainees. Under Article 5, anyone deprived of their liberty must have the opportunity to challenge their detention. For most immigration detainees, an application for release on bail is the simplest way to seek their release. Most people held in immigration detention rely on legal aid to access a lawyer. However, some detainees find it difficult to find an available legal representative offering quality advice.

Proposed changes to legal aid could limit many people’s access to legal advice and services in areas of civil law and for criminal cases. This means that some people, if forced to represent themselves, may not have access to a fair trial. The impacts of these changes will need to be assessed and tracked.

6. The legislative and regulatory framework does not offer sufficient protection of the right to a private life and for balancing the right to a private life with other rights

The HRA introduced a free standing right to privacy into UK law and increased protection for the right to private and family life and obligations on the state to protect and promote Article 8. However, the two key statutes, the Data Protection Act 1998 (DPA) and the Regulation of Investigatory Powers Act 2000 (RIPA) provide patchy protection. Definitions of ‘personal data’ which are central to DPA are not clear; and RIPA has not responded effectively to technological changes which enable more extensive surveillance of individuals.

Regulatory safeguards to protect against breaches of the right to private life are also not effective. The Information Commissioner’s Office does not have adequate resources to carry out its functions effectively and there is insufficient independent judicial oversight of RIPA and surveillance regulations.

The current Leveson Inquiry into media standards and surveillance has made the balance between individual’s rights to a private life and freedom of expression in the media an issue for public debate. Article 8 rights to a private life are not always adequately protected against press intrusion by injunctions and improper reporting of criminal investigations by the media may prejudice the right to a fair trial. The Press Complaints Commission has faced extensive criticism following its failure to investigate the phone hacking scandal effectively, and its future regulatory role is under scrutiny.

There are also problems with libel and defamation law which individuals may use to protect their reputations. The legal defences available to journalists, commentators and other defendants in defamation cases are complex and hard to use, and this may create a ‘chilling effect’ and encourage self-censorship. The internet makes publication instantaneous and harder to control. Personal information and false allegations can be circulated very quickly. Our evidence shows that libel laws are out of date and do not address issues arising from publication on the internet, and injunctions can also be difficult to enforce. The proposed changes in the Defamation Bill will need to be monitored to assess that people who are defamed can take action to protect their reputation where appropriate, without impeding free speech unjustifiably.

The high legal costs in cases related to privacy and freedom of expression make it difficult for individuals to protect themselves and may also have a ‘chilling

effect' on freedom of expression. The proposed abolition of conditional fee agreements will undermine access to justice for claimants and defendants of limited means, potentially breaching Articles 8 and 10.

Police rely on information and intelligence to plan for large scale protest events and to identify the potential for disorder or violence. Inappropriate and disproportionate use of surveillance of protestors who have not committed any criminal offence can violate their right to a private life.

7. The human rights of some groups are not always fully protected

Human rights are universal and apply to everyone. However, the review showed that some groups which are socially marginalised or particularly vulnerable do not enjoy full protection of their rights.

The review looked at how local authorities, police or social services had sometimes failed to fulfil their positive obligation to intervene in cases of serious ill-treatment of children, disabled people, and women at risk of domestic violence. Police sometimes failed to take seriously allegations of repeated violence that were so severe the allegations reached the threshold for inhuman and degrading treatment under Article 3. Local agencies sometimes failed to work together effectively, and in some cases this had led to the death of a child or disabled person.

The review looked at how ethnic minority groups were more likely to be subject to stop and search and counter-terrorism legislation, undermining their Article 5 rights to liberty and security. They are also more likely to have their details recorded on the National DNA Database, which interfered with their Article 8 rights to privacy. These incursions on Article 5 and 8 rights affected everyone, but ethnic minority groups were disproportionately affected compared to their population size. This discrimination also engaged their Article 14 rights, which prohibit discrimination in the enjoyment of the rights contained in the Convention.

The right to a home protected by Article 8 is something we take for granted, but the review found that the rights of Gypsies and Travellers were sometimes overlooked. Gypsy and Traveller communities face a shortage of caravan sites as some local authorities have failed to invest in site development. The lack of sufficient sites means it is difficult for Gypsies and Travellers to practice their traditional way of life.

The right to respect for a private life also protects our right to develop our personalities and relationships with others. Individuals who are transsexual and whose gender identity does not match their birth gender are not protected by current laws around marriage and civil partnership. The dual system of civil partnership for same sex couples and marriage for different sex couples means married transgender people are forced to choose between ending their marriage and having their acquired gender officially recognised by law. The review finds that the current options either to end the marriage and enter into a civil partnership, or remain in a marriage but not be recognised in one's acquired gender, means that transgender people cannot enjoy their right to a private identity and personal relationships, such as marriage.

Britain has a positive record in developing the legal and administrative infrastructure to monitor, investigate and prosecute instances of slavery, servitude, forced labour and trafficking, however the protective mechanisms may not work as well as intended. Our evidence shows that victims of trafficking may be criminalised or sent to immigration detention centres. In some cases trafficked children have been sent to adult prisons when charged with offences, or incorrect age assessments have meant they have not been offered the support and protection due to every child.

Our evidence also suggests that measures to curb the activities of gangmasters are not adequate to protect migrant workers, and proposed changes to the visa requirements for migrant domestic workers may lead to Article 4 breaches. The number of prosecutions and convictions for slavery, trafficking and forced labour are low.

8. Counter-terrorism and public order legislation designed to protect everyone can risk undermining several human rights

Since the 9/11 attacks, governments around the world have needed to take additional measures to protect their citizens from the threat of terrorism. While it is crucial for government to protect public safety, it has to balance this with its obligations to protect the rights of all individuals. The review identified problems with the interpretation and implementation of counter-terrorism legislation domestically, and with Britain's international counter-terrorism activities.

The review is critical of the impact of counter-terrorism legislation on legitimate expression of political views and gatherings. It found that the definition of terrorism is still too broad and criminalises lawful protests and political expression, as well as the terrorist acts which parliament intended.

Stop and search powers under the Terrorism Act 2000 have been widely criticised by the JCHR and human rights organisations for risking breaches to Articles 5, 8 and 14. Stop and search without reasonable suspicion may sometimes be necessary to prevent an immediate act of terrorism, or to search for perpetrators or weapons following a serious incident. But police have used stop and search powers against peaceful protestors and disproportionately against black and Asian people. The European Court of Human Rights has found the powers to stop and search under sections 44-47 of the Terrorism Act 2000 powers to be unlawful. The Protection of Freedoms Bill proposes changes to stop and search powers and it will be important these create a regime which respects human rights.

The review also finds problems with counter-terror measures against individuals suspected of terrorist offences. Over the past decade governments have tried to increase the maximum period for pre-charge detention with judicial authorisation for suspected terrorism-related offences. The current 14 day detention period is considerably less than the government's 2008 proposal for 42 days, but considerably longer than the four days permitted for individuals charged with a criminal offence. Extended periods of pre-charge detention risk breaching Article 5, the right to security and liberty, as people who have not been charged with an offence should not be deprived of their liberty for an excessive length of time. The UN Human Rights Committee and UN Human Rights Council have recommended strict time limits for pre-charge detention and that any terrorist suspect arrested should be promptly informed of any charge against him or her and tried in court within a reasonable time, or released.

Control orders and Terrorism Prevention and Investigation Measures (TPIMs) are another controversial area of counter-terror legislation which allow the Secretary of State to impose strict conditions on a terrorist suspect's movements and social contacts. Control orders were intended to be used against the small number of people whom the government believed to represent a threat to the security of the country, but for whom it had insufficient evidence to prosecute. These restrictions on liberty were based on reasonable suspicion of what a person might do, rather than as punishment following conviction for a criminal offence, and so take place outside the usual criminal law process. The UN Human Rights Committee and JCHR were critical of control orders that restrict the liberty of an individual who has not been charged with a criminal offence and the orders have been successfully challenged in the domestic and European courts in relation to Articles 5 and 8, the rights to liberty and security and to a private and family life. Courts have also found that the process by which control orders are granted, which involves the use of closed material, breaches Article 6, the right to a fair trial.

TPIMs replaced control orders, but still allow significant restrictions to be placed on people who are reasonably believed to be involved in terrorism-related activities, but have not been convicted of any offence. The government has stated that these will meet human rights obligations. However, the JCHR is critical of TPIMs and their compliance with human rights. The Commission believes the TPIM approach lacks important safeguards to protect human rights and may still fail to comply with the rights to liberty and security and the right to a fair trial, as well as Article 8 and 14 rights.

‘Closed material procedures’ have been introduced to deal with cases involving the use of sensitive material which the government fears cannot be made public without damaging national security. This means that some evidence is heard in secret; neither the person involved in the proceedings nor their representatives are told what it is. Instead, a ‘special advocate’ – appointed by the Attorney General – examines the closed material and represents the interests of the person affected in closed sessions. Any communication between the special advocate and the person whose interests they represent is prohibited without the permission of the court and the government. This means that a case may be decided against someone without that person ever finding out the reasons why. The use of closed material is expanding and is now used across tribunals, civil and criminal courts – and the government is proposing to expand it further. The closed material procedures risks breaching Article 6, the right to a fair trial.

Britain has an extensive legal framework regulating public protest. However the public order legislation is complex and very broad. Police sometimes do not understand their powers and duties and do not always strike the appropriate balance between the rights of different groups involved in peaceful protest. Protests in and around parliament are subject to overly restrictive authorisation rules. Managing modern protest can be difficult and challenging, with the police required to engage directly with protesters in fast-moving and volatile situations which may be provocative, intimidating and sometimes violent. On occasion, the police use force to manage a protest, or to prevent harm to people or damage to property. Criminal and common law require the use of force to be reasonable. Excessive force is unlawful and may violate Articles 2, 3 and 8. However there is no common view among police forces about the meaning of reasonable force and the police do not always use the minimum level of force when policing protests.

The use of surveillance, the infiltration of peaceful protest organisations, pre-emptive arrest or detention of individuals and the use of civil injunctions against protestors by private companies undermines the right to freedom of peaceful assembly and association with others.

9. Allegations of involvement and complicity in torture in overseas territories, and the government's failure so far to carry out an independent inquiry into these allegations, risk breaching Article 3

The government has stated that it condemns the use of torture and inhuman and degrading treatment, in support of Article 3. However, there are allegations that UK security and intelligence officers were complicit in the ill-treatment of prisoners and civilians in counter-terrorism operations overseas in the aftermath of the 9/11 attacks. There have also been allegations that British military personnel have been involved in the torture and ill-treatment of civilians and detainees in Iraq. Cases have been reported by non-governmental organisations, the UN and British domestic bodies like the JCHR, and some cases have been considered in court. The government denies that there is evidence of security service personnel torturing anyone or being complicit in torture.

Following these allegations, the British government published guidance setting out the approach that British intelligence officers should take when obtaining information from individuals detained overseas. Britain's laws and policy prohibit hooding at all times. However the guidance condoned hooding in very specific circumstances. A recent claim brought against the government was successful, and the guidance has been amended to reflect this.

When serious allegations of ill-treatment are made, the state has an obligation to undertake an effective investigation. However the Commission finds that the allegations of involvement of British military personnel in the torture and ill-treatment of civilians and detainees in Iraq have not been investigated thoroughly enough to meet Article 3 obligations. The Court of Appeal has found that the investigation set up by the government does not meet the requirements of an Article 3 investigation.

10. Immigration procedures can favour administrative convenience over safeguarding individuals' rights to liberty and security. Periods in detention can be unlawful if release or removal is not imminent

Immigration policy regulates the flow of people into Britain and determines who has the legal right to stay and work here and who cannot. Asylum seekers, that is, those who are at risk of persecution in their own countries, have the right to request asylum. Many applicants are assigned to the detained fast track

procedure, and detained in an immigration removal centre while their claim is assessed. An asylum applicant can appeal against an unsuccessful decision, and when this is exhausted, will remain in detention until they are removed from the country.

The UN High Commissioner of Refugees (UNHCR) has criticised Britain's use of fast track detention for asylum applicants for administrative convenience rather than last resort, and the lack of adequate safeguards to guarantee fairness of procedure and quality decision making. The length of time in detention for those who have committed no crime risks breaching the right to liberty and security under Article 5.

Immigrants may be detained for long periods without any realistic prospect of removal, breaching their right to liberty. Detention can also have a detrimental impact on a detainee's mental and physical health that may engage the obligation to safeguard vulnerable individuals under Article 2, the prohibition on inhuman and degrading treatment under Article 3, and the right to psychological integrity as an aspect of the right to a private life under Article 8. The government does not always follow its own procedures around assessing and removing people who are particularly vulnerable, such as survivors of torture and people with serious mental illness which risks breaching Article 5 for unlawful detention. Voluntary sector organisations and the UNHCR have criticised the fast track procedure for not having sufficient safeguards in place to prevent vulnerable individuals entering the fast track process.

Article 2 obliges authorities to take reasonable measures to avert risk of self-harm and suicide. Measures in immigration removal centres (IRCs) are based on those in prisons but IRCs do not have access to similar mental health services, and health care staff lack expertise in trauma associated with torture. This inadequate approach means that IRCs may not meet their Article 2 obligation in preventing suicide and self-harm.

The review also showed that despite the government's agreement to end the detention of children for immigration, children and families may still be detained for up to a week pending deportation. Children who enter the country as unaccompanied migrants, and those whose age is disputed may also be detained. The UN Convention on the Rights of the Child provides that detention should only be used as a last resort and for a short time, and the welfare of the child should be given primacy.

The future of human rights in Britain

This review has demonstrated the positive contribution human rights has made to our legal system and institutions. Modern human rights principles are linked to our traditional common, civil and criminal law and are part of British history and traditions. We have a strong institutional structure supporting our human rights obligations. The problems the review identifies show that in certain areas changes to the law, institutional processes or the way services are delivered are required to ensure public authorities fully meet human rights standards.

Over the next year, the Commission on a Bill of Rights will deliberate over the future of the HRA. It is to be hoped that it will take into account the valuable contribution the European Convention on Human Rights and the Human Rights Act has made to the workings of government in Britain and the ability of citizens to protect their rights. We believe the HRA is essential for the protection of human rights and is well crafted to balance Britain's international obligations with our constitutional conventions.



Appendix: Contributions

Throughout the development of the Human Rights Review, many individuals and organisations helped with exploring the issues and evidence that was compiled, and we are very grateful for these contributions. While the Human Rights Review has greatly benefitted from these insights and inputs, ultimately the content of this report is entirely the responsibility of the Equality and Human Rights Commission.

Regional and national roundtables

Through May to July 2011 we held several roundtable events, inviting participants to discuss the Human Rights Review and contribute their own evidence and analysis towards our report. These roundtables were held across England and Wales, and looked to focus on some of the key themes emerging from our initial analysis, such as social and older care, children and young people, immigration and asylum, criminal justice, and targeted violence. For contributing their time and expertise, we are grateful to colleagues below:

Kate Adams (Kent Refugee Help)
Caroline Airs (Crown Prosecution Service)
Lorraine Atkinson (Howard League for Penal Reform)
Jackie Ballard (Action on Hearing Loss)
Peter Bates (Merseyside Disability Federation)
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Mary Bradley (Age UK West Cumbria)
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Pip Cotterill (Manchester City Council)
Mary Coussey (Independent Monitoring Board, Yarls Wood IRC)
Tom Cunningham (Anti-Bullying Alliance)
Neil Denton (ARCH)
Anne Dickinson (Haslar Visitors Group)
Sharon Dixon (LGBT Federation)
John Drew (Youth Justice Board)
Lesley Duggan (Lesbian & Bisexual Women's Network)
Lyndsey Dyer (Mersey Care NHS Trust)
Nic Eadie (Gatwick Detainees Welfare Group)
Louise Falshaw (Her Majesty's Inspectorate of Prisons)
Craig Ford (Northumbria Police)
Lorraine Gradwell (Breakthrough UK)
Ray Gridley (Age Concern Manchester)
Stephen Gummer (Howard League for Penal Reform)
Mark Hall (Cleveland Police)
Nicky Harkin (Safer Middlesbrough Partnership)

Toby Harris (Independent Advisory Panel on Deaths in Custody)
Poppy Harrison (Youth Justice Board)
Chris Hatton (Centre for Disability Research, Lancaster University)
Ross Hendry (Office for Children's Commissioner for England)
Catherine Hodder (Children's Rights Alliance England)
Tim Holmes (Darlington NHS Trust)
Mary Hull (LGBT Domestic Violence Project)
Matt Leng (Ministerial Council on Deaths in Custody)
Juliet Lyon (Prison Reform Trust)
Bill MacKeith (Campaign to Close Campsfield)
Valeska Matziol (Manchester LINK)
Ikeni Mbako-Allison (Radar)
Heather Anne McGlade (Hart Gables)
Jamie McKenna (North Tyneside IAG)
Geoff Monaghan (Children's Rights Alliance for England)
Michael Moor (Independent Monitoring Board, Harmondsworth IRC)
Steve Morris (Age UK Wirral)
Rebecca Nadin (Prison Reform Trust)
Janet Owen (MESMAC)
Emma Roebuck (Gay Advice Darlington & Durham)
Rob Ryan (Northumbria Police)
Christina Sarb (Scope)
Margaret Shannon (Warrington MBC)
Conrad Simpson (Durham Constabulary)
Enver Solomon (Children's Society)
Nigel Thompson (Care Quality Commission)
Adeline Trude (Bail for Immigration Detainees)
David Walden (Social Care Institute for Excellence)
Fiona Walker (Inclusion North)
Holly Warren (Save the Children)

Additional contributions

In conjunction with the roundtable sessions, the following colleagues also contributed towards the development of the Human Rights Review (on a personal or organisational level). Their analysis and input, as well as further oversight during the drafting process, was immensely helpful:

Caroline Airs (Crown Prosecution Service)
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 Anqa Butt (Freedom from Torture)
 Sarah Campbell (Bail for Immigration Detainees)
 Neil Cobb (Durham Law School, Durham University)
 Nicolas Cooper (All Parliamentary Group on Extraordinary Rendition)
 Mick Conboy (Crown Prosecution Service)
 Steve Corkerton (Her Majesty's Inspectorate of Constabulary)
 Mary Coussey (Independent Monitoring Board, Yarls Wood IRC)
 Anne Dickinson (Haslar Visitors Group)
 John Drew (Youth Justice Board)
 Holly Dustin (End Violence Against Women Coalition)
 Lyndsey Dyer (Mersey Health Care Trust)
 Anna Edmundson (INQUEST)
 Louise Falshaw (Her Majesty's Inspectorate of Prisons)
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Michael Moor (Independent Monitoring Board, Harmondsworth IRC)
Jenny Moss (Kalayaan)
Rebecca Nadin (Prison Reform Trust)
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Laura Paton (Her Majesty's Inspectorate of Prisons)
Julian Petley (Campaign for Press and Broadcasting Freedom)
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Ilona Pinter (Children's Society)
Helen Shaw (INQUEST)
Jenny Talbot (Prison Reform Trust)
Lucy Thorpe (National Society for the Prevention of Cruelty to Children)
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Natasha Tsangarides (Medical Justice)
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Jane Webb (Prisons and Probations Ombudsman)
Helen Wildbore (London School of Economics)
Carolyne Williw (Children's Rights Alliance England)

Case studies

Throughout the report we have used case studies to illustrate the importance of human rights in people's day-to-day lives. We would like to thank the following people for sharing their experiences, and those of the organisations they work for, and for bringing these issues to life:

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Ian MacDonald (Liberty)
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