Key Human Rights Act Cases in the Last Twelve Months

a presentation by

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Introduction

1. The HRA has been in force for nearly 5 years and its basic principles are now well known and understood. Nevertheless, new and important decisions continue apace.

2. It is difficult to discern any major themes in the cases over the last 12 months. The provisions of the Act have been subject to close analysis by the English courts which have added many refinements to the rather broad brush strokes of the ECtHR. The HRA has secured its purpose of encouraging the development of a domestic human rights jurisprudence which reflects our institutional and legal culture. The enthusiastic predictions by some commentators about the impact of the HRA shortly after its enactment have not been realised. But the HRA can now be seen to be adding important value in the recent cases.

3. I should also mention the areas not canvassed in this paper. I have not discussed Article 5 cases - not because they are not significant but because decisions in this field are of limited interest except to specialist practitioners. More critically, I have not considered any decisions of the ECtHR.

Statutory construction under s 3 of the HRA

4. Statutory interpretation under the HRA is a critical means by which the Act gives effect to Convention rights. Section 3 of the Act provides:

   ‘So far as possible to do so, primary legislation and secondary legislation should be read and given effect in a way which is compatible with Convention rights.’

   If such a construction is not possible, then the court has the power to grant a declaration of incompatibility under section 4.

5. The nature of the s 3 interpretative obligation has been vigorously debated. Some have argued that a s 3 interpretation is a radically different exercise from engaging conventional construction1 whereas others suggest it should only be applied to ambiguous statutory provisions and be carefully tailored to the textual language of the statutory provision being examined.2

6. Where a court is asked to construe legislation in accordance with section 3, it should proceed as follows:

   • It is necessary to identify with precision the particular statutory provision which is said to contravene Convention rights.3

   • The court should next ascertain whether, absent section 3, there is any breach of Convention rights.4

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1 I take the view that the radical implications of s 3 are not sometimes appreciated: see R Clayton ‘The limits of what’s possible: statutory interpretation under the Human Rights Act’ [2002] EHRLR 559.


3 See R v A (No 2) [2002] 1 AC 45 per Lord Hope at 1582, 1583 para 110 and in R v Lambert [2002] AC 545 at 234 para 80; see also In Re S (Care Order: Implementation of Care Plan) ibid [2002] 2 AC 291 per Lord Nicholls at para 41.

• When the court comes to apply section 3, the touchstone is compatibility with Convention right
• The principal focus is to identify possible meanings to be given to the legislation in question.
• The court can interpret legislation under section 3 by “reading in” Convention rights (by implying words in a statute). For example, in R v Offen\(^5\) the Court of Appeal interpreted section 2 of the Criminal (Sentences) Act\(^6\) to take a broad view of the meaning of “exceptional circumstances” in making the power to impose a life sentence following a conviction for a second serious offence compatible with the prohibition from inhuman and degrading treatment.
• The court can also interpret legislation by “reading down” (by applying a narrow interpretation in order to ensure that the legislation remains valid). Thus, the House of Lords in R v Lambert\(^7\) construed a reverse onus provision in the Misuse of Drugs Act as imposing the evidential burden on the defendant.
• It is not possible under section 3 to interpret legislation compatibly if the construction conflicts with its express words. Thus, in R(Anderson) v Secretary of State for the Home Department\(^8\) the House of Lords refused to give a s 3 interpretation which would override an express power on the Home Secretary to release a prisoner;\(^9\) Lord Bingham said that to do so would not be judicial interpretation but judicial vandalism.
• It is also not possible under section 3 to interpret legislation compatibly if it conflicts with a statute by necessary implication. Thus, in In Re S (Care Order: Implementation of Care Plan)\(^10\) the House of Lords examined the reinterpretation of the Children Act given by the Court of Appeal,\(^11\) purportedly under section 3 of the Human Rights Act. The Court of Appeal had formulated a new procedure, requiring the local authority to notify the child’s guardian if a child failed to achieve a starred milestone within a reasonable time; and entitling the local authority or guardian to apply to the court for directions once it did so. Lord Nicholls\(^12\) emphasised that where a court is being asked to give a meaning which is substantially different from an Act of Parliament, it is likely to have crossed the boundary line between interpretation and amendment. The Children Act had been reinterpreted contrary to one of its cardinal principles, that the courts had no power to intervene in the way local authorities carried out their responsibilities to children under care orders. The Court of Appeal had therefore attempted to

\(^5\) Above
\(^7\) Above
\(^8\) [2003] 1 AC 837.
\(^10\) Above
\(^11\) (2001) 2 FLR 582.
\(^12\) Above at 731 para 40.
construe section 3 beyond the implied limitations of the statutory scheme created by the Children Act.

- It is not possible to interpret a statutory provision so as fundamentally to alter the statutory scheme. Therefore, in *International Transport Roth v Secretary of State for the Home Department* the court could not use s 3 to recreate a fixed penalty scheme so as to make it compatible with Article 6. As Simon Brown LJ observed, such a construction would be turning the legislative scheme inside out- something the court could not do. Similarly, in *Bellinger v Bellinger* recognition of a transsexual as a female for the purpose of marriage had very wide ramifications, raising issues not well suited for determination by court processes.

7. In *Ghaidan v Godin-Mendoza* the House of Lords significantly clarified the force to be given when construing legislation under s 3. Lord Nicholls emphasised that s 3 has an unusual and far-reaching character; it may require the court to depart from the unambiguous meaning that legislation would otherwise bear. He said that the intention of Parliament in enacting s 3 was, to the extent bounded only by what is ‘possible’, a court can modify the meaning and hence the effect of primary and secondary legislation.

8. Lord Steyn in *Ghaidan* looked at the use of declarations of incompatibility in practice compared to s 3 interpretations; in an Appendix to his opinion he showed that 10 declarations of incompatibility made by the courts, 5 other declarations overturned in an appeal and only 10 s 3 interpretation. He pointed out that s 3 is the principal remedial measure and that declarations were a measure of last resort so that the statistics showed that the law may have taken a wrong turn. Lord Steyn focused on two factors which are contributing to a misunderstanding of the Act. First, there is a constant refrain that judicial reading down or reading in flouts the will of Parliament as expressed in the statute under examination. But, as he observed, that question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the HRA. Secondly, Lord Steyn said there has been an excessive concentration on the linguistic features of the particular statute. He rejected a literalistic approach, emphasising a broad approach, concentrating amongst other things, in a purposive way on the importance of the fundamental right involved. Lord Steyn then drew attention to the European Community *Marleasing* analogy and the strength of the interpretative obligation under EEC law. He concluded by stressing that interpretation under s 3 is the prime remedial remedy and that resort to s

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14 Ibid, para 66.
17 Ibid, para 30.
18 Ibid, para 33.
19 Ibid, para 39.
20 Ibid, para 41.
21 Ibid, para 42.
22 Ibid, para 45.
4 must be exceptional. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.  

9. Lord Roger expressed similar views. He said that it was important to notice that s 3 required legislation to be ‘read’ and ‘given effect’ to Convention rights: creating two distinct but complementary obligations. He too stressed that it was not the intention of those drafting s 3 to place those asserting Convention rights at the mercy of the linguistic choice of the individual who drafted the statutory provision; it required s 3 interpretation to concentrate on matters of substance, not matters of mere language.

The meaning of public authorities

10. The second way in which the HRA gives effect to Convention rights is by imposing an obligation on public authorities not to act incompatibly with Convention rights. The scope of the HRA is therefore crucially dependant on the meaning to be given to the phrase ‘public authority’. Under s 6(1) of the HRA a public authority must not act incompatibly with Convention rights.

11. Section 6 contemplates two types of public authorities:
   - standard (or pure or core) authorities; and
   - functional or hybrid authorities.

12. The case law concerning the meaning of public authorities is opaque and very disappointing although there have now been a number of decisions which have addressed the issues raised by s 6.

13. It is important in order to understand the development of the relevant principles to go back to the early cases decided under the Act. It was accepted from the outset that the definition of who should be a public authority and what is a public function for the purposes of section 6 should be given a generous interpretation.

14. However, the fact that a body performed an activity which otherwise a public body would be under a duty to perform did not mean that such performance was necessarily a public function. In first and probably still most important authority, *Poplar Housing v Donoghue*, the Defendant had been granted a tenancy of a property by the London Borough of Tower Hamlets pending a decision as to whether she was intentionally homeless. The property had subsequently been transferred to the Claimant housing association. Following a determination by the council that the Defendant was intentionally homeless, the association issued a summons for possession under section 21(4) of the Housing Act 1996. The Defendant alleged that this amounted to a breach of Article 8. The Court of Appeal held that in all the circumstances of this “borderline” case the housing association was so closely assimilated with the council that it was performing public and not private functions.

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25 Ibid, para 50.
26 Above para 107.
27 Above, paras 123, 124.
29 Ibid para 66.
15. In *R (Heather) v Leonard Cheshire Foundation*[^31] the Court of Appeal, considered whether the defendant care provider constituted a “public authority” under section 6. Under the National Assistance Act 1948, a local authority engaged the Defendant to provide residential accommodation to the Claimants to meet its statutory obligation. The Claimants argued that the defendant’s decision to close the home was contrary to Article 8. Lord Woolf CJ held that, “on the approach adopted in *Donoghue*,” the defendant was not performing a public function. The local authority was contracting out to a voluntary service provider which had no statutory powers of its own; and, with the exception of the source of funding, there was no material distinction between the nature of the services provided by the Defendant to residents funded by a local authority and those provided to residents funded privately. The Defendant was not “standing in the shoes of the local authorities” The Court in *Heather* observed that the result of its ruling was that the defendant, was not subject to challenge under the HRA 1998, even though the local authority would have been if it had been responsible for making the same decision. The claimants’ submission that this circumstance militated in favour of a finding that the function was public was, however, dismissed as circular, the Court choosing to emphasise, as it had done in *Donoghue* (at para 60), the continuing obligation of the local authority to the individual(s) concerned under the Convention in respect of that function, regardless of the delegation of its performance.

16. By contrast, the managers of a private psychiatric hospital which was registered both as a mental nursing home under the Registered Homes Act 1984, and to receive patients liable to be detained under the Mental Health Act 1983, were held to be a public authority in *R (A) v Partnerships in Care*[^32]. The claimant challenged the decision by the managers to cease the treatment of personality disorders in one of its wards. In support of that ruling, Keith J remarked that under the 1983 and 1984 Acts, the managers were a body “upon whom important statutory functions are devolved”[^33] and that, by virtue of regulations made under the 1984 Act, “the statutory duty… to provide adequate professional staff and adequate treatment facilities was cast directly on the hospital”[^34].

17. In *Aston Cantlow v Wallbank*[^35] the House of Lords decided that a parochial church council (PCC) was not a standard or “core” public authority for purposes of s. 6(1) of the HRA. The House of Lords held that a core public authority exercised functions which were broadly governmental if they were all functions of a public nature. Lord Nicholls identified the authorities which are governmental in a broad sense; they include government departments, local authority, the police and other bodies whose nature is governmental factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest and a statutory constitution.[^36] Although the Church of England, as the established church, had special links with central government and performed certain

[^31]: [2002] 2 All ER 936
[^33]: para 17
[^34]: para 24
[^36]: Ibid, paras 6 to 8.
public functions, it was essentially a religious organisation and not a governmental organisation. PCCs were part of the means by which the Church promoted its religious mission and discharged financial responsibilities for parish churches. The functions of PCCs were therefore primarily concerned with pastoral and administrative matters within the parish and were not wholly of a public nature. Consequently, PCCs were not core public authorities under section 6(1)

18. In making that holding Lords Nicholls, Hope and Hobhouse relied on the ‘victim’ test under s 7(1) HRA. They considered that, since PCCs should be able to bring complaints under the HRA, PCCs must be able to be ‘victims’ under the Act. As a result PCC must be treated as ‘non-governmental organisations’ and could not then be “core” public authorities.

19. Lord Nichols also analysed how to define a hybrid public authority. He indicated that there was no universal test to determining whether a public body carried out a public function and should be regarded as a functional authority; but that relevant factors included whether the body is publicly funded or exercising statutory powers, is taking the place of central or local government or is providing a public service. Lord Hope expressed the view that the case law on judicial review may not provide much assistance as to functions of a public nature because they have not been decided for the purposes of identifying the liability of the state in international law, nor were the principles used to identify emanations of the state in European Community law.

20. The majority of the House of Lords concluded that a PCC was a functional authority; but went on to decide that the PCC’s enforcement of the Respondent’s archaic liability to repair the church’s chancel was a private and not a public act. Consequently, the act in question was outside the scope of the HRA.

21. In Hampshire CC v Beer the claimant challenged a refusal to grant him a stall holder’s licence in a farmer’s market from a non profit making company which had been previously managed by the local authority. The Court of Appeal decided that the Aston Canlow case had not overruled the Donoghue and Leonard Cheshire case; and decided that since the non profit making company exercised public functions so as to be amenable to judicial review, it was also a public authority under the HRA.

22. In R(West) v Lloyds the Court of Appeal held that Lloyds was not a public authority. They considered the fact that Lloyds regulated its’ members activities did not make it a governmental organisation. If the state was failing to protect investors, then it was the FSA which was answerable not Lloyds. The Court of Appeal identified various different principles to be derived from the bases; but failed to indicate how these principles should be prioritised or applied.

23. The approach taken by the courts to public authorities to date therefore has not been satisfactory. The report by the Joint Parliamentary Committee on Human Rights on the Meaning of Public Authority on the Human Rights Act was very critical of the way the case law developed. The Joint Committee took the view that as a result of

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37 Ibid, paras 10 to 12; and see Lord Hope at para 59.
38 Ibid, para 52.
39 Ibid, para 54
40 [2004] 1 WLR 233.
41 [2004] EWCA Civ 506.
43 Published on 3rd March 2004.
the combined effects of a restrictive judicial interpretation of one particular subsection of the Act on the one hand, and the changing nature of private and voluntary sector involvement in public services on the other, a central provision of the Act has been compromised in a way which reduces the protection it was intended to give to people at some of the most vulnerable moments in their lives. The Joint Committee recommended:

- amending the HRA to mark clear that a range of organisations or functions involved in the delivery of key services were covered by the Act;
- formulating contractual terms which could protect human rights (as suggested by Leonard Cheshire); and
- suggested that authoritative guidance be drafted.

However, the Joint Committee that it would be open to the House of Lords to rectify the deficiencies in the case law by reinterpreting the s 6 in the future.

24. In fact, it is very difficult to distil any bright light principles which could illuminate a fundamental issue of principle under the HRA. For example, whether or not any housing particular housing association (registered social landlord) is subject to the HRA requires a close analysis of the facts; and will be fiercely debated. The lack of clarity in the current case law has led one distinguished academic commentator[^44] to put forward the somewhat surprising argument that that the definition of a public authority is narrow under the HRA than it is when considering whether a decision is amenable to judicial review.

The extra territorial application of the HRA

25. In *R(Ullah) v Secretary of State for the Home Department*[^45] the Court of Appeal decided that Article 9 of the Convention was not engaged by a decision to expel an applicant for asylum to a country where he was inhibited in the practice or teaching of his religious beliefs if the degree of ill-treatment which he had suffered and/or might expect in the future was not sufficiently "flagrant" to engage Article 3 of the Convention. In fact, the Court of Appeal took the view that the only Convention article which might be engaged when an individual is removed from the UK is Article 3.

26. However, the House of Lords[^46] has now reversed the Court of Appeal, deciding that claims based on Convention breaches outside the UK could be made based on Articles 2, 4, 5, 7 and 8. The House of Lords said It was hard to think that a person could successfully resist expulsion in reliance on Article 9 without being entitled either to asylum on the ground of a well-founded fear of persecution for reasons of religion or personal opinion, or to resist expulsion in reliance on Article 3. Nonetheless, such a possibility could not be ruled out in principle unless the ECtHR had done so, which it had not.

27. The House of Lords emphasised that successful reliance on articles other than Article 3 (such as Articles 8 or Article 9) required a very strong case. The correct approach in

cases involving qualified rights such as those in Article 8 or Article 9 was that indicated by Devaseelan v Secretary of State for the Home Department\textsuperscript{47} when the IAT applied the criterion that the right in question would be completely denied or nullified by the alleged breach.

28. The House of Lords then immediately applied the reasoning in Ullah to Article 8 in the case of R(Razgar) v Secretary of State for the Home Department.\textsuperscript{48}

**Judicial deference**

29. The English courts have rejected the Strasbourg concept of a margin of appreciation. But the courts apply a similar approach in seeking to respect the discretionary judgment of a public authority. It has been argued\textsuperscript{49} that the legislature or courts have discretionary area of judgment and that the particular factors courts should take account of when considering whether to defer to the legislature or executive are:

- The nature of the right;
- The extent to which the issue involves consideration of social, economic or political factors;
- The extent to which the courts have a particular expertise eg in criminal matters;
- Whether the rights claimed have a high degree of constitutional protection eg political speech, access to the court or intimate aspects of private life.

That analysis was adopted by Lord Hope in \textit{R v DPP ex p Kebeline}.\textsuperscript{50}

30. I would argue that the emphasis placed on judicial deference can be overstated. After all, the HRA is a constitutional statute\textsuperscript{51} to be given a broad and generous view and has been drafted to ensure parliamentary sovereignty trumps the judicial interpretation of human rights. This fundamental drafting principle embodied in the HRA means that that the legislature or executive always have a second bite of the

\textsuperscript{47} [2003] Imm A.R. 1
\textsuperscript{48} [2004] UKHL 27.
\textsuperscript{49} D Pannick “Principles of interpretation of Convention rights under the Human Rights Act and the discretionary area of judgment” [1998] PL 545
\textsuperscript{50} [2002] 2 AC 366, 381 where he said:
\textsuperscript{51} See eg \textit{Brown v Stott} [2001] 2 WLR 817, per Lord Bingham at 835; and per Lord Steyn at 839; \textit{R v Offen} [2001] 1 WLR 253, 275 per Lord Woolf CJ; \textit{McCartan Turkington Breen v Times Newspapers} [2001] 2 AC 277, 297 per Lord Steyn.
cherry and can engage in a democratic dialogue.52

31. The decision of House of Lords in *R(Pro-life) v BBC* 53 contains an important discussion concerning judicial deference. Lord Hoffmann54 took the view that the word “deference” is inappropriate to describe a decision as to which branch of government in a particular instance has the decision-making power and what the limits of that legal power are. He stressed that the allocation by the courts of its decision-making powers to another branch of government is not a matter of courtesy or deference; but is based on recognised legal principles such as the principle that the independence of the courts is necessary for a proper decision of disputed legal rights or the principle that majority approval is necessary for a proper decision on policy or the allocations of resources. Lord Walker in *Pro-Life* analysed the proportionality principle with the intensity appropriate to the circumstances of the case,55 agreed with Lord Hoffmann that the word “deference” may not be the best word to use and concluded that any formulation of the deference principle as “one size fits all” would be impossible.56

32. The idea of deference is critical to the HRA because, as Lord Steyn emphasised in *R(Daly) v Secretary of State for the Home Department* 57 when applying proportionality context is everything. Curiously, however, the idea of judicial deference has been considered most explicitly in cases involving unqualified rights.

33. In *R (Bloggs 61) v Secretary of State for the Home Department* 58 the Court of Appeal considered the question of how much deference the court should pay to the decision maker in relation to the fundamental right to life. They held that even in an Article 2 case, where the right invoked is absolute, it was still appropriate for the courts to show some deference and/or to recognise the special competence of the decision maker. In this case, the decision being questioned was the decision of the Prison Service to return an informer who had been in the Protected Witness Unit to mainstream prison. The court scrutinised the Prison Service’s decision and then concluded that it justified the deference which the court should accord it. Auld LJ took the view that having given the decision anxious scrutiny, the conclusion reached was well within the margin of what was reasonable. This approach is open to question because it seems to assume the need to avoid a full merits review should be equated to the application of a *Wednesbury* style analysis.

34. In *Limbuela* (discussed below) Laws LJ suggested *obiter* that Article 3 might be interpreted differently when considered against the background of lawful government policy making.

35. There have also been two decisions of House of Lords (*Qazi* and *Marcic* discussed

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54 Ibid, paras 75, 76.
55 Ibid, paras 136 to 139.
56 Ibid, para 144.
57 [2001] 2 AC 532
58 [2003] 1 WLR 2724. An application for leave to appeal was dismissed after the prisoner who remained within the witness protection during the litigation was released from prison: see [2004] 1 WLR 440.
below) which decided that the statutory scheme makes it unnecessary to go through the exercise of considering whether an interference with Article 8 is unnecessary and disproportionate).

**Article 3: the substantive rights**

36. The Immigration Nationality and Asylum Act 2002 has required the courts to examine Article 3 very closely. I do not propose to examine this issue in detail which depend on factual circumstances in each case; but wish to look at the broad principles which have emerged. The problem is that the Administrative Court is concerned with case managing the vast number of applications under the 2002 Act; and that, as Laws LJ observed in *Limbuela*\(^{59}\) ‘we are left with a state of affairs in which our public courts are driven to make decisions whose dependence on legal principle is at best fragile, leaving uncomfortable scope for the social and moral preconceptions of the individual judge’. In that case the Court of Appeal had to bear in mind the implications of its decision for some 660 other cases.

37. Last year in *R(Q) v Secretary of State for the Home Department*\(^{60}\) the Court of Appeal approved the approach taken to Article 3 in *Pretty v United Kingdom*\(^ {61}\):

“As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court’s case law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.”

38. In *R(S) v Secretary of State for the Home Department*\(^ {62}\) the Court of Appeal returned to the issue of considering to what extent asylum seekers can rely on Article 3 in respect of provision of support by the Home Secretary. The Court took the view that there was no simple way of deciding when Article 3 will be engaged.\(^ {63}\) The Court of Appeal found that where the state has to act positively in order to avoid a breach of Article 3 (such that funds have to be expended), the courts must be careful not to set too low the threshold at which the duty to act arises. It is not enough for a claimant to feel that he has suffered a loss of dignity. The Court of Appeal reversed the trial judge by holding that the question of whether Article 3 was breached was a mixed

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\(^{60}\) [2004] QB 36.

\(^{61}\) (2002) EHRR 1 at para 52.


\(^{63}\) However, he did find that the line lay between the condition of the claimant in *S* and the claimant’s condition in *T*. At first instance, Maurice Kay J found that *S*’s condition verged on the degree of severity described in *Pretty*, and the Secretary of State was therefore obliged to act. *T*’s condition did not, and the Secretary of State was not so obliged.
issue of fact and law.

39. In *Secretary of State for the Home Department v Limbuela* the Court of Appeal gave further reflection to the question of when the refusal of the Secretary of State to provide assistance to a destitute asylum seeker would amount to a breach of his obligations under s. 6 of the HRA and Article 3 of the Convention; and again the approach in *Q.*

40. However, in his dissenting judgment in *Limbuela* Laws LJ gave extensively analysed Article 3 *obiter* which Carnworth LJ appeared to accept. Laws LJ began by distinguishing between (i) breaches of Article 3 which consist in violence from State servants; and (ii) breaches which consist in acts or omissions by the State which expose the claimant to suffering inflicted by third parties or circumstance. He went on to say that state violence is the paradigm case of violating Article 3 and contains three kinds of cases: (a) where the violence in question is actually authorised by the state; (b) where a State official acting in the course of his duty assaults another without the permission of his superior to do so; and (c) where the official has authority to use force (eg to arrest a criminal) but exceeds what is reasonable. Laws LJ then stated that acts or omissions by the State which expose individuals to suffering other than violence (even in instances as grave from the victim’s point of view as acts of violence which breach Article 3) are not categorically unjustified eg if they arise in the administration or execution of lawful government policy where Article 3 offers protection against suffering albeit not occasioned by violence where the suffering is sufficiently extreme. He concluded by stating that where Article 3 is deployed to challenge the consequences of lawful government policy, the Article operates as a safety net in exceptional or extreme cases. Laws LJ explained that the spectrum of Article 3 breaches is required by the need of some respect for the obligations the States undertook in becoming parties to the Convention and the need for a measured balance between the judicial domain of the protection of individual rights and the political domain of the State’s policy evolved in the general interest.

41. The approach taken by Laws LJ marks a radical departure. It is difficult to identify any basis for it in the decisions of the ECtHR; and his approach is difficult to square both with the proper construction of the terms of s 55 of the 2002 Act (which specifically is made subject to the HRA and is not therefore the consequences of lawful policy); or with the idea that the HRA should be given a broad and generous interpretation.

42. In *Limbuela* the Court of Appeal also declined to follow the view in *T* that Article 3 raised issues of fact and law allowing the Court of Appeal to overrule the judge of first instance. By contrast, Carnworth LJ decided that the Court of Appeal could only interfere with a first instance decision if the trial judge’s decision was plainly wrong.

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64 [2004] EWCA Civ 540; *The Times* 26.5.04.
65 Ibid, para 118.
66 Ibid, para 59.
67 Ibid, para 65.
68 Ibid para 68.
69 Ibid, para 77.
Article 3: Procedural obligations

42. Most of these cases concerned the State’s duties to conduct enquiries into killings and attempted killings. *R(Amin) v Secretary of State for the Home Department*\(^70\) concerned a young offender who was beaten to death by his cellmate in a young offender’s institute. There was an internal prison service inquiry, which was not made public, a police inquiry and a murder trial. A coroner’s inquest was started but never completed. The House of Lords held that, although the EtCHR had not set down any one model of investigation to be applied in all cases, it had laid down minimum standards in a number of cases.\(^71\) For such an investigation to be effective a number of requirements must be fulfilled:

- the persons responsible for the investigation must be independent of those implicated in the events—this must be ‘practical independence’;
- the investigation must be effective in the sense that it is capable of leading to a determination as to whether or not the force was justified and to the identification and punishment of those responsible;
- a requirement of promptness and reasonable expedition is implicit in this context;
- there must be a sufficient element of public scrutiny of the investigation and, in particular, the next of kin of the victim must be involved to the extent necessary to safeguard their legitimate interests.

None of these minimum standards were met in the *Amin* case. The police investigation raised more questions than it answered. The murder trial had not explored the wider issues. Most importantly, their Lordships considered that the prison inquiry was inadequate because it was private and because the family could not take part.

43. *Amin* should be contrasted with *R(Green) v Police Complaints Authority*.\(^72\) In this case the applicant claimed that a police officer had deliberately run him over in an attempt to kill him. The Police Complaints Authority held an investigation. Mr Green was given the opportunity to submit further evidence and he was given a schedule listing documents and statements that were to be taken into account. However, the PCA refused to disclose those documents to Mr Green. The House of Lords held that Mr Green’s involvement in the investigation had been sufficient to satisfy Articles 2 and 3. They held that there was nothing in *Edwards v UK*\(^73\) to suggest that parties to an investigation such as this should automatically be entitled to full disclosure.

44. In *In Re McKerr*,\(^74\) the House of Lords concluded that the duties imposed by the HRA on the State to investigate deaths do not apply when those deaths occurred before 2\(^{nd}\) October 2002. This decision is difficult to reconcile this decision with that of the

\(^{70}\) [2004] 1 AC 653.

\(^{71}\) See the cases also decided on 4\(^{th}\) May 2001, *Kelly v United Kingdom* paras 95 to 98; *Shanaghan v United Kingdom* paras 89 to 92; *McKerr v United Kingdom* (2001) 34 EHRR paras 112 to 115; *Edwards v United Kingdom* (2002) 35 EHRR 487 paras 70 to 74; and see also *McShane v United Kingdom* (2002) 35 EHRR 593 paras 94 to 98;

\(^{72}\) [2004] 1 WLR 725.

\(^{73}\) [2002] 35 EHRR 487.

\(^{74}\) [2004] 1 WLR 807.
ECtHR in *Cyprus v Turkey*75 in which it was held that the state had continuing obligations to investigate “the whereabouts and fate of … missing persons who disappeared in life threatening circumstances in 1974.”76 This case was not cited in *McKerr* which, it is submitted, is wrongly decided. The correct approach is taken by Jackson J in *R (Wright) v Home Secretary*77 when he held that a failure to investigate a pre-HRA death was a breach of a continuing procedural obligation.78

45. In perhaps the most important ‘procedural’ decision of the last 12 months, the House of Lords decided in *R (Middleton) v Coroner for the Western District of Somerset*79 that the traditional interpretation of the duties of juries in coroner’s inquests was not sufficient to satisfy the demands of Article 2 of the Convention. As a result, they said that, in cases where the coroner’s inquest was the means by which the State satisfied its duty under Article 2, it was necessary to construe Rule 36(1)(b) of the Coroner’s Rules as requiring the jury to decide “by what means and in what circumstances” the deceased met his death, not just “by what means” he met his death.

### Article 6 Developments

46. An important application of the law of bias was canvassed in *Lawal v Northern Spirit*,80 in relation to the constitution of the Employment Appeals Tribunal. The House of Lords had to consider the implications of the long-standing practice of appointing leading counsel to sit as part-time judges. The House of Lords underlined that the common law test of bias and the requirements under Article 6 of an independent and impartial tribunal are now the same in the light of *Porter v Magill*.81 The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal making the decision under challenge was biased. The House of Lords found that the practice of allowing leading counsel to sit on the EAT panel should be discontinued so as to ensure: (1) that there was no possibility of subconscious bias on the part of lay members who had previously sat on an EAT panel with counsel in his role as judge; and (2) that public confidence in the system was not undermined.

47. In *Laws v Lloyds*,82 the Court of Appeal rejected an Article 6 claim made in litigation brought by the Names. The Names first brought proceedings before the HRA was in force, when the accepted interpretation of s. 14 of the Lloyds Act 1982 was that it exempted Lloyds from liability for any claim excluding fraud. The appellant then sought to rely on s.3 of the HRA in support of a construction of s.14 which would allow a claim for damages for negligent misrepresentation. The Court of Appeal held that the HRA could not be used to place a different interpretation on s. 14 in litigation which had already commenced prior to its coming into force.

76 Para 136.
77 [2001] 1 Lloyd’s Rep Med 478, 488
78 See also, *R (Khan) v Secretary of State for Health* [2003] 3 FCR 341 to the same effect.
79 [2004] 2 WLR 800.
80 [2003] ICR 856.
81 [2002] 2 AC 357.
82 [2003] EWCA Civ 1887; *The Times* 23.1.04.
48. In *R (Kehoe) v Secretary of State for Work and Pensions* 83 the Court of Appeal held that Article 6 was not engaged by a mother’s complaint that she could not bring enforcement proceedings against an ex-husband who was defaulting in his maintenance payments. They held that, since the source of any rights she might have was statutory, the fact that the scheme set out in the Child Support Act 1991 did not give her a right to take enforcement proceedings demonstrated that she did not have an arguable civil right as required by article 6. Waller LJ, dissenting in part, relied on ‘visceral’ instinct to find otherwise. Nonetheless, all the members of the Court of Appeal agreed that, even if Article 6 was engaged, it was not breached as the scheme was necessary in the pursuit of a legitimate aim and proportionate.

**Article 8 developments**

49. In *Harrow LBC v Qazi* 84 a divided House of Lords stressed that Article 8 did not give rise to a right to a home, only a right to respect for a person’s home as an aspect of his right to privacy. The majority held (Lord Bingham and Lord Steyn strongly dissenting) 85 that, having regard to its object, article 8 could not be relied on to defeat proprietary or contractual rights to possession; that the domestic law gave the housing authority an unqualified right to immediate possession once service of the notice to quit had terminated the joint tenancy; that since it had been clear from the tenancy at its outset that it could be so terminated and since the premises, once recovered, would be available for letting to other persons in need of housing within the authority's area, there was no infringement of the defendant's right under article 8 to respect for his home; and that, accordingly, no question arose for determination under article 8(2). The House of Lords also indicated *obiter* that an interference which results in a diminution in the economic value of the home engages Article 1 of the First Protocol rather than Article 8.

50. The decision in *Qazi* is somewhat surprising. The idea that legal form trumps substance is alien to the Strasbourg jurisprudence; and Strasbourg cases certainly do not dictate the result.

51. In *Newham LBC v Kibata* 86 the Court of Appeal, applying *Qazi*, held that Article 8 would not be infringed by the making of an order for possession in favour of a local authority that was simply seeking to enforce its right to possession of its own freehold property against a person who no longer had any right under domestic law to remain in possession of the property.

52. The Divisional Court in *R(Ellis) v The Chief Constable of Essex Police* 87 considered the lawfulness of a proposed offender naming scheme operated by Essex Police. There was no dispute that the scheme involved an interference with private and family life contrary to Article 8(1), but Essex Police argued that any interference was

83  *The Times* 10.3.04.
84  [[2003] 3 WLR 792.
85  Lord Steyn said *inter alia* that it would be surprising if the views of the majority passed withstood European scrutiny.
87  [2003] 2 FLR 566.
justified under Article 8(2) as being necessary in the interests of the prevention or
detection of crime and the protection of the rights and freedoms of others. The
Divisional Court (Lord Woolf LCJ and Goldring J) declined to rule in principle on the
lawfulness of the scheme, holding that its legality would depend on the particular
circumstances of each offender included in it and how the scheme was operated in
practice. However, the Divisional Court expressed doubt that the possible benefits of
the scheme were proportionate to the offender’s Article 8 rights, as well as concern as
to the Article 8 rights of the offender’s ex-partner and daughter (albeit that both had
changed their names).

53. In *Djali v IAT* the Court of Appeal stressed, while dismissing the claim on the basis
that the applicant’s Article 8 rights were not engaged, that, in an asylum claim where
interference with an Article 8(1) right is borderline, the decision-maker must
“inevitably” regard the interests of immigration control as the “imperative and
overriding factor.”

54. The House of Lords in *Marcic v Thames Water* reversed the decisions of the two
lower courts that the statutory scheme set up to ensure the provision of an adequate
system of public sewers was in breach of Mr Marcic’s rights under Article 8 and
Protocol 1 Article 1. Drawing on the decision in *Hatton v United Kingdom* Lord
Nicholls drew an analogy between the principle of the margin of appreciation applied
by the European Court of Human Rights to decisions of national authorities, and the
approach to be applied by judges faced with matters of general policy. Where matters
of general policy were involved, the courts can do no more than review whether the
solution adopted by Parliament struck a fair balance between the interests of the
individual and the community as a whole. However, it is important when considering
the implications of *Marcic* to appreciate that the claimant was seeking to by pass a
very detailed statutory scheme which vested a decision affecting resource allocation
in the Director General of Water Services.

55. In *South Bucks DC v Porter* the House of Lords considered the power of the courts
to grant injunctions under s.187B Town and Country Planning Act 1990. The House
of Lords emphasised that the jurisdiction to grant injunctive relief was an original not
a supervisory jurisdiction. Although issues of planning policy and judgment were
matters for the local planning authorities and the Secretary of State, it was ultimately
for the court to decide whether the remedy of an injunction was just and proportionate
in all the circumstances, and in so doing had to have regard to Article 8 and to
consider whether the relief was proportionate in the Convention sense. Their
Lordships endorsed the finding of Simon Brown LJ in the court below that
proportionality required not only that the grant of an injunction be appropriate and
necessary for the safeguarding of the environment, but also that it did not impose an
excessive burden on the individual’s private life and home and (in the case of
gypsies) retention of his ethnic identity.

56. The same issues were discussed again in before the Court of Appeal in *Tonbridge &
Malling BC v Davis & Others.93 The Court of Appeal stressed that the courts in exercising their original jurisdiction to grant injunctive relief under s.187B Town and Country Planning Act had to have regard to all relevant circumstances. Auld LJ, with whom the other members of the Court of Appeal agreed, found that the judge had not erred in the exercise of his discretion or erred in his application of the Convention when the latter granted an injunction in circumstances where: (1) undoubted hardship would be caused to the travelling show-people by the grant of an injunction, in particular because they had nowhere else to go; but (2) serious environmental damage had been caused by the planning violation of a highly sensitive site; (3) the appellants had been deliberately unlawful in commencing and persisting in their conduct for some 3 years.

57. In Lough v Secretary of State94 the Court of Appeal will soon give judgment on a number of issues affecting the relationship between Article 8 and the grant of planning permission. The Court is likely to consider whether evidence of diminution in value is a relevant factor to be considered under Article 8 or Article 1 of the First Protocol even though it is not a material planning consideration. The Court of Appeal is also likely to decide whether a general public interest balance for breach of the UDP under s 54A of the Town and Country Planning Act is equivalent to the planning inspector giving separate consideration to whether there is a disproportionate interference with Convention rights.

58. In Anufrijeva v LB Southwark,95 the Court of Appeal gave important guidance on HRA damages (see below) but also had to consider the scope of Article 8. The Court of Appeal held that Article 8 could impose a positive obligation to provide support, especially where the welfare of children was at stake or family life was seriously inhibited. However, the Court of Appeal found that maladministration would only infringe Article 8 where the consequence was serious (e.g. where a public authority committed acts that it knew were likely to cause psychiatric harm to an individual). Importantly, in the conjoined case of N v Secretary of State for the Home Department the Court of Appeal found that the egg-shell skull principle did not apply to claims brought under the HRA or in respect of the Convention: it was therefore not enough that acts committed by a public authority caused stress which in turn caused psychiatric harm to a particularly susceptible individual in circumstances in which such harm was not reasonably foreseeable.

59. There are many aspects of the Anufrijeva judgment which are open to question. For example, the Court of Appeal failed to give any consideration to whether the public authorities had acted disproportionately, they failed to address, still less reverse, the trial judge’s finding in a conjoined appeal, N that there was a breach of the claimant’s right of respect to privacy and a number of the principles expressed about HRA damages are highly questionable. The claimant in N proposes to petition the House of Lords.

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93 [2004] EWCA Civ 194; The Times 5.3.04.
95 [2004] 2 WLR 603.
The law of confidence and Article 8

60. Before the enactment of the HRA many commentators (including Lord Bingham) anticipated that the HRA would lead provide a decisive impetus towards establishing a common law tort of infringement of privacy. But the enactment of the HRA has not had such an impact.

61. In Douglas v Hello the Court of Appeal, particularly Sedley LJ indicated that there might be some scope for the development of privacy rights.

62. However, in Secretary of State for the Home Department v Wainwright the House of Lords firmly rejected this possibility, concluding that there was still no cause of action in English law for invasion of privacy, and more importantly that that it was not necessary to create such a tort in order to comply with Article 8. Instead, anyone whose rights under Article 8 were infringed should apply for the statutory remedy under the HRA itself. In the case itself, which concerned a complaint about the prison service strip-searching visitors, their Lordships considered that it would have been doubtful whether the claimants would have been entitled to any monetary remedy in the absence of any evidence that the prison service had intended to breach their article 8 rights.

63. In Campbell v Mirror Group the House of Lords indicated that courts will hold journalists strictly to account for every aspect of articles that they write on confidential subjects, at least in relation to intimate personal information where publication might have serious adverse consequences. It is nevertheless a curious decision. Before the House of Lords, Ms Campbell accepted that, since she had claimed that she did not take drugs, she could not claim that it was a breach of her rights under Article 8 for the Court to expose that as false. However, she successfully argued that that did not justify The Mirror printing peripheral information about her attendance at Narcotics Anonymous meetings when she had a reasonable expectation that such attendance would be confidential.

64. The interaction of Articles 6, 8 and 10 were considered by the Court of Appeal in Re S (A child) (Identification: Restriction on Publication) in the context of identification of a child’s family in criminal proceedings. The Court of Appeal held that Articles 8 and 10 had to be balanced by a court deciding whether to exercise its jurisdiction to restrain publication, as s.12(4) HRA gave precedence to neither. Hale LJ (as she then was, and with whom the other members of the Court of Appeal agreed as to the law) stressed that “the importance of Article 6 lies in the values which it is there to protect and the impact of those values upon the exercise of the right to freedom of expression in Article 10.” In considering the proportionality of any proposed interference with an Article 10 right, the Court of Appeal stressed that a court must not only consider the importance of press freedom in principle, it must also consider those features which enhance its importance in a particular case.

96 Lord Bingham ‘Should there be a law to protect rights of personal privacy’ [1996] EHRLR 450.
97 [2001] QB 967.
98 [2003] 2 WLR 1137.
100 [2004] Fam 43.
101 Ibid, at Paragraph 44.
Conversely, in considering the proportionality of any proposed interference with the Article 8 right to respect for private and family life, a court must consider the magnitude of the interference by reference to the specific circumstances of the individual, and consider what steps, if any, are necessary to prevent or minimise the interference.

65. The effect of Articles 8 and 14 upon the Employment Rights Act 1996 was considered by the Court of Appeal in *X v Y*.[102] The Court held that Employment Tribunals had, so far as was possible, to read and give effect to s.98 HRA in a way that was compatible with Articles 8 and 14. The Court of Appeal declined to find that Article 8 had an horizontal effect, but held that, by a process of interpretation, the Article 8 right was “blended” with the law on unfair dismissal contained in the ERA 1996, albeit without creating a new private law right of action against private law employers. The Court of Appeal started from the premises that a dismissal for a reason that would amount to an unjustified interference with an Article 8 right would not normally be fair. However, it recognised that there may be cases in which there would be a potential justification under s.98 for such a dismissal. It therefore clarified that the ET, in deciding whether such a dismissal was fair, should read and give effect to s.98 ERA 1996 so as to be compatible with Article 8.[103] Mummery LJ explained the impact of Article 8 on unfair dismissal principles as follows:

- In an employee in the public sector employment is dismissed in breach of Article 8 or 14, and then he will be unfairly dismissed.
- It would not normally be unfair for a private sector employee to be dismissed for a reason which is an unjustified breach of Article 8.
- If there was a possible justification, then the employment tribunal should read and give effect to Convention rights by construing s 98 of the Employment Rights Act under s 3 of the HRA.

**The emerging law of Article 14**

66. Article 14 is of course not a free standing right and it is necessary for a claimant to show that he is within the ambit of another Convention right. There has been a steady stream of significant discrimination cases brought in the last 12 months.

67. Five questions must be addressed in an Article 14 case (based on the approach of Brooke LJ in *Wandsworth LBC v Michalak*[^104^] as amplified in *R (Carson) v Secretary of State for Work and Pensions*[^105^]). The original four questions were:

- Do the facts fall within the ambit of one or more of the Convention rights?
- Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
- Were those others in an analogous situation?

[^103^]: On the facts of the case, Dyson and Mummery LJJ found that Article 8 (and hence Article 14) was not engaged. Brooke LJ was of the view that, without a greater understanding of the facts of the case, it was not possible to conclude that the applicant’s Convention rights had not been engaged.
• Was the difference in treatment objectively justifiable? Ie, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?
• The additional question is whether the difference in treatment is based on one or more of the grounds proscribed - whether expressly or by inference - in article 14.

68. The Court of Appeal in (1) Carson (2) Reynolds v Secretary of State for Work and Pensions\textsuperscript{106} found that Article 14 was engaged when read together with Protocol 1 of Article 1:

(1) in Carson in respect of UK pensioners who lived abroad in certain countries and who in consequence did not receive the annual uprate to their pensions paid to UK residents and residents of certain other countries;
(2) in Reynolds in respect of those in receipt of jobseekers’ allowance who were between 18 and 25 and therefore received less than those who were over 25\textsuperscript{107}.

69. In respect of Carson the Court of Appeal, applying Michalak v LB Wandsworth\textsuperscript{108}, then found there to be no discrimination on the basis that the circumstances of Carson and her claimed comparators was not so similar as to call for a positive justification for the withholding of the uprate or, alternatively, on the basis that the discrimination was objectively and reasonably justified. In respect of Reynolds, the Court of Appeal found that there was objective and reasonable justification for the discrimination.

70. The thorny issue of Gurkha pensions was definitively settled in R(Purja) v MoD\textsuperscript{109}, in which the Court of Appeal held that the differential treatment meted out to Gurkha and British soldiers could in principle engage Article 14 read together with Article 8 and Protocol 1 Article 1. However, the Court of Appeal as a whole agreed that Gurkha and British soldiers were not in an analogous situation when their pay and pension structures are compared as a whole. Rix LJ dissented from the finding that Gurkhas were not in an analogous situation as regards accompanied service and found that the discrimination was not justified.

71. The Court of Appeal held in Wilkinson v IRC\textsuperscript{110} that it had been correct for the first instance judge to make a declaration of incompatibility in respect of s.262 Income and Corporation Taxes Act 1988 on the basis that it was incompatible with Article 14 read together with Articles 8 and Protocol 1 Article 1 of the Convention in its

\textsuperscript{106} [2003] 3 All ER 577.
\textsuperscript{107} The Court of Appeal rejected an argument that that the situation of those in receipt of income supports engages Article 14 read together with Protocol 1 Article 1, or that the situation of those in receipt of jobseeker’s allowance and/or those in receipt of income support could engage Article 8 read together with Article 14.
\textsuperscript{108} [2003] 1 WLR 617. However, Laws LJ reformulated the third question in Michalak (“were the chosen comparators in an analogous situation to the complainant’s situation?”) to read: “are the circumstances of X and Y so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X?.” Laws LJ also pointed out that it was very difficult conceptually then to disassociate this question from the fourth Michalak question (“if so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aims sought to be achieved?”)
\textsuperscript{109} [2004] 1 WLR 289
\textsuperscript{110} [2003] 1 WLR 2683.
discriminatory effect on widowers as compared to widows. However, Lord Phillips MR, giving the judgment of the Court, held that there was no legitimate justification for men receiving a tax allowance which had always been restricted by Parliament to women. The principle of just satisfaction therefore did not require the payment of a Widow’s Bereavement payment to a widower. The Court of Appeal took a similar approach to just satisfaction in *R(Hooper) v IRC*.111

72. Article 14 was considered in connection with religious communities in the case of *Campbell & Others v (1) South Northamptonshire DC (2) Secretary of State for Work and Pensions* 112. Here, the Court of Appeal held that the refusal to grant housing benefit to members of a particular church who lived communally, on the basis that the tenancy agreements had not been executed for a “commercial purpose,” did not engage Article 14 read together with Article 9 and Protocol 1 Article 1. The Court of Appeal found that the decision as to whether or not the tenancy agreements were executed for a commercial purpose was a decision made on the basis of facts, and that the Convention does not purport to change facts or to make evidence relevant to a factual inquiry inadmissible. The fact that the tenancy agreements were entered into for a specific religious purposes was not relevant, and Article 9 was therefore not engaged by their decision.113 In any event the Court of Appeal found that, even if Article 14 had been engaged, then refusal of housing benefit in respect of non-commercial leases would be a proportional interference so as not to place the claimant church in a unique position amongst religions of receiving a state subsidy. Applying *Carson*, the Court of Appeal found that the right to housing benefit did not constitute a possession for purposes of Protocol 1 Article 1.

73. A number of cases have considered claims of discrimination on ground of the claimant’s sexual orientation.

74. In *R(Amicus) v Secretary of State for Trade and Industry* 114 Richards J had to consider the compatibility of certain of the Employment Equality (Sexual Orientation) Regulations 2003 (‘the 2003 Regulations’) with Council Directive 2000/78, Article 8 of the Convention and Article 14 read together with Article 8. The 2003 Regulations prohibit discrimination on grounds of sexual orientation in the fields of employment and vocational training; the Regulations under challenge set down certain exceptions, including (1) an exception in relation to employment for purposes of an organised religion and (2) an exception for benefits dependent on marital status. Richards J found that the Regulations did not interfere with rights under Article 8 of the Convention – indeed, they added to existing rights. No challenge therefore lay by means of Article 8. Moreover, the Regulations did not produce any difference of treatment in the enjoyment of rights falling within the ambit of the Convention (and, in any event, to the extent that a comparison was made between same-sex and married couples, such couples were not in an analogous situation): the claim under Article 14 read together with Article 8 therefore failed.

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111 [2003] 3 All ER 673.
112 [2004] EWCA Civ 409; *The Times* 23.4.04.
113 The Court of Appeal rejected shortly the refusal of housing benefit was a material interference with their religious practices, finding that the claimants would not have to abandon or modify a specific lifestyle dictated by their religious beliefs.
75. In *A v Chief Constable of West Yorkshire Police*,\(^{115}\) the House of Lords declined to give retrospective effect to the decision of *Goodwin v United Kingdom*\(^{116}\) in respect of the rights of transsexuals. The House of Lords concluded that the words “same sex” in s.54(9) PACE 1984 and “woman,” “man” and “men” in ss.1,2,6, and 7 SDA 1975 had to be read as referring to the acquired gender of a post-operative transsexual who was visually and for all practical purposes indistinguishable from non-transsexual members of that gender. However, this was so as to comply with the United Kingdom’s obligations under the Equal Treatment Directive 76/207 Article 2(1); the decision in *Goodwin* postdated the date upon which the Chief Constable had refused to offer A employment, and A’s rights were therefore to be determined without reference to the decision in *Goodwin*.

76. The effect of Articles 8 and 14 upon the Employment Rights Act 1996 was considered by the Court of Appeal in *X v Y*\(^{117}\) and was discussed earlier. An employee who engaged in consensual sex in a public toilet while off duty and away from his work place. He was arrested for gross indecency and cautioned. Sometime later the employer learned of the incident and dismissed the employee for gross misconduct. The Court of Appeal decided that the right of respect for privacy was not engaged on the facts. The employee’s conduct occurred in a place where the public had access, it was a criminal offence which was normally a matter of legitimate public concern, it led to a caution which was relevant to employment and it should have been disclosed as a matter of legitimate concern.

77. In *Ghaidan v Godin-Mendoza*\(^{118}\) the House of Lords decided that the Rent Act 1997 should be read, and given effect to, as though the survivor of a homosexual couple living together was the surviving spouse of the original tenant. It was possible under s.3 to interpret the Rent Act 1977 Sch.1 para.2 so that it was compliant with Article 8; and the court was required to depart from the interpretation it gave *Fitzpatrick v Sterling Housing Association* (2001) 1 AC.\(^{119}\)

78. Article 14 was considered together with Article 5 in *R (Clift) v SSHD*.\(^{120}\) Lord Woolf LCJ (with whom the other members of the Court of Appeal agreed), followed *R (Smith) v Parole Board*,\(^{121}\) and expressed doubts as to whether Article 5 was engaged by the making of parole decisions taken regarding a prisoner serving over 15 years, decisions which the Home Secretary had reserved to himself. In any event, while there was a difference between the treatment offered the claimant and his comparators (who were serving less than 15 years), there was an objective and reasonable justification for that difference. Lord Woolf LCJ considered that it was perfectly reasonable for the Home Secretary to draw a line and say that he should remain democratically accountable for and retain a residual discretion over parole decisions about prisoners serving over 15 years, who would generally have committed the most serious crimes.

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115 [2004] 2 WLR 1209.
119 [2001] 1 AC 27.
121 [2004] 1 WLR 421.
HRA damages

79. In *Anufrijeva v LB Southwark* the Court of Appeal gave guidance as to the award of damages in HRA cases. Lord Woolf LCJ stressed that damages under the HRA are not recoverable as of right, but only when it was “just and appropriate” and “necessary” to achieve “just satisfaction.” Where damages are awarded, “rough guidance” as to the level of such damages can be found in the *JSB Guidelines*, and the levels of awards made by CICB, the Parliamentary Ombudsman and the Local Government Ombudsman. In cases of maladministration: (1) the level of awards made by the Ombudsman may be the only comparator; and (2) awards should be moderate, but not minimal, as this would undermine respect for Convention Rights.

80. The Court of Appeal also suggested some guidelines on procedure.
- the court should look critically at any attempt to claim for maladministration which should normally only be brought in the Administrative Court by way of judicial review;
- before permission is granted the Court must require explanation as to why the claim is not being made to any relevant Ombudsman;
- if other relief is sought permission should be deferred on the damages aspect until alternative dispute remedies have been exhausted or it can be remitted to a judge or master for summary disposal on the basis that damages are not required to achieve just satisfaction;
- the citation of more than 3 authorities must be justified and the hearing should be limited to ½ a day except in exceptional circumstances.

81. Unfortunately, none of these procedures were canvassed in court.

82. A number of observations of the Court of Appeal in *Anufrijeva* are open to question:
- balancing the interests of the victim with the public is not part of Strasbourg case law;
- the suggestion that damages is the last resort has no support in ECtHR case law; and the approach may be in breach the right to an effective remedy under Article 13 of the Convention;
- the emphasis on the fact that the ECtHR takes account in awarding damages of a number of factors including, in particular, the character and nature of the parties. That particular emphasis is surprising since the Law Commission observed at para 4.53, this consideration would be hard to justify under the HRA since, as a general principle, the status of a claimant is irrelevant to damages in tort;
- the Court of Appeal’s statement that there is a disinclination of the ECtHR to pay compensation for procedural errors is too broad; their view depends on causation.
- the stress on saying the critical message is whether the remedy is “necessary” does not accurately reflect ECtHR case law;

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122 [2004] 2 WLR 603. The Court of Appeal also had reason to consider the scope of Article 8. The Court held that Article 8 could impose a positive obligation to provide support, especially where the welfare of children was at stake or family life was seriously inhibited.
• the Court failed to address the question of whether awards in discrimination cases for injury to feelings are appropriate comparators

83. In Ali v Head Teacher and Governors of the Lord Grey School, the claimant was held to be entitled to damages where his right to education under Protocol 1 Article 2 was affected by his exclusion from school. The Court of Appeal allowed the claimant’s case to proceed to a hearing on the quantum of damages to be awarded for a period where: (1) he had been excluded unlawfully from school; and (2) he was not offered adequate or appropriate substitute education.

23rd June 2003

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