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PROTECTING CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLISH LAW

1. THE FORMER METHOD


Our arrangements for the protection of human rights are different from those of most other countries. The differences are related to differences in our constitutional traditions. Although our present constitution may be regarded as deriving in part from the revolution settlement of 1688–89, consolidated by the Union of 1707, we, unlike our European neighbours and many Commonwealth countries, do not owe our present system of government either to a revolution or to a struggle for independence. The United Kingdom—

(a) has an omnicompetent Parliament, with absolute power to enact any law and change any previous law; the courts in England and Wales have not, since the seventeenth century, recognised even in theory any higher legal order by reference to which Acts of Parliament could be held void;[1] in Scotland the courts, while reserving the right to treat an Act as void for breaching a fundamental term of the Treaty of Union [see McCormick v Lord Advocate 1953 SC 396], have made it clear that they foresee no likely circumstances in which they would do so;

(b) unlike other modern democracies, has no written constitution;

(c) unlike countries in civil law tradition, makes no fundamental distinction, as regards rights or remedies, between ‘public law’ governing the actions of the State and its agents, and ‘private law’ regulating the relationships of private citizens with one another; nor have we a coherent system of administrative law applied by specialised tribunals or courts and with its own appropriate remedies;[2]

(d) has not generally codified its law, and our courts adopt a relatively narrow and literal approach to the interpretation of statutes;

(e) unlike the majority of EEC countries and the United States, does not, by ratifying a treaty or convention, make it automatically part of the domestic law (nor do we normally give effect to such an international agreement by incorporating the agreement itself into our law).

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1 Ed. Following the European Communities Act 1972, the UK courts have recognised limitations upon parliamentary sovereignty that result from European Union law.

2 Ed. This ceased to be wholly true with the introduction of the present Order 53 remedy for judicial review and the distinction between public and private law used in its application: see O’Reilly v Mackman [1983] 2 AC 237, HL.
In other countries the rights of the citizen are usually (thought not universally) to be found enunciated in general terms in a Bill of Rights or other constitutional document. The effectiveness of such instruments varies greatly. A Bill of Rights is not an automatic guarantee of liberty; its efficacy depends on the integrity of the institutions which apply it, and ultimately on the determination of the people that it should be maintained. The United Kingdom as such has no Bill of Rights of this kind. The Bill of Rights of 1688, though more concerned with the relationship between the English Parliament and the Crown, did contain some important safeguards for personal liberty—as did the Claim of Right of 1689, its Scottish equivalent. Among the provisions common to both the Bill of Rights and the Claim of Right are declarations that excessive bail is illegal and that it is the right of subjects to petition the Crown without incurring penalties. But the protection given by these instruments to the rights and liberties of the citizen is much narrower than the constitutional guarantees now afforded in many other democratic countries.\\footnote{[3]}

The effect of the United Kingdom system of law is to provide, through the development of the common law and by express statutory enactment, a diversity of specific rights with their accompanying remedies. Thus, to secure the individual’s right to freedom from unlawful or arbitrary detention, our law provides specific and detailed remedies such as habeas corpus\\footnote{[4]} and the action for false imprisonment. The rights which have been afforded in this way are for the most part negative rights to be protected from interference from others, rather than positive rights to behave in a particular way. Those rights which have emerged in the common law can always be modified by Parliament. Parliament’s role is all-pervasive—potentially, at least. It continually adapts existing rights and remedies and provides new ones, and no doubt this process would continue even if a comprehensive Bill of Rights were enacted.

The legal remedies provided for interference with the citizen’s rights have in recent times been overlaid by procedures which are designed to afford not so much remedies in the strict sense of the term as facilities for obtaining independent and impartial scrutiny of action by public bodies about which an individual believes he has cause for complaint, even though the action may have been within the body’s legal powers. For example, the actions of central government departments are open to scrutiny by the Parliamentary Commissioner for Administration; and complaints about the administration of the National Health Service are investigated by the Health Service Commissioners.

\section*{NOTES}

1. As the penultimate paragraph of the above extract from the Report\\footnote{[5]} indicates, before the Human Rights Act 1998 civil liberties were protected in the UK law by a mixture of legislation and common law. Dicey pointed out over a century ago\\footnote{[6]} that when providing such protection Parliament and the courts did not usually make general positive statements of a right. There is, for example, no statute providing for a ‘right to freedom of assembly’. Instead the technique was to legislate in detailed terms, making particular legislative provision, as in the Public Order Act 1986, from which the general right might be inferred. The courts were

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\item [3] \textit{Ed.} The Bill of Rights was relied upon (unsuccessfully) in \textit{Williams v Home Office (No. 2)} [1981] 1 All ER 1211, QBD.
\item [4] \textit{Ed.} Although habeas corpus is of value in some civil liberties contexts (e.g. obtaining the release of suspects being questioned by the police, and preventing deportation (\textit{R v Secretary of State for the Home Department, ex p Maboyayi} [1992] QB 244, CA)), it has limitations in others (e.g. achieving the release of the mentally disordered: see \textit{X v United Kingdom} [1981] EHRR 188). On habeas corpus, see R.J. Sharpe, \textit{The Law of Habeas Corpus} (2nd edn, 1989) and A. Le Sueur [1992] PL 13.
\item [5] The Report was prepared in connection with the consideration of the question of a Bill of Rights by the House of Lords Select Committee on a Bill of Rights.
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similarly restrained when developing the common law.\(^7\) While sometimes making
general statements,\(^8\) they preferred to formulate particular rules, shaped by the
facts of the cases before them. Moreover, the focus of judgments was often, as it was in legislation, upon mat-
ters, such as the need to ensure public order, other than the protection of the civil liberty con-
cerned. Another characteristic of the common law approach was that the individual’s civil
liberties were treated truly as liberties, not as rights. It was a negative approach by which a
court, when faced with a civil liberties issue, sought to discover whether there is a limitation
in law upon the challenged action and, if there is not, to conclude that the action was lawful.
A weakness of this approach was that it permitted interferences with civil liberties as well as
protection of them.\(^9\)

2. As the Report also states, nearly all countries protect civil liberties by means of a Bill
of Rights.\(^10\) Lord Lloyd\(^11\) defines a Bill of Rights as a ‘constitutional code of human rights’
that is binding in law, is (inevitably) generally worded and has the following other key
characteristics:

(a) The code should be given some sort of overriding authority over other laws.

(b) Power should be vested in the judiciary (whether generally or by way of a Constitu-
tional or Supreme Court) to interpret the rights set forth in the Bill of Rights and
to determine judicially their proper scope, extent and limits, and their relationship
inter se.

(c) The judiciary will possess the power to declare legislation invalid which it holds to
be repugnant to the rights guaranteed in the Bill of Rights.

3. The UK had, and still has,\(^12\) no bill of rights in the above sense. A power of judicial review
over legislation was claimed by Coke CJ in Dr Bonham’s Case:\(^13\) ‘When an Act of Parliament
is against common right and reason, or repugnant, or impossible to be performed, the
common law will control it, and adjudge such Act to be void.’ Had this claim been pressed and
accepted, the resulting power could have been used to protect civil liberties in much the same
way as a Bill of Rights does without any formal enactment. But it proved only to be rhetoric;
no statute has ever been overturned on the basis of it. The position before the Human Rights
Act 1998 was stated by Lord Reid in British Railways Board v Pickin:\(^14\)

The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem
strange and startling to anyone with any knowledge of the history and law of our constitution... In earlier

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\(^7\) See D.J. Harris, in F. Matscher (ed.), The Implementation of Economic and Social Rights (1991), p. 201.
\(^8\) See, e.g., Lord Kilbrandon’s reference in Cassell v Broome [1972] AC 1027 at 1133, HL, to a ‘constitutional
right to free speech’.
\(^9\) See E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law (14th edn by A.W. Bradley and
K.D. Ewing, 2007), Pt III. See also R v Kirkless Metropolitan Borough Council, ex p C [1993] 2 FLR 187, CA, in
which counsel for a detained, mentally disordered person argued that there was no legal basis for the detention,
and Stuart-Smith LJ stated that counsel had asked the wrong question: ‘The real question is, on what basis can it
be said that the council acted unlawfully’, and there was none.
\(^10\) Australia remains an exception. Canada and New Zealand adopted bills of rights in 1982 and 1990 respect-
ively. The Canadian and New Zealand models were taken into account when the Human Rights Act 1998 was
enacted. Although the 1998 Act differs significantly from both, it contains some echoes of the New Zealand Bill
of Rights and the experience of the courts in implementing both systems was instructive.
\(^11\) (1976) 39 MLR 121 at 122–123.
\(^12\) The definition is one that fits the bills of rights in states such as the United States and Germany. The courts
in Canada can overturn federal or provincial legislation unless the legislature concerned expressly provides that
it may not do so: Canadian Charter of Rights and Freedoms, s. 33, which is enacted in Sch. B to the Canada Act
1982, Chap. 36. The courts in New Zealand have no power to overturn statutes; they apply a rule of interpreta-
tion similar to that in s. 3 of the Human Rights Act: see M. Taggart [1998] PL 266.
\(^13\) (1610) 8 Co Rep 114a, 118.
\(^14\) [1974] AC 765 at 765, 782, HL.
times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has become obsolete.

In *Oppenheimer v Cattermole* the question was whether English courts should recognise a Nazi law that deprived German Jews resident abroad of their nationality and confiscated their property. A majority of the House of Lords took the view that the law was ‘so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all’. Mann refers to the case and notes that ‘for more than 300 years England has been spared the necessity of facing’ the question of the legality of such laws within its own legal system. He suggests that were it to arise ‘English judges could no doubt find a legally convincing reason for reverting to the tradition of the fundamental law’ and that the ‘real question would be whether, in the condition which has been assumed, they would have the strength of character to search for it’.

4. Although subject to Parliament, the courts have always played an important role in the protection of civil liberties by the interpretation of statutes, the review of administrative action and the development of the common law. As far as the interpretation of statutes is concerned, the courts have developed certain presumptions that help. The presumption against the taking of property without compensation is an example. So are the presumptions against the retrospective effect of legislation, against denial of access to the courts, against interference with the freedom from self-incrimination; and against interference with the liberty of the subject. The presumption that legislation complies with UK treaty obligations is important in that the UK is bound by a number of international human rights treaties, including the ECHR. There is also a presumption that UK legislation complies with customary international law, which contains a number of human rights guarantees (e.g. against torture).

15 [1976] AC 249, HL.  
16 Lord Cross at 278.  
17 (1978) 94 LQR 512, 513–514.  
18 *Central Control Board (Liquor Traffic) v Cannon Brewery Co. Ltd* [1919] AC 744 at 752, HL, per Lord Atkinson. See also *R v Secretary of State for Transport, ex p de Rothschild* [1989] 1 All ER 933, CA.  
19 *Waddington v Miah* [1974] 1 WLR 683, HL.  
20 *Raymond v Honey* [1983] 1 AC 1, HL.  
21 *Re O* [1991] 2 QB 520, CA.  
22 *R v Hallstrom, ex p W* [1986] QB 1090, QBD. This presumption does not apply in wartime: *R v Halliday* [1917] AC 270, HL.  
23 Other human rights treaties in force protecting civil and political rights to which the UK is a party include the Genocide Convention 1948, UKTS 58 (Cmnd 4421, 1970); the ILO Freedom of Association Convention (Cmd 7638, ILO 87); the ILO Right to Organise Convention (Cmd 7852, ILO 98); the International Covenant on Civil and Political Rights 1966, UKTS 6 (Cmd 6702, 1977); the Convention on the Elimination of All Forms of Racial Discrimination 1966, UKTS 77 (Cmd 4108, 1969); the Convention on the Elimination of All Forms of Discrimination against Women 1979, UKTS 2 (Cmd 643, 1989); the UN Convention Against Torture 1984, UKTS 107 (Cm 1775, 1991); the European Convention for the Prevention of Torture 1987, UKTS 5 (Cm 1634, 1991); and the Convention on the Rights of the Child 1989, UKTS 44 (Cm 1976, 1992). The Universal Declaration of Human Rights 1948, GAOR, 3rd Sess., Resolutions, p. 71, is not a treaty and not in itself legally binding. However, it has come, at least in part, to be recognised as stating customary international law and British courts have made reference to it: see e.g. Lord Reid in *Waddington v Miah* [1974] 1 WLR 683 at 964, HL.  
24 *Mortensen v Peters* (1906) 8 F 93, Ct of Justiciary.  
5. The courts have a well-established power of judicial review of administrative action taken by national or local or other government authorities, including action bearing upon civil liberties. This had long been so where the action was based upon statutory powers but the exercise of prerogative powers may be subject to judicial review also, depending upon the subject matter of the power: Council of Civil Service Unions v Minister of the Civil Service.26 The courts may quash or prevent executive decisions that are not authorised by law; that are not taken in accordance with the prescribed procedures; that are erroneous in law; that infringe the rules of natural justice; or that involve an exercise of discretion that is not proportionate in human rights cases.

6. The judges have a long and proud tradition of protecting civil liberties at common law against encroachment by the executive. Entick v Carrington27 is a classic example. But although cases of this sort still occur,28 some judges, before the Human Rights Act 1998, were less open to persuasion than others. It was a common complaint that the courts generally were not inclined to develop the law on a grand scale, at least in the field of civil liberties. Commenting upon the failure of the courts to develop a law of privacy in the way that the American courts have, Street29 stated:

But there is no spirit of adventure or progress, either in judges or counsel, in England today. Today’s English judges are not the innovators that some of their distinguished predecessors were; in the hands of modern judges the common law has lost its capacity to expand. They have not been helped by counsel. Cases are argued and tried by a narrow circle of men who seldom look beyond the decided cases for guidance. The entire development of the American law of privacy can be traced to an article in a law periodical published by Harvard Law School.30 It is inconceivable that the views of an academic journal would exercise similar influence in Britain. This inward- and backward-looking attitude of the English Bar serves only to increase the likelihood that the courts will fail to make the law fit the needs of the time.

Later in the same book he wrote:31

Our judges may be relied on to defend strenuously some kinds of freedom. Their emotions will be aroused where personal freedom is menaced by some politically unimportant area of the executive: a case of unlawful arrest by a policeman, for example. Their integrity is, of course, beyond criticism. Yet there are obvious limitations to what they can be expected to do in moulding the law of civil liberties. Two factors stand in their way: their reluctance to have clashes with senior members of Government, their desire not to have a repetition of the nineteenth-century strife between Parliament and the courts; and secondly,

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26 [1985] AC 374, HL. In the Council of Civil Service Unions case, the prerogative power to determine conditions of employment in the civil service was considered ‘justiciable’ and hence subject to judicial review, but the powers to make treaties and to defend the realm were given (per Lord Roskill) as examples of powers that involved ‘high policy’ so that their exercise would not be subject to judicial review. In R v Secretary of State for Foreign and Commonwealth Affairs, ex p Everett [1989] QB 811, CA, the prerogative power to issue a British passport was held to be subject to judicial review. So is the prerogative of mercy: R v Secretary of State for the Home Department, ex p Bentley [1994] QB 349, CA.

27 Below, Chap. 4.

28 See the remarkable case of Re M [1994] 1 AC 377, HL, in which the Home Secretary was held in civil contempt of court for disobeying a court injunction not to deport a Zairean whose application for judicial review of the Home Office decision not to grant him asylum was under consideration by the courts. See also R v Secretary of State for the Home Department, ex p Fire Brigades Union [1995] 1 All ER 888, CA (Home Secretary could not introduce under the prerogative a criminal injuries scheme that was radically different from the statutory scheme).


30 Ed. See below, Chap. 8.

their unwillingness to immerse themselves in problems of policy, which of course loom large in many of the issues examined here.

No doubt Street would have approved of the Court of Appeal’s role in developing the law of privacy in Douglas v Hello!, though the continued attachment to the law of confidence in many subsequent cases may illustrate that Street’s arguments remain largely valid.

2. THE PRESENT METHOD: THE HUMAN RIGHTS ACT 1998

- Rights Brought Home: The Human Rights Bill, Cm 3782, pp. 4–7

NOTES

1. The Human Rights Act 1998 had been preceded by a series of private members’ bills during a period of 25 years or so proposing the introduction of a bill of rights. Draft bills of rights had also been prepared by non-governmental organisations. Parliamentary progress could not be made in the absence of support by the government of the day. The tide

32 [2001] 2 All ER 289.
33 For details of the private bills introduced by Lord Wade, Sir Edward Gardner, Mr Graham Allen and Lord Lester, see M. Zander, A Bill of Rights (4th edn, 1996), Chap. 1.
turned when the Labour Party decided to introduce a bill of rights as party policy and later included it in its 1997 election manifesto.

2. One objection to a bill of rights is that it involves the courts in politics. Although the British courts have always had to rule on matters of political and social controversy, a power of interpretation such as that in HRA, s. 3, based upon the standards of the ECHR, inevitably increases their participation in such matters. The question raised is whether unelected judges, who are necessarily difficult to dismiss, should be given a political and social role on this scale. The contrary argument is that persons taking decisions on human rights matters (which often concern minority groups and the unpopular) should be free from the ‘tyranny of the majority’. 37

3. Another concern has been that the judiciary is not a cross-section of society, as it should be to be properly qualified to take decisions that have great social impact. J.A.G. Griffiths states:

Of 514 Circuit judges in post on 1 December 1994, 29 were women, and 4 were of ethnic minority origin. In 1996 there were 7 female judges on the High Court bench.

In summary, 80 per cent of the senior judiciary are products of public schools and of Oxford or Cambridge, with an average age of about sixty; 5.1 per cent are women; 100 per cent are white. Some explanation of the gross disproportions in gender and colour can no doubt be found in the structure of the legal profession, in the financial and other difficulties facing those wishing to qualify as barristers, and then needing to support themselves in the early years of practice. Another part of the explanation is sexual and racial discrimination within the profession.

4. Later in the same book, the same author, while recognising the independence of the judiciary, also expressed concern, as a commentator on the left, at entrusting judges with greater powers at the expense of Parliament because of their generally conservative (with a small ‘c’) philosophy: 39

Judges in the United Kingdom are not beholden politically to the government of the day. And they have longer professional lives than most ministers. They, like civil servants, see governments come like water and go with the wind. They owe no loyalty to ministers, not even that temporary loyalty which civil servants owe. Coke said that Bracton said that the King ought to be under no man but under God and the law. 40

Judges are also lions under the throne but that seat is occupied in their eyes not by the Prime Minister but by the law and by their conception of the public interest. It is to that law and to that conception that they owe allegiance. In that lies their strength and their weakness, their value and their threat.

By allegiance to ‘the law’ judges mean the whole body of law, much of which has its origins in the judge-made common law. ‘The law’ also means the rule of law and here the allegiance is to the philosophical ideal that we should be ruled by laws and not by men. If that means that power should not be exercised arbitrarily or on the whim of rulers and their officials but should be dependent on and flow from properly constituted authority and from rules written down and approved by some form of representative assembly, it is an admirable and necessary, if partial, safeguard against tyranny. The proposition can hardly be taken

36 See, e.g., the Tameside case [1977] AC 1014, HL (comprehensive schooling) and R v Secretary of State for the Environment, ex p Hammersmith and Fulham Borough Council [1990] 3 All ER 589, HL (charge-capping).
40 Prohibitions del Roy (1607) 12 Co Rep 63.
further because, in modern industrial society, it is impossible to avoid vesting considerable discretionary power in public officials if only because laws cannot be adequately framed to cover every eventuality.

... When on 14 June 1995, it was put to the Lord Chief Justice that ‘the very top judges’ had in recent years been more ‘robust’ in standing up to the executive, Lord Taylor said, ‘It is not that they have been more robust. We have developed judicial review. It did not exist as such before 1977.’

The reply was significant but evasive, suggesting that the judicial attitude to the executive had not changed, only that the means of review at the disposal of the judiciary had improved. Later, in his evidence to the Select Committee, Lord Taylor emphasized that the courts ‘were very careful not to go too far’ in overturning ministerial decisions and he cited challenges to Maastricht by Rees-Mogg, to the Anglo-Irish Agreement, and to the use of a statute brought in existence in 1939 for the national emergency. But these were surely examples of deliberate use of the courts for political propaganda. It was not surprising that the applications were dismissed.

However the question is answered, what is undeniable is that the courts have, during this decade, become more severe in their criticism and more strict in their scrutiny of the exercise of executive powers in some areas....

To some, the judicial view of the public interest appears merely as reactionary conservatism. It is not the politics of the extreme right. Its insensitivity is clearly rooted more in the unconscious assumptions than in a wish to oppress. But it is demonstrable that on ever major social issue which has come before the courts during the last thirty years—concerning industrial relations, political protest, race relations, governmental secrecy, police powers, moral behaviour—the judges have supported the conventional, established and settled interest. And they have reacted strongly against challenges to those interests. This conservatism does not necessarily follow the day-to-day political policies currently associated with the party of that name. But it is a political philosophy none the less.

Ewing and Gearty\textsuperscript{41} reach a similar conclusion: ‘The harsh reality is that we need to be protected by Parliament from the courts, as much as we need to be protected from the abuse of executive power.’

Lord Denning has expressed opposition to a US-style bill of rights on the different ground of the effect upon judicial independence and public confidence in the courts:\textsuperscript{42}

\ldots if judges were given power to overthrow sections or Acts of Parliament, they would become political, their appointments would be based on political grounds and the reputation of our Judiciary would suffer accordingly. One has only to see, in the great Constitutions of the United States of America and of India, the conflicts which arise from time to time between the judges and the Legislature. I hope we shall not have such conflicts in this country. The independence of our judges and their reputation for impartiality depend on their obeying the will of Parliament and on their being independent. The independence of the judges is the other pillar of our Constitution.

5. The Constitutional Reform Act 2005 established the new Judicial Appointments Commission\textsuperscript{43} which seeks to provide for greater transparency in judicial appointments and encourage a wider range of applicants. In its first annual report\textsuperscript{44} the Chair of the JAC noted, ‘The overall number of applications received is encouraging and I am pleased that, in our first full year, many women and black and minority ethnic candidates successfully put their

\begin{itemize}
\item \textsuperscript{41} K. Ewing and C. Gearty, Freedom Under Thatcher (1990), pp. 270–271.
\item \textsuperscript{42} 369 HL Deb, 25 March 1976, cols 797–798.
\item \textsuperscript{43} See www.judicialappointments.gov.uk.
\item \textsuperscript{44} Judicial Appointments Commission, Annual Report 2006–7 (2007).
\end{itemize}
names forward.’ However, more recently, the Justice Secretary stated that ‘expectations that the new system of appointing judges would lead to a more diverse judiciary have so far not been fulfilled’.45

- **Human Rights Act 1998**

### Introduction

1. **The Convention rights**

   (1) In this Act ‘the Convention rights’ means the rights and fundamental freedoms set out in—

      (a) Articles 2 to 12 and 14 of the Convention,
      (b) Articles 1 to 3 of the First Protocol, and
      (c) Articles 1 and 2 of the Sixth Protocol,

   as read with Articles 16 to 18 of the Convention.

   (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

   (3) The Articles are set out in Schedule 1.

   (4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

   (5) In subsection (4) ‘protocol’ means a protocol to the Convention—

      (a) which the United Kingdom has ratified; or
      (b) which the United Kingdom has signed with a view to ratification.

   (6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned in force in relation to the United Kingdom.

2. **Interpretation of Convention rights**

   (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

      (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
      (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,
      (c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or
      (d) decision of the Committee of Ministers taken under Article 46 of the Convention,

   whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

   (2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

   (3) In this section ‘rules’ means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

      (a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

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(b) by the Secretary of State, in relation to proceedings in Scotland; or
(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—
   (i) which deals with transferred matters; and
   (ii) for which no rules made under paragraph (a) are in force.

Legislation

3. Interpretation of legislation
(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—
   (a) applies to primary legislation and subordinate legislation whenever enacted;
   (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
   (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4. Declaration of incompatibility
(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—
   (a) that the provision is incompatible with a Convention right, and
   (b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility.

(5) In this section ‘court’ means—
   (a) the House of Lords;
   (b) the Judicial Committee of the Privy Council;
   (c) the Courts-Martial Appeal Court;
   (d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;
   (e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section (‘a declaration of incompatibility’)—
   (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
   (b) is not binding on the parties to the proceedings in which it is made.

5. Right of Crown to intervene
(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.
(2) In any case to which subsection (1) applies—
   (a) a Minister of the Crown (or a person nominated by him),
   (b) a member of the Scottish Executive,
   (c) a Northern Ireland Minister,
   (d) a Northern Ireland department,
   is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—
   ‘criminal proceedings’ includes all proceedings before the Courts-Martial Appeal Court; and
   ‘leave’ means leave granted by the court making the declaration of incompatibility or by the House of Lords.

Public authorities

6. Acts of public authorities
(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—
   (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
   (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section ‘public authority’ includes—
   (a) a court or tribunal, and
   (b) any person certain of whose functions are functions of a public nature,
   but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) ‘Parliament’ does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) ‘An act’ includes a failure to act but does not include a failure to—
   (a) introduce in, or lay before, Parliament a proposal for legislation; or
   (b) make any primary legislation or remedial order.

7. Proceedings
(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
   (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
   (b) rely on the Convention right or rights concerned in any legal proceedings,
   but only if he is (or would be) a victim of the unlawful act.
(2) In subsection (1)(a) ‘appropriate court or tribunal’ means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—
   
   (a) the period of one year beginning with the date on which the act complained of took place; or
   
   (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

   but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) ‘legal proceedings’ includes—

   (a) proceedings brought by or at the instigation of a public authority; and
   
   (b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section ‘rules’ means—

   (a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,
   
   (b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,
   
   (c) in relation to proceedings before a tribunal in Northern Ireland—
   
      (i) which deals with transferred matters; and
   
      (ii) for which no rules made under paragraph (a) are in force,

   rules made by a Northern Ireland department for those purposes, and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

   (a) the relief or remedies which the tribunal may grant; or
   
   (b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) ‘The Minister’ includes the Northern Ireland department concerned.
8. Judicial remedies

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated—

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—

‘court’ includes a tribunal;

‘damages’ means damages for an unlawful act of a public authority; and

‘unlawful’ means unlawful under section 6(1).

9. Judicial acts

(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—

‘appropriate person’ means the Minister responsible for the court concerned, or a person or government department nominated by him;
‘court’ includes a tribunal;
‘judge’ includes a member of a tribunal, a justice of the peace and a clerk or other officer entitled to
exercise the jurisdiction of a court;
‘judicial act’ means a judicial act of a court and includes an act done on the instructions, or on behalf,
of a judge; and
‘rules’ has the same meaning as in section 7(9).

10. Power to take remedial action

This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention
right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that
time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of
the European Court of Human Rights made after the coming into force of this section in proceed-
ings against the United Kingdom, a provision of legislation is incompatible with an obligation of
the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this sec-
tion, he may by order make such amendments to the legislation as he considers necessary to remove
the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in
question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section,

he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been
quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister
proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by
Her Majesty in Council.

(6) In this section ‘legislation’ does not include a Measure of the Church Assembly or of the General
Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

11. Safeguard for existing human rights

A person’s reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the
United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from
sections 7 to 9.
12. Freedom of expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (‘the respondent’) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

‘court’ includes a tribunal; and

‘relief’ includes any remedy or order (other than in criminal proceedings).

13. Freedom of thought, conscience and religion

(1) If a court’s determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section ‘court’ includes a tribunal.

Derogations and reservations

14. Derogations

(1) In this Act ‘designated derogation’ means—

any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) …

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection [(1)] to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to Schedule 3 as he considers appropriate to reflect—

(a) any designation order; or

(b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.
15. Reservations
(1) In this Act ‘designated reservation’ means—
(a) the United Kingdom’s reservation to Article 2 of the First Protocol to the Convention; and
(b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the Secretary of State.

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) The Secretary of State must by order make such amendments to this Act as he considers appropriate to reflect—
(a) any designation order; or
(b) the effect of subsection (3).

16. Period for which designated derogations have effect
(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act… at the end of the period of five years beginning with the date on which the order designating it was made.

(2) At any time before the period—
(a) fixed by subsection (1)… or
(b) extended by an order under this subsection,
comes to an end, the Secretary of State may by order extend it by a further period of five years.

(3) An order under section 14(1)… ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect—
(a) anything done in reliance on the order; or
(b) the power to make a fresh order under section 14(1)…

(5) In subsection (3) ‘period for consideration’ means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which—
(a) Parliament is dissolved or prorogued; or
(b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.\[46\]

17. Periodic review of designated reservations
(1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—
(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and

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\[46\] The words omitted were repealed by the Human Rights (Amendment) Order 2001, SI 2001/1216 (in force 1 April 2001). They provided for the UK derogation from its obligations under Art. 5(3) that was in issue in Murray v UK (1996) 22 ECHR 29. The derogation was withdrawn in 2001.
(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(2) The appropriate Minister must review each of the other designated reservations (if any)—

(a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and

(b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

... Parliamentary procedure

19. Statements of compatibility

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ('a statement of compatibility'); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

... SCHEDULES

Schedule 1

THE ARTICLES

PART I

THE CONVENTION RIGHTS AND FREEDOMS

ARTICLE 2

RIGHT TO LIFE

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.

ARTICLE 3

PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
ARTICLE 4
PROHIBITION OF SLAVERY AND FORCED LABOUR
1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. 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 well-being of the
       community;
   (d) any work or service which forms part of normal civic obligations.

ARTICLE 5
RIGHT TO LIBERTY AND SECURITY
1. Everyone has the right to liberty and security of person. 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 per-
       sons of unsound mind, alcoholics or drug addicts or vagrants;
   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised 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 of any 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 authorised 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.
ARTICLE 6
RIGHT TO A FAIR TRIAL
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 but 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 to 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 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.

ARTICLE 7
NO PUNISHMENT WITHOUT LAW
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 recognised by civilised nations.

ARTICLE 8
RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE
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 well-being 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.

ARTICLE 9
FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION
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 for the protection of the rights and freedoms of others.

ARTICLE 10
FREEDOM OF EXPRESSION
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.

ARTICLE 11
FREEDOM OF ASSEMBLY AND ASSOCIATION
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.

ARTICLE 12
RIGHT TO MARRY
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 14
PROHIBITION OF DISCRIMINATION
The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 16
RESTRICTIONS ON POLITICAL ACTIVITY OF ALIENS
Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17
PROHIBITION OF ABUSE OF RIGHTS
Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.
ARTICLE 18
LIMITATION ON USE OF RESTRICTIONS ON RIGHTS
The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

PART II
THE FIRST PROTOCOL

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.

PART III
THE SIXTH PROTOCOL

ARTICLE 1
ABOLITION OF THE DEATH PENALTY
The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

ARTICLE 2
DEATH PENALTY IN TIME OF WAR
A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Schedule 2
REMEDIAL ORDERS

Orders
1. (1) A remedial order may—
(a) contain such incidental, supplemental, consequential or transitional provisions as the person making it considers appropriate;
(b) be made so as to have effect from a date earlier than that on which it is made;
(c) make provision for the delegation of specific functions;
(d) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes—
(a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and
(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A remedial order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

2. No remedial order may be made unless—
(a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or
(b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3. (1) No draft may be laid under paragraph 2(a) unless—
(a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and
(b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing—
(a) a summary of the representations; and
(b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

4. (1) If a remedial order (‘the original order’) is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—
(a) a summary of the representations; and
(b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must—
(a) make a further remedial order replacing the original order; and
(b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).
NOTES

1. *The Scheme of the Human Rights Act.* This is both complicated and unique. The HRA provides for the indirect incorporation of the rights in the European Convention on Human Rights into UK law as ‘the Convention rights’ (s. 1). This has two main consequences. First, in all cases coming before them, the UK courts must interpret primary legislation compatibly with Convention rights so far as is possible (s. 3), taking into account the interpretation that has been given to them at Strasbourg (s. 2). If, despite all efforts, primary legislation cannot be interpreted compatibly with Convention rights, the courts may make a ‘declaration of incompatibility’ (s. 4). This does not affect the validity, continuing operation or enforcement of the legislation concerned. Instead, the legislation continues to apply, but a Minister may decide to legislate to remove the incompatibility, with the possibility of using a ‘fast track’ legislative procedure to do so (s. 10). Subordinate legislation that is incompatible with Convention rights is, in most cases, invalid (s. 3).

Second, ‘public authorities’ must act in accordance with Convention rights, unless incompatible primary or subordinate legislation leaves them no choice (s. 6). If they do not do so, a ‘victim’ of the resulting breach of the HRA has a public law right of action against the public authority concerned, or may rely on the Convention right in other legal proceedings (s. 7). A court may award damages or grant other relief to the victim (s. 8).

There are also consequences for the common law, which must be applied and developed by the courts, as ‘public authorities’, in accordance with Convention rights.

2. *Section 1: The Convention rights.* The HRA applies to the Convention rights listed in s. 1. These are the rights in Arts 2–12, 14 and 16–18 of the ECHR, Arts 1–3 of the First Protocol to the ECHR and Art. 1 of the 13th Protocol. The HRA thus extends to almost all of the rights in the ECHR and its Protocols. The missing rights are the right to an effective remedy in national law guaranteed by Art. 13 of the ECHR, and the rights in the 4th, 6th, 7th and 9th Protocols, which the UK has not ratified. The Convention rights have to be read with Arts 16–18, which permit restrictions on the political activities of aliens (Art. 16); prohibit the use of Convention rights so as to subvert other rights (Art. 17); prohibit the use of a permitted restriction for an improper purpose (Art. 18).


48 E.g. criminal proceedings against the victim.

49 The inclusion of the right to education in Art. 2, First Protocol is subject to the reservation to that article made by the UK upon ratification of the ECHR: see s. 15(1)(a) HRA. For the text of the reservation, see Sch. 3, Pt II HRA.

50 For the text see HRA, Sch. 1.

51 Lord Irvine LC explained the omission of Art. 13 as follows: ‘The courts would be bound to ask what was intended beyond the existing scheme of remedies set out in the Act. It might lead them to fashion remedies other than clause [now section] 8 remedies, which we regard as sufficient and clear. We believe that clause 8 provides effective remedies before our courts … I cannot conceive of any state of affairs in which an English court, having held an act to be unlawful because of its infringement of a Convention right, would under clause 8(1) be disabled from giving an effective remedy’: 583 HL Deb, 18 November 1997, cols 475, 479. Cf. Lord Hope in *Montgomery v HM Advocate* [2001] 2 WLR 779 at 794, PC. However, Lord Irvine LC noted that although Art. 13 was not included as a Convention right, the courts may none the less ‘have regard to Article 13’ when applying the HRA: ibid., col. 477. See the reliance upon it by Lord Hope in *R v Lambert* [2001] 3 All ER 577 at 609, HL.

52 The 4th Protocol has been signed but not ratified.

53 E.g. by relying upon freedom of expression or association to replace a democratic society by one that does not protect Convention rights generally.
The HRA does not apply to a Convention right to the extent of any derogation from it that the UK has made under Art. 15 of the ECHR and that has been ‘designated’ for this purpose under the HRA.54 There is no such ‘designated derogation’ at present.55

3. The HRA does not extend to all human rights. A small number of civil and political rights are omitted. In addition to the ECHR rights that are not incorporated (see preceding note), a few other civil and political rights that are not included in the ECHR are absent. For example, there is no guarantee of freedom of information, the right to recognition as a person in law, or the right of a detained person to be treated with humanity and dignity.56

Human rights include economic, social and cultural rights as well as civil and political rights.57 The former are not protected by the ECHR58 and hence the HRA. Instead, within the Council of Europe, economic, social and cultural rights are guaranteed by the European Social Charter 1961,59 which is enforceable through the assessment of national reports by the European Committee of Social Rights in Strasbourg and a right of collective (but not individual) complaint.60 The Charter has not been incorporated into UK law.61

4. Of course, UK law may protect these missing human rights, or may protect Convention rights more extensively than the ECHR requires, outside of the regime of the HRA.62 In such situations, the advantages of the HRA are not available, including its rules of interpretation and remedies. Instead, the rules of interpretation that were developed by the UK courts in human rights cases before the HRA continue to apply, as do the familiar, non-HRA judicial remedies in national law.

5. **Section 2: Reliance upon Strasbourg jurisprudence in the interpretation of Convention rights.** This section requires a court (or tribunal) to ‘take into account’ the interpretation given to the ECHR by the European Court of Human Rights and other specified Strasbourg

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54 HRA, s. 14.
55 Originally, s. 14(1)(a) expressly designated the derogation from ECHR, Art. 5(3) that was in issue in Murray v UK (1999) 22 EHRR 29. However, in 2001 the UK withdrew this derogation and the HRA was amended accordingly, with s. 14(1)(a) being repealed: see SI 2001/1216. A further derogation issued after the terrorist attacks in New York in 2001 relating to detention without trial was withdrawn following the House of Lords decision in A v Secretary of State for the Home Department [2004] UKHL 56: see, Human Rights Act 1998 (Amendment) Order 2005, SI 2005/1071.
56 See also the criticism of the underlying ECHR ideology (individualistic, not socialist) in K. Ewing and C. Gearty [1997] EHRLR 146.
57 See the Universal Declaration of Human Rights 1948, which extends to all five categories of rights.
58 But see the guarantees of the right to respect for family life (Art. 8 ECHR), the right to freedom of association (Art. 11 ECHR), the right to property (Art. 1, First Protocol) and the right to education (Art. 2, First Protocol), which, to some extent concern economic, social or cultural rights. On inadequacies of social rights protection in the UK, see K. Ewing [1999] PL 104.
60 See the 1995 Collective Complaints Protocol to the 1961 Charter, ETS 158. In force 1998. The UK has not yet accepted to be bound by the procedure.
61 Nor has its UN counterpart, the International Covenant of Economic, Social and Cultural Rights 1996. The UK is a party to the Covenant.
62 This is recognised by s. 11 HRA. See also Art. 53 ECHR. See, e.g., the Sex Discrimination Act 1975, the Race Relations Act 1976, and the Freedom of Information Act 2000. Nearly all of the prohibitions of discrimination in the first two of these fall outside Art. 14 ECHR. Some of them (concerning private discrimination in employment, etc.) are not directly covered by the 12th ECHR Protocol either, although that Protocol is likely to be interpreted as imposing positive obligations on states to control private conduct.
bodies. Strasbourg jurisprudence is thus persuasive but not legally binding.\footnote{63} In \textit{R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions},\footnote{64} Lord Slynn stated:

\begin{quote}
Although the Human Rights Act 1998 does not provide that a national court is bound by these decisions (of the European Court of Human Rights) it is obliged to take account of them so far as they are relevant. In the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights. If it does not do so there is at least the possibility that the case will go to that court which is likely in the ordinary case to follow its own constant jurisprudence.
\end{quote}

As the above indicates, if the UK courts adopt an interpretation that is less favourable to a litigant relying upon the ECHR than that adopted previously at Strasbourg, there is always the possibility of a successful challenge at Strasbourg. This may also be the case where the interpretation goes to the balance between two Convention rights. If, for example, a UK court were to interpret the right to respect for privacy (Art. 8 ECHR) more extensively than the European Court of Human Rights and at the expense of the right to freedom of expression (Art. 10), a newspaper might be able to bring a successful Strasbourg claim under Art. 10.

In \textit{R (on the application of Ullah) v Special Adjudicator},\footnote{65} Lord Bingham stated:

\begin{quote}
\ldots a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.\footnote{66}
\end{quote}

The jurisprudence of the UK courts indicates a clear intent to follow the interpretation of the ECHR at Strasbourg. However, the House of Lords have made clear that domestic rules of precedent still apply and thus lower courts must still follow higher courts even when the latter decision may conflict with a clear Strasbourg authority (unless it was a pre HRA decision).\footnote{67} Is this consistent with Lord Bingham’s comment (above) that national courts must keep pace with Strasbourg jurisprudence? Was it Parliament’s intention that the courts mirror Strasbourg jurisprudence or that domestic courts should develop a human rights jurisprudence of their own?\footnote{68} Section 2 requires only that domestic courts ‘take into account’ Strasbourg jurisprudence. However, if the ECHR provides a level below which domestic rights must not fall, but UK courts should not imply more than that, does

\begin{footnotes}
\footnote{63} The jurisprudence of the European Court of Justice is legally binding: see European Communities Act 1972, s. 3.
\footnote{64} [2001] 2 WLR 1389 at 1399, HL.
\footnote{65} [2004] UKHL 26 at para. 20. See also, \textit{R (on the application of Marper) v Chief Constable of South Yorkshire} [2004] 1 WLR 2196.
\footnote{67} \textit{Kay v London Borough of Lambeth; Leeds City Council v Price} [2006] UKHL 10.
\footnote{68} See J. Lewis [2007] PL 720; See also, Joint Committee on Human Rights, \textit{A Bill of Rights for the UK?}, 29th Report of Session 2007–8 HC 150/HL 165, p. 21; see also, R. Clayton [2007] EHRLR 11.
\end{footnotes}
this effectively meaning that Strasbourg jurisprudence is binding? In the recent case of Huang v Secretary of State for the Home Department, the Lords were clear in stating that Strasbourg jurisprudence is not binding. It appears that the exceptions to being bound by Strasbourg are when (a) the Strasbourg interpretation is not clear because some aspect of English law has been misinterpreted, or (b) when there are ‘special circumstances’ such as that a conclusion fundamentally at odds with the British constitution would result. Rarely have these exceptions been invoked leading Lewis to comment: ‘It follows that the mirror principle is practically inescapable.’ Does the reference to taking account of Strasbourg ‘jurisprudence’ rather than ‘decisions’ suggest that it is the broader principles in the cases that are to be followed rather than seeking to discover binding precedent?

6. Section 3: Interpretation of legislation compatibly with Convention rights. On the approach to be followed by a court (or tribunal) when applying the ‘so far as it is possible’ rule in s. 3 HRA to decide whether legislation is compatible with the Convention rights: see Ghaidan v Godin-Mendoza below and the notes thereto. Although they do not apply a ‘margin of appreciation’ doctrine when deciding whether legislation is compatible with Convention rights, the courts have accepted that they should in appropriate cases defer to Parliament’s legislative judgment as to whether a particular limitation upon a Convention right in a Westminster statute is compatible with it: see Brown v Stott below and the notes thereto.

The rule of interpretation in s. 3 HRA extends only to the compatibility of legislation with Convention rights. As far as its compatibility with the UK’s other human rights treaty obligations is concerned, the position was explained by Lord Denning in R v Chief Immigration Officer, Heathrow Airport, ex p Salamat Bibi:

The position as I understand it is that if there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the Convention as an aid to clear up the ambiguity and uncertainty. . . . but I would dispute altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament.

This statement concerning the (then) unincorporated ECHR must apply to other human rights treaties also.

7. The HRA and the common law. By virtue of s. 6 HRA, the courts, as public authorities, must not act incompatibly with Convention rights. As far as their application of the common law is concerned, this means that the courts must not act inconsistently with Convention rights procedurally or in the provision of remedies. It also means that any existing substantive rule of common law that is incompatible with Convention rights must give way to them, with a court being obliged to ignore otherwise binding precedent to the contrary. Moreover, the substantive common law cannot be developed incompatibly with Convention rights. More positively, Convention rights may be used by the courts as a basis for their application.

71 Lewis, op. cit., p. 731. 72 Ibid., p. 747.
73 This includes the HRA itself: R v Lambert [2001] 3 All ER 577 at 612, per Lord Hope.
74 [1976] 1 WLR 979 at 984.
75 See s. 6(3) HRA. On the meaning of ‘public authority’ see, YL v Birmingham City Council [2007] UKHL 27.
76 E.g. in criminal proceedings in the application of common law rules of evidence.
78 See Lord Irvine LC, 583 HL Debs, 24 November 1997, col. 783: ‘We also believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the Convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.’
taking the initiative to develop common law rules or causes of action that further those rights, as in *Campbell v Mirror Group Newspapers*.79 However, s. 6 does not mean that the courts, as ‘public authorities’, must allow one private person to sue another for a breach of a Convention right.80

8. **Section 4: Declarations of incompatibility.** Primary legislation81 that, despite the application of the rule of interpretation in s. 3, is incompatible with Convention rights is not thereby rendered invalid, inoperative or unenforceable.82 Instead, a court may make a ‘declaration of incompatibility’. In *Ghaidan v Godin-Mendoza* (see below) the House rejected the notion that s. 4 should be used in preference to s. 3. The purpose of a declaration of incompatibility is to give notice of the incompatibility to the government, so that it may initiate remedial action, not to provide a remedy for any victim. In contrast, incompatible subordinate legislation is invalid, inoperative and unenforceable unless the incompatibility flows unavoidably from the enabling primary legislation,83 in which latter case a declaration of incompatibility may be made. Note that s. 4 provides a *discretion* to grant a declaration. It is suggested that such a declaration may be granted in favour of someone not a ‘victim’ as such but this is likely to be a scenario in which the discretion will not be exercised.84

9. **Section 6: Acts of public authorities.** Section 6(1) HRA makes it unlawful for a ‘public authority’ to act incompatibly with a Convention right. However, an act, which includes a failure to act, is not unlawful if the authority has no choice but to act in this way because of incompatible primary legislation.85 In such a case, no claim may be brought by the victim of the act against the authority under s. 7 HRA; the only remedy is a declaration of incompatibility. For example, a court will not commit an unlawful act if it is required to take a decision or give judgment in a certain way by incompatible primary legislation.

There has been a good deal of case law on the meaning of ‘public authority’ with a distinction being drawn between core public authorities, whose activities fall within s. 6, and hybrid public authorities whose functions may be of a public or private nature.86 In relation to the latter, the central debate has surrounded whether the body in question has the organisational characteristics of a public body or whether the task it is performing is akin to that of a public body. The Court of Appeal has stated that the definition of who is a public authority and what is a public function should be given a ‘generous interpretation’,87 but

79 For *Campbell v Mirror Group Newspapers* see Chap. 8.
80 See, e.g., *Venables v News Group Newspapers* [2001] Fam 430 below. Contrast the position under s. 7 HRA, by which a private individual has a *statutory* cause of action against a public authority (but not a private individual) for conduct incompatible with a Convention right.
81 For the meaning of primary legislation, see s. 21(1) HRA. see P. Billings and B. Pontin [2001] PL 21.
82 HRA, s. 3(2)(b).
83 HRA, s. 3(2)(c). Incompatible subordinate legislation does not in itself render its enabling legislation incompatible: per Dame Elizabeth Butler-Sloss, in *Re K (a child) (secure accommodation: right to liberty)* [2001] 2 WLR 1144 at 1155, CA. For the meaning of subordinate legislation, see s. 21(1) HRA.
85 HRA, s. 6(2). However, in the case of executive acts, there will usually be some discretion which can be exercised consistently with Convention rights. As to the courts, they must apply the common law and, so far as possible, interpret legislation in accordance with Convention rights.
86 *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] UKHL 37.
87 *Donoghue v Poplar Housing and Regeneration Community Association* [2001] EWCA Civ 595, para. [58], per Lord Woolf CJ.
this approach has not been consistently followed.\textsuperscript{88} The Parliamentary Joint Committee on Human Rights\textsuperscript{89} has commented:

We consider that the Government’s campaign to educate public authorities in their responsibilities under the HRA will be of limited value if it can only direct its efforts towards ‘pure’ public authorities. We consider that the current approach of the courts to the meaning of public authority will inhibit the development of a positive human rights culture in the United Kingdom. In so far as it prevents the direct application of the HRA to significant numbers of vulnerable people, such as the residents of privately-run care homes, this approach helps to perpetuate the myth that the HRA creates no real benefits for ‘ordinary people’ in their day to day lives.

The decision of the House of Lords in \textit{Y.L. v Birmingham City Council}\textsuperscript{90} confirmed the courts’ narrow approach to the definition, basing the interpretation upon the nature of the task performed. In that case, a private nursing home which cared for residents under a contract with the local authority was not deemed to be a public authority for the purposes of the HRA. The care home existed and was run in order to make profits in a competitive market and entered private contractual agreements to take in residents. Section 145 of the Health and Social Care Act 2008 has reversed this finding and care homes are now public authorities for the purposes of the HRA.\textsuperscript{91} Whether this will provide the impetus for a broader approach to the interpretation of s. 6, HRA remains to be seen.

10. \textit{Acts of private persons.}\textsuperscript{92} The Act creates the right to bring a claim for a breach of Convention rights only against a public authority (vertical effect).\textsuperscript{93} However, the Act also makes it unlawful for a public authority (including a court) to act in a way that is incompatible with a Convention right. Therefore, to what extent is a court obliged to reach a solution that is compatible with Convention rights in a dispute between two private parties? On the one hand the structure of the Act would suggest that this was not the intention and Convention rights are rights against the state. On the other hand, it is unlikely that the intention behind the Act was that it would have no effect at all on relations between private parties. The position endorsed thus far appears to be neither full horizontal effect nor no effect at all but a middle position, as espoused by Baroness Hale in \textit{Venables v News Group Newspapers} in stating that s. 6(1):\textsuperscript{94}

\begin{quote}
\textit{does not seem to me to encompass the creation of a free-standing cause of action based directly upon the articles of the convention,}
\end{quote}

\textsuperscript{88} See, e.g., \textit{R (Heather) v Leonard Cheshire Foundation} [2001] EWHC 429 (Admin), where the court held that a charitable foundation which ran a care home, the majority of whose residents were funded by their local authority or health authority, was not exercising a public function. See also, M. Sunkin [2004] PL 643; cf. D. Oliver [2002] PL 476 and [2004] PL 329 suggesting that a broad approach is not necessarily desirable. Further, see P. Craig [2002] LQR 551; C.M. Donnelly [2005] PL 785.


\textsuperscript{90} [2007] UKHL 27.


\textsuperscript{93} Ss. 6, 7.

\textsuperscript{94} [2001] Fam 430 at para. 27.
but does require the court,

to act compatibly with Convention rights in adjudicating upon existing common law causes of action, and that includes a positive as well as a negative obligation. 95

11. Section 7: Claims by victims. Section 7(1) allows a victim to claim in court that a public authority has acted unlawfully contrary to s. 6(1). A claim may be brought or made in one of two ways. First under s. 7(1)(a) a claim may be brought against a public authority before the appropriate court or tribunal.96 The HRA thus introduces a public law right of action for the breach of a Convention right by a public authority. This cause of action applies only to acts by public authorities; as noted above, it does not extend to acts by private persons. Moreover, a public authority is not liable where it cannot act otherwise because of the constraints of incompatible primary legislation.97 Nor does s. 7(1) apply to judicial acts by courts or tribunals: instead a claim of incompatibility must be made on appeal to a higher court or tribunal or in judicial review proceedings.98

Second, a victim may raise an issue of incompatibility in legal proceedings that have been commenced on some other basis,99 for example, criminal proceedings in which the victim is a defendant, a civil claim in contract or tort to which the victim is a party, or judicial review proceedings brought on other established judicial review grounds.

Claims under s. 7 may only be made by a ‘victim’ of the act. ‘Victim’ has the same meaning as it has in Art. 34 ECHR, which contains the locus standi requirement for bringing a Strasbourg application.100 This requirement means essentially that the applicant must be directly or indirectly affected by the act of the public authority.101 This is a more restrictive rule than that in judicial review proceedings under UK law, which allows non-governmental organisations to bring proceedings about a matter of general concern in respect of which they have a ‘sufficient interest’.102 The reason for limiting claims under s. 7 in this way was explained in Parliament as follows:103

As a government, our aim is to grant access to victims. It is not to create opportunities to allow interest groups from SPUC to Liberty ... to venture into frolics of their own in the courts. The aim is to confer access to rights, not to license interest groups to clog up the courts with test cases.

If a UK public authority has jurisdiction overseas a victim could bring action under the HRA if the authority acts incompatibly with Convention rights.104

12. Section 8: Damages or other relief. Where a claim succeeds under s. 7, the court or tribunal may award damages or grant such other remedy or relief as it considers ‘just and appropriate’. Damages,105 like other remedies or relief, are discretionary and may only be awarded

95 See also Campbell v Mirror Group Newspapers [2004] UKHL 22 at para. 132 per Baroness Hale.
96 Such claims are heard in the ordinary courts.
97 HRA, s. 6(2).Where s. 6(2) applies, the remedy is a declaration of incompatibility under s. 4, not a claim under s. 7.
98 HRA, s. 7(1).99 HRA, s. 7(1)(b).
102 See, e.g., R v Inspectorate of Pollution, ex p Greenpeace (No. 2) [1994] 4 All ER 329, QBD.
105 In accordance with the usual rule of judicial immunity, damages may not be awarded in respect of a judicial act done in good faith, except as compensation for detention contrary to Art. 5 ECHR: s. 9(3) HRA.
by a court or tribunal with the power to award damages or compensation in civil proceedings. 106 Damages may not be awarded unless the court is satisfied that this is necessary to afford 'just satisfaction', 107 which is the criterion for the award of damages by the European Court of Human Rights. 108 When deciding whether to award damages, and the amount of any award, a court must 'take into account' the principles applied at Strasbourg. 109 Though there are examples of courts awarding damages analogous to those in tort, the House of Lords have suggested that the ECtHR principles ought to be the guide. Lord Bingham, rejecting a domestic scale of damages, stated: 110

... there are in my opinion broader reasons why this approach should not be followed. First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Second, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper 'Rights Brought Home: The Human Rights Bill' (Cm 3782, 1 October 1997), para 2.6:

'The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg.'

Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not ‘principles’ applied by the Court, but this is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all.

13. Section 10: Remedial action: legislation to remove an incompatibility. A declaration of incompatibility that is made by a court under s. 4 HRA does not render the legislation invalid, inoperative or ineffective. 112 Instead, the provision for ‘remedial action’ in s. 10 applies. By s. 10(2), after any appeal proceedings in the case have been completed, a Minister ‘may’ 113 proceed by ‘remedial order’ to amend the offending legislation to eliminate

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106 HRA, s. 8(2). Criminal courts are excluded.
107 HRA, s. 8(3).
108 Art. 41 ECHR.
110 E.g., see R (KB) v Mental Health Review Tribunal [2003] 2 All ER 209.
111 R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14, para. 19.
112 HRA, s. 4(6)(a). Nor is the declaration binding on the parties to the case: s. 4(6)(b) HRA.
113 The Minister thus has a power, not a duty, to initiate legislative change. Failure to make a remedial order is not a breach of s. 6(1): s. 6(5) HRA.
the incompatibility. The order may be given retrospective effect. Section 10(3) gives a similar power to correct primary legislation that prevents the alteration of incompatible subordinate legislation. A remedial order may be adopted by the use of a ‘fast track’ procedure, involving an affirmative resolution of each of the two Houses of Parliament. However, a Minister may act by way of remedial order only if he considers that there are ‘compelling reasons’ for doing so; otherwise, a statute will be needed. Lord Hoffmann has stated: ‘If the courts make a declaration of incompatibility, the political pressure upon the government to bring the law into line will be hard to resist.’ Would this be true in all cases? What about a case involving a legal point that would not attract much public interest?

The power to make a ‘remedial order’ is also available to a Minister where the European Court of Human Rights has given a judgment, whether against the UK or another state, which suggests that UK legislation is contrary to the ECHR.

14. Section 12: Freedom of expression. Section 12 of the HRA was introduced because of concerns that the HRA might serve as a vehicle for the introduction of a right to privacy at the expense of the right to freedom of expression on the part of the media. However, the direction to ‘have particular regard to the importance of the Convention right to freedom of expression’ in the introductory wording of s. 12(4) has not had the desired effect. Instead, it was used to further the common law protection of privacy at the expense of the press in Douglas v Hello! (No. 1), the Court of Appeal taking account of (a) the fact that the reference in s. 12(4) is to the ‘Convention right’ to freedom of expression, which includes the permissibility in Art. 10(2) of restrictions to protect the ‘rights of others’ (including the right to privacy), and (b) the reference to ‘any relevant privacy code’ in s. 12(4), which includes the Press Complaints Commission Code.

15. Section 13: Freedom of religion. Section 13 requires courts to have ‘particular regard to the importance of’ the right to freedom of religion in Art. 9 ECHR. It was introduced by the Government in place of amendments that had been successfully promoted by the churches in the House of Lords who feared that their activities might be affected by the HRA by the guarantee of freedom of ‘thought, conscience and religion’ in Art. 9 and the prohibition on discrimination in Art. 14 ECHR.

16. Section 19: Parliamentary statements of compatibility. Section 19 requires that when a Bill is introduced into Parliament, a Minister make a statement before the second reading on its compatibility with Convention rights. The Bill may proceed even though the statement is

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114 Sch. 2, para. 1(1)(b) HRA. A person cannot be convicted of a criminal offence by the retrospective application of a remedial order: para. 1(3).
115 For the details of the procedure see Sch. 2, HRA. The remedial order must be laid before both Houses of Parliament for 60 days: para. 2(a). The 60-day period may be dispensed with in urgent cases: para. 2(b).
116 The ‘compelling reasons’ limitation was inserted because Parliament was concerned about giving Ministers too wide a power to bypass ordinary legislative procedures. Lord Simon expressed concern about the use of Henry VIII clauses: 583 HL Deb, 27 November 1997, col. 1141. A decision on the existence of ‘compelling reasons’ may be subject to judicial review: see K. Ewing (1999) 62 MLR 70 at 93.
117 (1999) 62 MLR 159 at 160. 118 HRA, s. 10(1)(b).
119 [2001] QB 967. Section 12(4) does not ‘require the court to treat freedom of speech as paramount’ or ‘direct the court to place even greater weight on the importance of freedom of expression than it does already’; instead, ‘the requirement “to pay particular regard” contemplates specific and separate consideration being given to this factor’: per Sir Andrew Morritt V-C, in Imutan Ltd v Uncaged Campaigns Ltd [2001] 2 All ER 385 at 391, Ch D. See also Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142, [2001] 2 All ER 370, Ch D, in which s. 12(4) did not prevent a successful breach of copyright claim for the unauthorised publication of a minute of a private meeting.
120 For these concerns and generally on s. 13, see P. Cumper [2000] PL 154.
not able to confirm compatibility.\textsuperscript{121} No such obligation exists in respect of any amendments introduced during the passage of the Bill. Section 19 statements are not binding on the courts and do not have persuasive authority.\textsuperscript{122} In 2007 the Constitution Committee of the House of Lords stated:

\begin{quote}
Notwithstanding ministerial statements under section 19, there have been cases in which it is clear that ministers have initially adopted a far too optimistic view about the compatibility of provisions in a bill. Although few statutory provisions enacted since the HRA came into force have been subject to declarations of incompatibility by the courts, on a number of occasions the Government has had to make or accept major amendments to bills to bring them into line with Convention rights (as Parliament views them).\textsuperscript{123}
\end{quote}

Declarations of incompatibility relating to post HRA-legislation have been made in \textit{A v Secretary of State for the Home Department}\textsuperscript{124} in relation to s. 23 of the Anti-terrorism, Crime and Security Act 2001 permitting detention without trial (subsequently repealed by the Prevention of Terrorism Act 2005) and \textit{R (Baiai) v Secretary of State for the Home Department}\textsuperscript{125} in relation to s. 19(3) of the Asylum and Immigration (Treatment of Claimants) Act 2004 dealing with immigration procedures where sham marriages are suspected. Details of pre-HRA legislation found to be incompatible can be found in the 2007 House of Lords Select Committee Report of the Constitution.\textsuperscript{126}

\section{Section 22: Retrospective effect.}
Section 22(4) means that a victim cannot bring proceedings under s. 7(1)(a) in respect of acts by public authorities that occurred before the HRA entered into force on 2 October 2000. The HRA does not apply to an appeal against a conviction by a court made before that date.\textsuperscript{127} What was a contentious issue initially is waning in importance as time passes.

\section{The Parliamentary Joint Committee on Human Rights.}
The Joint Committee on Human Rights is a Select Committee of the two Houses of Parliament. Its work can be separated into three areas: (1) legislative scrutiny, to consider compliance with human rights;\textsuperscript{128} (2) thematic inquiries into issues relating to human rights; and (3) scrutiny of Government responses to adverse judgments from the European Court in Strasbourg and declarations of incompatibility made under s. 4 by domestic courts. The JCHR has suggested that it does not always have sufficient time to carry out its scrutiny role effectively:

\begin{quote}
\ldots we regret that the rapid progress of the Bill through Parliament has made it impossible for us to scrutinise the Bill comprehensively for human rights compatibility in time to inform debate in Parliament.\textsuperscript{129}
\end{quote}

\begin{footnotesize}
\textsuperscript{121} HRA, s. 19(2). See Communications Act 2003, s. 321 where no statement of compatibility was made.
\textsuperscript{122} Per Lord Hope in \textit{R v A} [2001] UKHL 25 at para. 69.
\textsuperscript{124} See Chap. 6. \textsuperscript{125} [2007] EWCA Civ 478.
\textsuperscript{127} \textit{R v Lambert} [2001] 3 All ER 577, HL. See also \textit{Macdonald v Advocate General for Scotland} [2003] UKHL 30, in which the possibility of retrospective effect in civil proceedings was rejected.
\textsuperscript{128} D.J. Feldman [2002] PI 323.
\textsuperscript{129} Joint Committee on Human Rights, Tenth Report of Session 2004–05, Prevention of Terrorism Bill, HL 68/HC 334, p. 3.
\end{footnotesize}
From 2007 the Committee produces an annual report on its work. In a 2004 report the Joint Committee made out a case for a human rights commission which would help to develop and foster a culture of human rights. The Government responded with plans for an all-encompassing human rights and equality body. The Equality and Human Rights Commission began work in October 2007. For details, see Chapter 14.


The respondent had lived in a stable homosexual relationship with the deceased. The Rent Act 1977 provided only for rights of succession for a person living with the tenant ‘as his or her wife or husband’. The respondent claimed that this unfairly discriminated against him and was thus a breach of Art. 14. The House of Lords, under s. 3 of the HRA, reinterpreted the Rent Act to allow succession to any couple who had been living together in a stable relationship.

Lord Nicholls of Birkenhead:

4. I must first set out the relevant statutory provisions and then explain how the Human Rights Act 1998 comes to be relevant in this case. Paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 provide:

2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.

(2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.

3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant’s family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.

5. On an ordinary reading of this language paragraph 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot. That was decided in Fitzpatrick’s case. The survivor of a homosexual couple may, in competition with other members of the original tenant’s ‘family’, become entitled to an assured tenancy under paragraph 3. But even if he does, as in the present case, this is less advantageous. Notably, so far as the present case is concerned, the rent payable under an assured tenancy is the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, and an assured tenant may be evicted for non-payment of rent without the court needing to be satisfied, as is essential in the case of a statutory tenancy, that it is reasonable to make a possession order. In these and some other respects the succession rights granted by the statute to the survivor of a homosexual couple in respect of the house where he or she is living are less favourable than the succession rights granted to the survivor of a heterosexual couple.

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6. Mr Godin-Mendoza’s claim is that this difference in treatment infringes article 14 of the European Convention on Human Rights read in conjunction with article 8. Article 8 does not require the state to provide security of tenure for members of a deceased tenant’s family. Article 8 does not in terms give a right to be provided with a home: *Chapman v United Kingdom* (2001) 33 EHRR 399, 427, para 99. It does not ‘guarantee the right to have one’s housing problem solved by the authorities’: *Marzari v Italy* (1999) 28 EHRR CD 175, 179. But if the state makes legislative provision it must not be discriminatory. The provision must not draw a distinction on grounds such as sex or sexual orientation without good reason. Unless justified, a distinction founded on such grounds infringes the Convention right embodied in article 14, as read with article 8. Mr Godin-Mendoza submits that the distinction drawn by paragraph 2 of Schedule 1 to the Rent Act 1977 is drawn on the grounds of sexual orientation and that this difference in treatment lacks justification.

7. That is the first step in Mr Godin-Mendoza’s claim. That step would not, of itself, improve Mr Godin-Mendoza’s status in his flat. The second step in his claim is to pray in aid the court’s duty under section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compliant with the Convention rights. Here, it is said, section 3 requires the court to read paragraph 2 so that it embraces couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship. So read, paragraph 2 covers Mr Godin-Mendoza’s position. Hence he is entitled to a declaration that on the death of Mr Wallwyn-James he succeeded to a statutory tenancy.

8. The first of the two steps in Mr Godin-Mendoza’s argument requires him to make good the proposition that, as interpreted in *Fitzpatrick*’s case, paragraph 2 of Schedule 1 to the Rent Act 1977 infringes his Convention right under article 14 read in conjunction with article 8. Article 8 guarantees, among other matters, the right to respect for a person’s home. Article 14 guarantees that the rights set out in the Convention shall be secured ‘without discrimination’ on any grounds such as those stated in the non-exhaustive list in that article. . . .

13. In the present case paragraph 2 of Schedule 1 to the Rent Act 1977 draws a dividing line between married couples and cohabiting heterosexual couples on the one hand and other members of the original tenant’s family on the other hand. What is the rationale for this distinction? The rationale seems to be that, for the purposes of security of tenure, the survivor of such couples should be regarded as having a special claim to be treated in much the same way as the original tenant. The two of them made their home together in the house in question, and their security of tenure in the house should not depend upon which of them dies first.

14. The history of the Rent Act legislation is consistent with this appraisal. A widow, living with her husband, was accorded a privileged succession position in 1920. In 1980 a widower was accorded the like protection. In 1988 paragraph 2(2) was added, by which the survivor of a cohabiting heterosexual couple was treated in the same way as a spouse of the original tenant.

15. Miss Cass Frisk QC submitted there is a relevant distinction between heterosexual partnerships and same sex partnerships. The aim of the legislation is to provide protection for the traditional family. Same sex partnerships cannot be equated with family in the traditional sense. Same sex partners are unable to have children with each other, and there is a reduced likelihood of children being a part of such a household.

16. My difficulty with this submission is that there is no reason for believing these factual differences between heterosexual and homosexual couples have any bearing on why succession rights have been conferred on heterosexual couples but not homosexual couples. Protection of the traditional family unit may well be an important and legitimate aim in certain contexts. In certain contexts this may be a cogent reason justifying differential treatment: see *Kamen v Austria* (2003) 2 FLR 623, 630, para 40. But it is important to identify the element of the ‘traditional family’ which paragraph 2, as it now stands, is seeking to protect. Marriage is not now a prerequisite to protection.
under paragraph 2. The line drawn by Parliament is no longer drawn by reference to the status of marriage. Nor is parenthood, or the presence of children in the home, a precondition of security of tenure for the survivor of the original tenant. Nor is procreative potential a prerequisite. The survivor is protected even if, by reasons of age or otherwise, there was never any prospect of either member of the couple having a natural child.

20. In the present case the only suggested ground for according different treatment to the survivor of same sex couples and opposite sex couples cannot withstand scrutiny. Rather, the present state of the law as set out in paragraph 2 of Schedule 1 of the Rent Act 1977 may properly be described as continuing adherence to the traditional regard for the position of surviving spouses, adapted in 1988 to take account of the widespread contemporary trend for men and women to cohabit outside marriage but not adapted to recognise the comparable position of cohabiting same sex couples. I appreciate that the primary object of introducing the regime of assured tenancies and assured shorthold tenancies in 1988 was to increase the number of properties available for renting in the private sector. But this policy objective of the Housing Act 1988 can afford no justification for amending paragraph 2 so as to include cohabiting heterosexual partners but not cohabiting homosexual partners. This policy objective of the Act provides no reason for, on the one hand, extending to unmarried cohabiting heterosexual partners the right to succeed to a statutory tenancy but, on the other hand, withholding that right from cohabiting homosexual partners. Paragraph 2 fails to attach sufficient importance to the Convention rights of cohabiting homosexual couples.

24. In my view, therefore, Mr Godin-Mendoza makes good the first step in his argument: paragraph 2 of Schedule 1 to the Rent Act 1977, construed without reference to section 3 of the Human Rights Act, violates his Convention right under article 14 taken together with article 8.

SECTION 3 OF THE HUMAN RIGHTS ACT 1998

25. I turn next to the question whether section 3 of the Human Rights Act 1998 requires the court to depart from the interpretation of paragraph 2 enunciated in Fitzpatrick’s case.

26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights ‘so far as it is possible to do so’. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word ‘possible’. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which ‘possibility’ is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships’ House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28. One tenable interpretation of the word ‘possible’ would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

29. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may
nonetheless require the legislation to be given a different meaning. The decision of your Lordships’ House in *R v A (No 2) [2002] 1 AC 45* is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused’s right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is. depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the ‘interpretation’ of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is ‘possible’, a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, ‘go with the grain of the legislation’. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

34. Both these features were present in *In re S (Minors) (Care Order: Implementation of Care Plan) [2002] 2 AC 291*. There the proposed ‘starring system’ was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in *K (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837* section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In *Bellinger v Bellinger [2003] 2 AC 467* recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures.
35. In some cases difficult problems may arise. No difficulty arises in the present case. Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting heterosexual couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.

36. For these reasons I agree with the decision of the Court of Appeal. I would dismiss this appeal.

Lord Steyn:

37. In my view the Court of Appeal came to the correct conclusion. I agree with the conclusions and reasons of my noble and learned friends Lord Nicholls of Birkenhead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. In the light of those opinions, I will not comment on the case generally.

38. I confine my remarks to the question whether it is possible under section 3(1) of the Human Rights Act 1998 to read and give effect to paragraph 2(2) of Schedule 1 to the Rent Act 1977 in a way which is compatible with the European Convention on Human Rights. In my view the interpretation adopted by the Court of Appeal under section 3(1) was a classic illustration of the permissible use of this provision. But it became clear during oral argument, and from a subsequent study of the case law and academic discussion on the correct interpretation of section 3(1), that the role of that provision in the remedial scheme of the 1998 Act is not always correctly understood. I would therefore wish to examine the position in a general way.

39. My impression is that two factors are contributing to a misunderstanding of the remedial scheme of the 1998 Act. First, there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.

40. The second factor may be an excessive concentration on linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.

41. In enacting the 1998 Act Parliament legislated ‘to bring rights home’ from the European Court of Human Rights to be determined in the courts of the United Kingdom. That is what the White Paper said: see Rights Brought Home: The Human Rights Bill (1997) (cm 3782), para 2.7. That is what Parliament was told. The mischief to be addressed was the fact that Convention rights as set out in the ECHR, which Britain ratified in 1951, could not be vindicated in our courts. Critical to this purpose was the enactment of effective remedial provisions.

42. It is necessary to state what section 3(1), and in particular the word ‘possible’, does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two possible meanings. The word ‘possible’ in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be
adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.

45. Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR 1-4135, 4159 the European Court of Justice defined this obligation as follows:

‘It follows that, in applying national law, whether the provisions in questions were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty’

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

46. Parliament had before it the mischief and objective sought to be addressed, viz the need ‘to bring rights home’. The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section 3(1) was the prime remedial measure, and section 4 a measure of last resort. How the system modelled on the EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that ‘in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility’ and the Home Secretary said ‘We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention’: Hansard (HL Debates,) 5 February 1998, col 840 (3rd reading) and Hansard (HC Debates,) 16 February 1998, col 778 (2nd reading). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with Convention rights. This is the remedial scheme which Parliament adopted.

47. Three decisions of the House can be cited to illustrate the strength of the interpretative obligation under section 3(1). The first is *R v A (No. 2)* [2002] 1 AC 45 which concerned the so-called rape shield legislation. The problem was the blanket exclusion of prior sexual history between the complainant and an accused in section 41(1) of the Youth Justice and Criminal Evidence Act 1999, subject to narrow specific categories in the remainder of section 41. In subsequent decisions, and in academic literature, there has been discussion about differences of emphasis in the various opinions in *A*. What has been largely overlooked is the unanimous conclusion of the House. The House unanimously agreed on an interpretation under section 3 which would ensure that section 41 would be compatible with the ECHR. The formulation was by agreement set out in paragraph 46 of my opinion in that case as follows:

‘The effect of the decision today is that under section 41(3)c) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded.’

This formulation was endorsed by Lord Slyn of Hadley at p 56, para 13 of his opinion in identical wording. The other Law Lords sitting in the case expressly approved the formulation set out in para 46 of my opinion: Lord Hope of Craighead, at pp 87–88, para 110, Lord Clyde, at p 98, para 146; and Lord Hutton, at p 106, para 163. In so ruling the House rejected linguistic arguments in favour of a broader approach. In the subsequent decisions of the House in *In re S (Minors) (Care Order: Implementation of Case Plan)* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467, which touched on the remedial structure of the 1998 Act, the decision of the House in the case of *A* was not questioned. And in the present case nobody suggested that *A* involved a heterodox exercise of the power under section 3.
48. The second and third decisions of the House are *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 which involve the interpretative obligation under EEC law. *Pickstone* concerned section 1(2) of the Equal Pay Act 1970, as amended by section 8 of the Sex Discrimination Act 1975 and regulation 2 of the Equal Pay (Amendment) Regulations 1983 (SI 1983/1794) which implied into any contract without an equality clause one that modifies any term in a woman’s contract which is less favourable than a term of a similar kind in the contract of a man:

(a) where the woman is employed on like work with a man in the same employment.

(b) where a woman is employed on work rated as equivalent with that of a man in the same employment.

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment.

Lord Templeman observed (at pp. 120–121):

‘In my opinion there must be implied in paragraph (c) after the word ‘applies’ the words ‘as between the woman and the man with whom she claims equality.’ This construction is consistent with Community law. The employers’ construction is inconsistent with Community law and creates a permitted form of discrimination without rhyme or reason.’

That was the ratio decidendi of the decision. *Litster* concerned regulations intended to implement an EC Directive, the purpose of which was to protect the workers in an undertaking when its ownership was transferred. However, the regulations only protected those who were employed ‘immediately before’ the transfer. Having enquired into the purpose of the Directive, the House of Lords interpreted the Regulations by reading in additional words to protect workers not only if they were employed ‘immediately before’ the time of transfer, but also when they would have been so employed if they had not been unfairly dismissed by reason of the transfer: see Lord Keith of Kinkel, at 554. In both cases the House eschewed linguistic arguments in favour of a broad approach. *Pickstone* and *Litster* involved national legislation which implemented EC Directives. *Marleasing* extended the scope of the interpretative obligation to unimplemented Directives. *Pickstone* and *Litster* reinforce the approach to section 3(1) which prevailed in the House in the rape shield case.

49. A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word ‘possible’ in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the ECHR to decide on the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not ‘possible’ and made a declaration under section 4. Interpretation could not provide a substitute scheme. *Bellinger* is another obvious example. As Lord Rodger of Earlsferry observed ‘…in relation to the validity of marriage, Parliament regards gender as fixed and immutable’: [2003] 2 WLR 1174, 1195, para 83. Section 3(1) of the 1998 Act could not be used.

50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation
under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

51. I now return to the circumstances of the case before the House. Applying section 3 the Court of Appeal interpreted ‘as his or her wife or husband’ in the statute to mean ‘as if they were’ his wife or husband’. While there has been some controversy about aspects of the reasoning of the Court of Appeal, I would endorse the reasoning of the Court of Appeal on the use of section 3(1) in this case. It was well within the power under this provision.

Appeal dismissed.

Lord Rodger and Baroness Hale concurred. Lord Millet dissented.

NOTES

1. In this case, the House of Lords considered the approach to the interpretation of legislation to be taken by the courts when applying the requirement in s. 3(1) HRA that ‘[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. There has been considerable debate on the scope of s. 3 ranging from a broad construction in R v A132 to a narrower interpretation in Anderson133 and Bellinger.134 The above case appears to have settled the issue in favour of a broad construction.

2. As Ghaidan shows, a lot may be done in the application of s. 3 to temper legislation to achieve Convention compliance and so avoid the need for a declaration of incompatibility and new legislation. Section 3 takes matters much further than the longstanding rule of statutory interpretation by which any ambiguity in a statute must be resolved consistently with UK treaty obligations. The rule in s. 3 also differs fundamentally from those which generally apply in the interpretation of statutes. In R v A135 Lord Steyn stated that:

Under ordinary methods of interpretation a court may depart from the language of the statute to avoid absurd consequences: section 3 goes much further. Undoubtedly, a court must always look for a contextual and purposive interpretation: section 3 is more radical in its effect... In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strange. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort.

Note in connection the application of s. 3 the use by judges of the terms ‘reading in’ and ‘reading down’136 ‘Reading in’ means reading words into a statute that will cause it not to be incompatible with Convention rights. ‘Reading down’ means reading wording that might lead to incompatibility in a limited way so as to prevent this. However, as Lord Nicholls states above, the interpretation must not be inconsistent with a fundamental feature of legislation.

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136 See, e.g., Lord Hope in R v Lambert [2001] 3 All ER 577 at 604, HL; and Lord Cooke in R v DDP, ex p Kebilene [2000] 2 AC 326 at 373, HL. E.g., Secretary of State for the Home Department v MB [2006] EWCA Civ 1140, [2006] HRLR 37 where the procedural requirements of s. 3(10) of the Prevention of Terrorism Act 2005 were ‘read down’ to secure compliance with Art. 6(1).
3. In *Ghaidan*, Lord Millett dissented, suggesting that the use of s. 3 would result in the thrust of the legislation being defeated:

It is obvious that, if paragraph 2(2) of Schedule 1 to the Rent Act 1977 as amended had referred expressly to ‘a person of the opposite sex’ who was living with the original tenant as his or her husband or wife, it would not be possible to bring the paragraph into conformity with the Convention by resort to section 3. The question is whether the words ‘of the opposite sex’ are implicit; for if they are, then same result must follow. Reading the paragraph as referring to persons whether of the same or opposite sex would equally contradict the legislative intent in either case. I agree that the operation of section 3 does not depend critically upon the form of words found in the statute; the court is not engaged in a parlour game. But it does depend upon identifying the essential features of the legislative scheme; and these must be gathered in part at least from the words that Parliament has chosen to use. Drawing the line between the express and the implicit would be to engage in precisely that form of semantic lottery to which the majority rightly object. [para. 77]

4. How close to the line between interpretation and legislation does the House of Lords decision in *Ghaidan* come? Does it overstep that line? Is the role of the courts under s. 3 to read into a statutory provision, if necessary, wording that makes it compatible with Convention rights so long as the statute does not contain express and clear wording to the contrary?137 In Parliament, Lord Irvine suggested that, in view of s. 3, ‘in 99 per cent of the cases that will arise, there will be no need for judicial declarations of incompatibility’.138

5. The fact that a court is not able to interpret primary legislation as being compatible with Convention rights does not affect its ‘validity, continuing operation or enforcement’.139 Instead, the court must apply it in the case before the court and in subsequent cases, unless and until the competent Minister has taken remedial action under s. 10 HRA.140 However, subordinate legislation141 that is incompatible with a Convention right is invalid, etc., unless the ‘primary legislation prevents the removal of the incompatibility’.142 Subject to this exception, incompatible subordinate legislation is invalid whenever it is made and even though the statute authorising it post-dates the HRA.

6. There is an inevitable tension between s. 3 and s. 4 as only the former can guarantee a remedy to the claimant.

- **Brown v Stott** [2001] 2 All ER 97, [2001] 2 WLR 817, Privy Council

The defendant was suspected of stealing a bottle of gin from a superstore in the early hours. When asked by the police, who suspected she had been drinking alcohol, how she had

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139 HRA, s. 3(2)(b). The normal rule of implied repeal of statutes by later inconsistent statutes does not apply to a pre-HRA statute that is contrary to the HRA.

140 Per Lord Steyn, in *R v DPP, ex p Kebilene* [2000] 2 AC 326 at 367, HL.

141 Mainly regulations, statutory orders in council, devolved legislation in Scotland, Northern Ireland and Wales. See s. 21(1) HRA.

142 HRA, s. 3(2)(c).
reached the superstore, the defendant pointed to a car, which she said was hers. She was charged with theft and taken to the police station. There, under s. 172(2)(a) of the Road Traffic Act 1988, the defendant was required to indicate who had been driving the car when she travelled to the superstore, and admitted that it was her. After a positive breath test, the defendant was charged with driving while her breath alcohol level was above the legal limit. In the Scottish High Court of Judicature, it was held that the evidence compulsorily obtained from her under s. 172(2)(a) could not be led by the procurator fiscal because s. 172(2)(a) infringed the defendant’s Convention right to a fair trial in Art. 6 ECHR, particularly the implied right to freedom from self-incrimination that had been read into Art. 6(1) by the European Court of Human Rights. The procurator fiscal and the Advocate General appealed. The Privy Council first held that the case raised a devolution issue so that the question of the compatibility of s. 172(2)(a) with Convention rights could be raised. It then unanimously upheld an appeal from the decision of the High Court of Justiciary on the ground that, as read in accordance with s. 3 HRA, s. 172(2)(a) was not incompatible with Art. 6 ECHR.

**Lord Steyn:**

In the first real test of the Human Rights Act 1998 it is opportune to stand back and consider what the basic aims of the Convention are. One finds the explanation in the very words of the preambles of the Convention. There were two principal objectives. The first was to maintain and further realise human rights and fundamental freedoms. The framers of the Convention recognised that it was not only morally right to promote the observance of human rights but that it was also the best way of achieving pluralistic and just societies in which all can peaceably go about their lives. The second aim was to foster effective political democracy. This aim necessarily involves the creation of conditions of stability and order under the rule of law, not for its own sake, but as the best way to ensuring the well being of the inhabitants of the European countries. After all, democratic government has only one raison d’être, namely to serve the interests of all the people. The inspirers of the European Convention, among whom Winston Churchill played an important role, and the framers of the European Convention, ably assisted by English draftsmen, realised that from time to time the fundamental right of one individual may conflict with the human right of another. Thus the principles of free speech and privacy may collide. They also realised only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European liberal democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the European Convention (1950) is the descendant of the Universal Declaration of Human Rights (1948) which in article 29 expressly recognised the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others. It is also noteworthy that article 17 of the European Convention prohibits, among others, individuals from abusing their rights to the detriment of others. Thus, notwithstanding the danger of intolerance towards ideas, the Convention system draws a line which does not accord the protection of free speech to those who propagate racial hatred against minorities: article 10; *Jersild v Denmark* (1994) 19 EHRR 1, 26, para 31. This is to be contrasted with the categorical language of the First Amendment to the United States Constitution which provides that ‘Congress shall make no law … abridging the freedom of speech.’ The European Convention requires that where difficult questions arise a balance must be struck. Subject to a limited number of absolute guarantees, the scheme and structure of the Convention reflects this balanced approach. It differs in material respects from other constitutional systems but as a European nation it represents our Bill of Rights. We must be guided by it. And it is a basic premise of the Convention system that only an entirely neutral, impartial,
and independent judiciary can carry out the primary task of securing and enforcing Convention rights. This contextual scene is not only directly relevant to the issues arising on the present appeal but may be a matrix in which many challenges under the Human Rights Act 1998 should be considered.…

The present case is concerned with article 6 of the Convention which guarantees to every individual a fair trial in civil and criminal cases.…

It is well settled, although not expressed in the Convention, that there is an implied privilege against self-incrimination under article 6. Moreover, section 172(2) undoubtedly makes an inroad on this privilege. On the other hand, it is also clear that the privilege against self-incrimination is not an absolute right. While there is no decision of the European Court of Human Rights directly in point, it is noteworthy that closely related rights have been held not to be absolute. It is significant that the basic right of access to the courts has been held to be not absolute: Colder v United Kingdom 1 EHRR 524. The principle that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law is connected with the privilege against self-incrimination. Yet the former has been held not to be absolute: Salabiaku v France 13 EHRR 379. The European Court has also had occasion to emphasise the close link between the right of silence and the privilege against self-incrimination: Murray v United Kingdom 22 EHRR 29. In Murray the European Court held that the right of silence is not absolute.

In these circumstances it would be strange if a right not expressed in the Convention or any of its Protocols, but implied into article 6 of the Convention, had an absolute character. In my view the right in question is plainly not absolute. From this premise it follows that an interference with the right may be justified if the particular legislative provision was enacted in pursuance of a legitimate aim and if the scope of the legislative provision is necessary and proportionate to the achievement of the aim.…

In considering whether an inroad on the privilege against self-discrimination can be justified, it is necessary to concentrate on the particular context. An intense focus on section 172(2) is required. It reads:

‘Where the driver of a vehicle is alleged to be guilty of an offence to which this section applies—(a) the person keeping the vehicle shall give such information as to the identity of the driver as he may be required to give by or on behalf of a chief officer of police, and (b) any other person shall if required as stated above give any information which it is in his power to give and may lead to identification of the driver.’

This penalty for failing to comply with section 172(2) is a fine of not more than £1,000. In addition an individual may be disqualified from driving and endorsement of the driver’s licence is mandatory. It is well established that an oral admission made by a driver under section 172(2) is admissible in evidence: Foster v Farrell 1963 JC 46.

The subject of section 172(2) is the driving of vehicles. It is a notorious fact that vehicles are potentially instruments of death and injury. The statistics placed before the Board show a high rate of fatal and other serious accidents involving vehicles in Great Britain. The relevant statistics are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Fatal and serious accidents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>40,601</td>
</tr>
<tr>
<td>1997</td>
<td>39,628</td>
</tr>
<tr>
<td>1998</td>
<td>37,770</td>
</tr>
</tbody>
</table>

The effective prosecution of drivers causing serious offences is a matter of public interest. But such prosecutions are often hampered by the difficulty of identifying the drivers of the vehicles at the time of, say, an accident causing loss of life or serious injury or potential danger to others. The tackling of this social problem seems in principle a legitimate aim for a legislature to pursue.

The real question is whether the legislative remedy in fact adopted is necessary and proportionate to the aim sought to be achieved. There were legislative choices to be made. The legislature could have decided to do no more than to exhort the police and prosecuting authorities to redouble their efforts. It may, however, be that such a policy would have been regarded as inadequate. Secondly, the legislature
could have introduced a reverse burden of proof clause which placed the burden on the registered owner to prove that he was not the driver of the vehicle at a given time when it is alleged that an offence was committed. Thirdly, and this was the course actually adopted, there was the possibility of requiring information about the identity of the driver to be revealed by the registered owner and others. As between the second and third techniques it may be said that the latter involves the securing of an admission of a constituent element of the offence. On the other hand, such an admission, if wrongly made, is not conclusive. And it must be measured against the alternative of a reverse burden clause which could without further investigation of the identity of the driver lead to a prosecution. In their impact on the citizen the two techniques are not widely different. And it is rightly conceded that a properly drafted reverse burden of proof provision would have been lawful.

It is also important to keep in mind the narrowness of the interference. Section 172(2) is directed at obtaining information in one category, namely the identity of the driver at the time an offence was allegedly committed. The most important part of section 172(2) is paragraph (a) since the relevant information is usually peculiarly within the knowledge of the owner. But there may be scope for using (b) in a limited category of cases, e.g. when only the identity of a passenger in the car is known. Section 172(2) does not authorise general questioning by the police to secure a confession of an offence. On the other hand, section 172(2) does, depending on the circumstances, in effect authorise the police officer to invite the owner to make an admission of one element in a driving offence. It would, however, be an abuse of the power under section 172(2) for the police officer to employ improper or overbearing methods of obtaining the information. He may go no further than to ask who the driver was at the given time. If the police officer strays beyond his power under section 172(2) a judge will have ample power at trial to exclude the evidence. It is therefore a relatively narrow interference with the privilege in one area which poses widespread and serious law enforcement problems.

Under the Convention system the primary duty is placed on domestic courts to secure and protect Convention rights. The function of the European Court of Human Rights is essential but supervisory. In that capacity it accords to domestic courts a margin of appreciation, which recognises that national institutions are in principle better placed than an international court to evaluate local needs and conditions. That principle is logically not applicable to domestic courts. On the other hand, national courts may accord to the decisions of national legislatures some deference where the context justifies it: see R v Director of Public Prosecutions, Ex p Keblene [2000] 2 AC 326, 380–381 per Lord Hope of Craighead; see also: Singh, Hunt and Demetriou, ‘Is there a Role for the “Margin of Appreciation” in National Law after the Human Rights Act?’ [1999] EHRLR 15. This point is well explained in Lester & Pannick, Human Rights Law and Practice (1999), p 74:

‘Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions.’

In my view this factor is of some relevance in the present case. Here section 172(2) addresses a pressing social problem, namely the difficulty of law enforcement in the face of statistics revealing a high accident rate resulting in death and serious injuries. The legislature was entitled to regard the figures of serious accidents as unacceptably high. It would also have been entitled to take into account that it was necessary to protect other Convention rights, viz the right to life of members of the public exposed to the danger of accidents; see article 2(1). On this aspect the legislature was in as good a position as a court to assess the gravity of the problem and the public interest in addressing it. It really then boils down to the question whether in adopting the procedure enshrined in section 172(2), rather than a reverse burden technique, it took more drastic action than was justified. While this is ultimately a question for the court, it is not unreasonable to regard both
techniques as permissible in the field of the driving of vehicles. After all, the subject invites special regulation; objectively the interference is narrowly circumscribed; and it is qualitatively not very different from requiring, for example, a breath specimen from a driver. Moreover, it is less invasive than an essential modern tool of crime detection such as the taking of samples from a suspect for DNA profiling. If the matter was not covered by authority, I would have concluded that section 172(2) is compatible with article 6. …

The decision of the European Court in Saunders v United Kingdom 23 EHRR 313 gave some support to the view of the High Court of Justiciary. With due respect I have to say that the reasoning in Saunders is unsatisfactory and less than clear: see the critique in Andrews, ‘Hiding Behind the Veil: Financial Delinquency and the Law’ (1997) 22 ELR 369; Eriksen and Thorkildsen, ‘Self-Incrimination, The Ban on Self-Incrimination after the Saunders Judgment’ (1997) 5 JFC 182; Davies, ‘Do polluters have the right not to incriminate themselves?’ (1999) 143 SJ 924. The European Court did not rule that the privilege against self-incrimination is absolute. Surprisingly in view of its decision in Murray 22 EHRR 29 that the linked right of silence is not absolute it left the point open in respect of the privilege against self-incrimination: 23 EHRR 313, 339–340, para 74. On the other hand, the substance of its reasoning treats both privileges are not absolute. The court observed, at p 337, para 68:

‘The court recalls that, although not specifically mentioned in article 6 of the Convention, the right to silence and the right not to incriminate oneself, are generally recognised international standards which lie at the heart of the notion of a fair procedure under article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fullfilment of the aims of article 6.’

The court emphasised the rationale of improper compulsion. It does not hold that anything said under compulsion of law is inadmissible. Admittedly, the court also observed, at para 68:

‘The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in article 6(2) of the Convention.’

Again one finds the link with the non-absolute right of silence. In any event ‘methods of coercion or oppression in defiance of the will of the accused’ is probably another way of referring to improper compulsion. This is consistent with the following passage, at p 338, para 69:

‘In the present case the court is only called upon to decide whether the use made by the prosecution of the statements obtained from the applicant by the inspectors amounted to an unjustifiable infringement of the right. This question must be examined by the court in the light of all the circumstances of the case. In particular, it must be determined whether the applicant has been subject to compulsion to give evidence and whether the use made of the resulting testimony at his trial offended the basic principles of a fair procedure inherent in article 6(1) of which the right not to incriminate oneself is a constituent element.’

The expression ‘unjustifiable infringement of the right’ implies that some infringements may be justified. In my view the observations in Saunders do not support an absolutist view of the privilege against self-incrimination. It may be that the observations in Saunders will have to be clarified in a further case by the European Court. As things stand, however, I consider that the High Court of Justiciary put too great weight on these observations. In my view they were never intended to apply to a case such as the present. …

That brings me back to the decision of the High Court of Justiciary. It treated the privilege against self-incrimination as virtually absolute. That conclusion fits uneasily into the balanced Convention system, and cannot be reconciled with article 6 in all its constituent parts and the spectrum of jurisprudence of the European Court on the various facets of article 6.
I would hold that the decision of the High Court of Justiciary on the merits was wrong. The procurator fiscal is entitled to lead the evidence of Miss Brown’s admission under section 172(2)…

I am in complete agreement with Lord Hope of Craighead that a devolution issue has been raised and I would respectfully endorse his reasons.

For these reasons, as well as the reasons given by Lord Bingham of Cornhill, I would allow the appeal and quash the declaration made by the High Court.

Appeal allowed.

Lord Bingham, Lord Hope, Lord Clyde and the Right Honourable Ian Kirkwood also delivered judgments allowing the appeal.143

NOTES

1. Deference to Parliament. Lord Steyn’s judgment in Brown v Stott articulates the ‘deference to Parliament’ principle that the courts apply when deciding whether Westminster legislation is incompatible with Convention rights. Lord Bingham spoke in Brown v Stott144 in similar terms:

While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to these bodies: see Lester and Pannick, Human Rights Law and Practice (1999), pp. 73–76.

Earlier, Lord Hope had taken the same position in R v DPP, ex p Kebilene:145

The doctrine of the ‘margin of appreciation’ is a familiar part of the jurisprudence of the European Court of Human Rights. The European Court has acknowledged that, by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed to evaluate local needs and conditions than an international court: Buckley v United Kingdom (1996) 23 EHRR 101, 129, paras. 74–75. Although this means that, as the European Court explained in Handyside v United Kingdom (1976) 1 EHRR 737, 753, para. 48, ‘the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights,’ it goes hand in hand with a European supervision. The extent of this supervision will vary according to such factors as the nature of the Convention right in issue, the importance of that right for the individual and the nature of the activities involved in the case.

This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.

143 The decision has subsequently been confirmed by the Strasbourg Court in O’Halloran v UK (2007) App. No. 15809/02; Francis v United Kingdom (2007) App. No. 25624/02.
144 [2001] 2 WLR 817 at 835, HL. 145 [2000] 2 AC 326 at 380, HL.
In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para. 3.21 of Human Rights Law and Practice (1999), of which Lord Lester of Herne Hill and Mr. Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the ‘discretionary area of judgment’. It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. But even where the right is stated in terms which are unqualified the courts will need to bear in mind the jurisprudence of the European Court which recognises that due account should be taken of the special nature of terrorist crime and the threat which it poses to a democratic society: Murray v United Kingdom (1994) 19 EHRR 193, 222, para. 47.

More recently, in A v Secretary of State for the Home Department Lord Nicholls discussed deference in the context of terrorism legislation:

80 … In enacting legislation and reaching decisions Parliament and ministers must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.

81. In the present case I see no escape from the conclusion that Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights.

Therefore, even in areas in which the judiciary sees a clear need for deference this does not extend to the decision in its entirety.

2. The ‘margin of appreciation’ doctrine to which their Lordships refer is well established in the jurisprudence of the European Court of Human Rights. It was formulated most famously in Handyside v United Kingdom in the context of limitations on freedom of expression (Art. 10 ECHR): 147

By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them…

Nevertheless, Article 10(2) does not give the contracting states an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those states’ engagements, is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision.

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By means of the doctrine, the European Court of Human Rights allows states, whether acting through their legislature, executive or judiciary, a certain degree of latitude in borderline cases in deciding whether a limitation upon a Convention right is justifiable by the public interest. It does so because of the local knowledge of state institutions. There is, as it were, a presumption in favour of their assessment of the facts and of what is called for in the light of them. It is also used as a basis for not pressing a state on a matter of social policy where European values are in flux. As Lord Steyn states, the margin of appreciation doctrine, or principle, is not 'logically applicable' in the different context of national courts assessing the compatibility of national legislation with Convention rights. However, the 'deference to Parliament' principle, while having a different justification, ie recognition of the special position of a democratically elected legislature 'where the context justifies it', may lead to the same result on the facts of a particular case.

3. In *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* Laws LJ formulated four principles stating how UK courts should approach the issue of deference. These are that: (1) 'greater deference is to be paid to an Act of Parliament than a decision of the Executive or subordinate measure'; (2) there is more scope for deference 'where the Convention itself requires a balance to be struck much less where the right is stated in terms which are unqualified'; (3) 'greater deference will be due to the democratic powers where the subject-matter in hand is peculiarly within their constitutional responsibility and less when it lies more particularly within the constitutional responsibility of the courts'; and (4) 'greater or lesser deference will be due according to whether the subject-matter lies more readily within the actual or potential expertise of the democratic powers or the courts'.

4. In *Huang v Secretary of State for the Home Department* the House of Lords recognised the difficulty in the term 'deference' and confirmed that it is not a doctrine that can prevent a court from holding that a particular decision is a disproportionate interference with a Convention right.

5. When reviewing decisions where the decision-maker is required to comply with the Convention as a matter of law the approach to be adopted was summarised by Lord Phillips MR in *R (Mahmood) v Secretary of State for the Home Department*. First, even where human rights are at stake, the role of the court was supervisory; it did not substitute its own decision for that of the executive and there would often be an area of discretion permitted to the executive before a response could be demonstrated to infringe the Convention (see above). Secondly, in conducting a review of a decision affecting human rights, the court should subject it to 'the most anxious scrutiny'. Thirdly, instead of merely applying the tests of *Wednesbury* unreasonableness, the court should 'ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention'. The third of these propositions was subject to modification by the House of Lords in the following case.

148 E.g. the legal status of transsexuals: see *Sheffield and Horsham v UK* (1998) 27 EHRR 163.
149 Per Lord Steyn, extract from *Brown v Stott* above.
150 [2003] QB 728, paras [83]–[87].
151 [2007] UKHL 11.
153 [2001] 1 WLR 840 at paras [37]–[40].
R (on the application of Daly) v Secretary of State for the Home Department  

Home Office policy on the searching of prisoners’ cells in closed prisons was set out in a 1995 Security Manual. This provided that prisoners were not to be present when searches took place. This restriction was justified on the grounds that prison officers might be intimidated by prisoners who were present and that it was necessary to keep searching methods secret. Under the policy, officers could, *inter alia*, examine prisoners’ correspondence with their legal advisers to check that it was bona fide legal correspondence and that it did not conceal anything else. However, they could not read it unless there was reasonable cause to suspect that its contents endangered prison security, or the safety of others, or was otherwise of a criminal nature.

In this case, the applicant applied for judicial review of the policy in so far as it concerned legal correspondence that he kept in his cell. The House of Lords upheld his appeal against a Court of Appeal decision dismissing his application for judicial review. It did so on the basis that the policy infringed the common law right of a prisoner to legal professional privilege in his communications with his legal adviser. This was because the possibility that a prison officer might, improperly, read the correspondence and this would have a chilling effect on freedom of communication. Although the general wording of the Prison Rules might justify some limitation on the common law right to professional legal privilege, they could not justify a policy that extended to all prisoners, whether or not there was reason to believe that they might be abusing their freedom of correspondence.

The House of Lords also held that the executive decision underlying the policy was an interference with a Convention right, viz. the right to respect for correspondence in Art. 8 ECHR. The following extract from Lord Steyn’s judgment addresses the ECHR issue only. In particular, it indicates the judicial review criterion to be followed by the courts when considering whether an executive decision complies with the ECHR. The other members of the House of Lords concurred in his judgment on this point. The extracts from Lord Bingham’s and Lord Cooke’s judgment consider the overlap between the position at common law and under the HRA.

**Lord Bingham:**

23. I have reached the conclusions so far expressed on an orthodox application of common law principles derived from the authorities and an orthodox domestic approach to judicial review. But the same result is achieved by reliance on the European Convention. Article 8(1) gives Mr Daly a right to respect for his correspondence. While interference with that right by a public authority may be permitted if in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the prevention of disorder or crime or for protection of the rights and freedoms of others, the policy interferes with Mr Daly’s exercise of his right under article 8(1) to an extent much greater than necessity requires. In this instance, therefore, the common law and the Convention yield the same result. But this need not always be so. In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, the European Court held that the orthodox domestic approach of the English courts had not given the applicants an effective remedy for the breach of their rights under article 8 of the Convention because the threshold of review had been set too high. Now, following the incorporation of the Convention by the Human Rights Act 1998 and the bringing of that Act fully into force, domestic courts must themselves form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy. On this aspect of the case, I agree with and adopt the observations of my noble and learned friend Lord Steyn which I have had the opportunity of reading in draft.
Lord Steyn:

24. My Lords, I am in complete agreement with the reasons given by Lord Bingham of Cornhill in his speech. For the reasons he gives I would also allow the appeal. Except on one narrow but important point I have nothing to add.

25. There was written and oral argument on the question whether certain observations of Lord Phillips of Worth Matravers MR in \( R \) (Mahmood) \( v \) Secretary of State for the Home Department [2001] 1 WLR 840 were correct. The context was an immigration case involving a decision of the Secretary of State made before the Human Rights Act 1998 came into effect. The Master of the Rolls nevertheless approached the case as if the Act had been in force when the Secretary of State reached his decision. He explained the new approach to be adopted. The Master of the Rolls concluded, at p 857, para 40:

‘When anxiously scrutinising an executive decision that interferes with human rights, the court will ask the question, applying an objective test, whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention. When considering the test of necessity in the relevant context, the court must take into account the European jurisprudence in accordance with section 2 of the 1998 Act.’

These observations have been followed by the Court of Appeal in \( R \) (Isiko) \( v \) Secretary of State for the Home Department \( [1998] \) 1 KB 223, and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in \( R \) \( v \) Ministry of Defence, Ex p Smith \( [1996] \) QB 517, 554E–G per Sir Thomas Bingham MR. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.

26. The explanation of the Master of the Rolls in the first sentence of the cited passage requires clarification. It is couched in language reminiscent of the traditional Wednesbury ground of review (Associated Provincial Picture Houses Ltd \( v \) Wednesbury Corp \( [1948] \) 1 KB 223), and in particular the adaptation of that test in terms of heightened scrutiny in cases involving fundamental rights as formulated in \( R \) \( v \) Ministry of Defence, Ex p Smith \( [1996] \) QB 517, 554E–G per Sir Thomas Bingham MR. There is a material difference between the Wednesbury and Smith grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake.

27. The contours of the principle of proportionality are familiar. In de Freitas \( v \) Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing \( [1999] \) 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:

‘whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach: see Professor Jeffrey Jowell QC, ‘Beyond the Rule of Law: Towards Constitutional Judicial Review’ \( [2000] \) PL 671; Craig, Administrative Law, 4th ed (1999), pp 561–563; Professor David Feldman, ‘Proportionality and the Human Rights Act 1998’, essay in The Principle of Proportionality in the Laws of Europe edited by Evelyn Ellis (1999), pp 117, 127 et seq. The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the
decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, ex p Smith [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. It will be recalled that in Smith the Court of Appeal reluctantly felt compelled to reject a limitation on homosexuals in the army. The challenge based on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to respect for private and family life) foundered on the threshold required even by the anxious scrutiny test. The European Court of Human Rights came to the opposite conclusion: Smith and Grady v United Kingdom (1999) 29 EHRR 493. The court concluded, at p 543, para 138:

‘the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the court’s analysis of complaints under article 8 of the Convention.’

In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

28. The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary, as Professor Jowell [2000] PL 671, 681 has pointed out the respective roles of judges and administrators are fundamentally distinct and will remain so. To this extent the general tenor of the observations in Mahmood [2001] 1 WLR 840 are correct. And Laws LJ rightly emphasised in Mahmood, at p 847, para 18, ‘that the intensity of review in a public law case will depend on the subject matter in hand’. That is so even in cases involving Convention rights. In law context is everything.

Lord Cooke of Thorndon:

29. My Lords, having had the advantage of reading in draft the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Steyn, I am in full agreement with them. I add some brief observations on two matters, less to supplement what they have said than to underline its importance.

30. First, while this case has arisen in a jurisdiction where the European Convention for the Protection of Human Rights and Fundamental Freedoms applies, and while the case is one in which the Convention and the common law produce the same result, it is of great importance, in my opinion, that the common law by itself is being recognised as a sufficient source of the fundamental right to confidential communication with a legal adviser for the purpose of obtaining legal advice. Thus the decision may prove to be in point in common law jurisdictions not affected by the Convention. Rights similar to those in the Convention are of course to be found in constitutional documents and other formal affirmations of rights elsewhere. The truth is, I think, that some rights are inherent and fundamental to democratic civilised society. Conventions, constitutions, bills of rights and the like respond by recognising rather than creating them.

31. To essay any list of these fundamental, perhaps ultimately universal, rights is far beyond anything required for the purpose of deciding the present case. It is enough to take the three identified by Lord Bingham: in his words, access to a court; access to legal advice; and the right to communicate confidentially with a legal adviser under the seal of legal professional privilege. As he says authoritatively from the
woolsack, such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment. The point that I am emphasising is that the common law goes so deep.

32. The other matter concerns degrees of judicial review. Lord Steyn illuminates the distinctions between ‘traditional’ (that is to say in terms of English case law, Wednesbury) standards of judicial review and higher standards under the European Convention or the common law of human rights. As he indicates, often the results are the same. But the view that the standards are substantially the same appears to have received its quietus in Smith and Grady v United Kingdom (1999) 29 EHRR 493 and Lustig-Prean and Beckett v United Kingdom (1999) 29 EHRR 548. And I think that the day will come when it will be more widely recognised that Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 was an unfortunately regressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.

33. I, too, would therefore allow the present appeal.

Appeal allowed.

Lord Hutton and Lord Scott concurred.

NOTES

1. As Lord Steyn indicates in his judgment in the Daly case, in a passage that was accepted by the other four judges, the test to be used when deciding for the purposes of the HRA whether executive decisions are compatible with Convention rights is whether they are a proportionate response to a pressing social need (para. 27). This test is one that has been developed by the European Court of Human Rights when deciding whether a limitation on a Convention right is acceptable under Arts 8(2), 9(2) and 10(2) ECHR, and one that it has required national courts to use when deciding whether a limitation on a Convention right is a breach of the ECHR. If they do not, they are not providing an effective remedy for the purposes of Art. 13 ECHR. As Lord Steyn states, the Strasbourg Court has made it clear in a number of British cases that the much more relaxed Wednesbury criterion for judicial review (see next note) is not rigorous enough for this purpose. Moreover, the stricter version of it in the Smith case was not good enough when that case went to Strasbourg as Smith and Grady v United Kingdom. It was in this context that the proportionality test was introduced in the Daly case. Note that no ‘margin of appreciation’ language is used by Lord Steyn, and it is clear that no such margin applies. At the same time, as Lord Steyn indicates, the proportionality test does not mean substituting a judge’s decision on the merits for one by a member of the executive. The court’s power is still one of review, not of decision, and involves only deciding whether what has been done is one of possibly a number of proportionate responses.

154 (1999) 29 EHRR 493. In Smith, the Court of Appeal had reluctantly held that it could not overturn the executive prohibition on homosexuals in the armed forces. At Strasbourg, the Court found a breach of Art. 8 ECHR: on the facts, even allowing for a margin of appreciation, the action, taken against the particular applicants had been disproportionate. Note that the ‘heightened scrutiny’ test did provide a remedy in R v Lord Saville of Newdigate, ex p A [1999] 4 All ER 860, CA (decision of the Bloody Sunday Tribunal of Inquiry not to allow soldiers to give evidence anonymously quashed as unreasonable).
2. The Wednesbury test to which Lords Steyn and Cooke refer is one of ‘unreasonableness’, or, in Lord Diplock’s term, ‘irrationality’. It was expounded by Lord Diplock in the following classic passage:\textsuperscript{155}

By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

3. The Daly case is an example of the role of the courts in ensuring that acts of the executive are not incompatible with Convention rights. In that case, it would not have been difficult for Home Office policy on cell searching to have conformed with Convention rights within the limits of the enabling primary legislation, i.e. the Prison Act 1952. Generally, it will be very unusual for the powers given to the executive by primary legislation to be so tightly drawn that a Minister or other executive member will have no choice but to act incompatibly with Convention rights, particularly in view of the rule of interpretation in s. 3 HRA.\textsuperscript{156} As a result, executive action incompatible with Convention rights will almost always be invalid, rather than lead to a declaration of incompatibility.

In relation to the declaration of incompatibility the reader should cross reference to the case of A v Secretary of State for the Home Department reported fully below in Chapter 6.

4. A declaration of incompatibility may only be made at the level of court indicated in s. 4(5), viz. in England and Wales, the High Court and above. A magistrates’ court, Crown Court, county court or tribunal may not make such a declaration; instead, the point must be taken on appeal.

5. As a declaration of incompatibility, like the initial judicial determination of incompatibility, does not affect the legal validity, operation or enforcement of the legislative provision concerned,\textsuperscript{157} the curious result is that a litigant who successfully raises an issue of incompatibility may well not benefit.\textsuperscript{158} For example, a person who successfully claimed that he was detained under legislation that was incompatible with the Convention right to freedom of the person in Art. 5 ECHR would none the less have no right to release; an order for his detention could be renewed under the incompatible law despite a declaration of incompatibility concerning it.\textsuperscript{159} In such a case, it is much better for an alleged victim of a violation of a Convention right if the court, applying s. 3 HRA, manages to stretch the meaning of a statute in the victim’s favour, rather than find an incompatibility. However, there is an important exception to the rule that a finding of incompatibility cannot work to the advantage of the individual victim in the instant case. This concerns criminal convictions where the defendant has been denied a fair trial contrary to the Convention right in Art. 6 ECHR. In such cases, the conviction would almost certainly be set aside as ‘unsafe’, as provided in

\textsuperscript{155} Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 408, HL.


\textsuperscript{157} HRA, s. 4(6).

\textsuperscript{158} Damages or other relief would not be available under s. 3 because the act of the public authority would, if a case where a declaration of incompatibility is available, not be unlawful for the purposes of s. 6(1): s. 6(2) HRA.

\textsuperscript{159} Per Dame Elizabeth Butler-Sloss in Re K (a child) [2001] 2 WLR 1141 at 1148, CA (legislation authorising the detention of children in secure units; in fact held not contrary to Art. 5 ECHR). Moreover, the detainee would not have the Art. 5(5) ECHR right to compensation: ibid.
s. 2 of the Criminal Appeal Act 1968.\textsuperscript{160} In other, non-criminal cases, the only possibility is that any remedial action taken by the government following the declaration of incompatibility is given retroactive application, which the HRA allows.\textsuperscript{161} Otherwise, in non-criminal cases the remedy for the litigant, as it was before the HRA was enacted, is to take the case on the long road to Strasbourg, armed with a declaration of incompatibility, which will be a powerful weapon before the European Court. Although these considerations suggest that in some cases there may be insufficient incentive under the HRA for an individual\textsuperscript{162} to raise a question of incompatibility, note that a 'compatibility' argument may be added to other arguments in criminal, civil or judicial review proceedings brought on some other legal basis without much trouble. A litigant who presents such an argument may be rewarded with a s. 3 reading of a statute that makes it compatible with Convention rights from which he or she can profit in the instant case.\textsuperscript{163}

The device of the 'declaration of incompatibility' is ingenious and not found in any other legal system. It was prompted by a wish to respect the principle of parliamentary sovereignty.\textsuperscript{164} Lord Irvine LC stated in Parliament:\textsuperscript{165}

\begin{quote}

The design of the Bill is to give the courts as much space as possible to protect human rights, short of a power to set aside or ignore Acts of Parliament. In the very rare cases where the higher courts will find it impossible to read and give effect to any statute in a way which is compatible with convention rights, they will be able to make a declaration of incompatibility. Then it is for Parliament to decide whether there should be remedial legislation. Parliament may, not must, and generally will, legislate. If a Minister’s prior assessment of compatibility (under Clause 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could withhold remedial action. There is a fast-track route for Ministers to take remedial action by order. But the remedial action will not retrospectively make unlawful an act which was a lawful act—lawful since sanctioned by statute. This is the logic of the design of the Bill. It maximises the protection of human rights without trespassing on parliamentary sovereignty.
\end{quote}

The power given to the UK courts by ss. 3 and 4 HRA falls far short of the power of judicial review of legislation of certain other national courts such as the US Supreme Court.\textsuperscript{166} For example, in the famous case of \textit{Roe v Wade},\textsuperscript{167} state criminal abortion statutes that interfered with a woman’s constitutional right to privacy were struck down by the US Supreme Court, so that they did not apply to the petitioners’ cases and had no further legal effect. Does the absence of such a power on the part of UK courts mean that the HRA is not a 'bill of rights'?

\begin{footnotesize}


\textsuperscript{161} See s. 10 and Sch. 2, para. 1(1)(b) HRA. The remedial order may also make ‘different provision for different cases’: para. 1(1)(d).

\textsuperscript{162} A court, which must apply Convention rights, may raise a compatibility issue on its own initiative.

\textsuperscript{163} See \textit{R v A} [2001] UKHL 25, where evidence that might contribute to an acquittal was admissible.

\textsuperscript{164} Whether the motivation for doing so was a genuine respect for that principle or the need to ease the passage of the HRA through a Parliament that might not be sympathetic to a surrender of its powers, or a mixture of the two, is not clear. On parliamentary sovereignty and the HRA, see N. Bamforth [1998] PL 572; M. Elliott (1999) 115 LQR 119; K. Ewing (1999) 62 MLR 79 at 91; S. Freeman (1998) 114 LQR 538.

\textsuperscript{165} 582 HL Debs, 3 November 1997, cols 1228–1229.

\textsuperscript{166} Remarkably, the Supreme Court’s power is an implied one, read into the US constitution by the Supreme Court itself: \textit{Marbury v Madison} 5 US 1 (1 Cranch) 137 (1803).

\textsuperscript{167} 410 US 113 (1973).
\end{footnotesize}
3. THE FUTURE METHOD OF PROTECTING RIGHTS: A DOMESTIC BILL OF RIGHTS?

The HRA will always stir debate about whether it ought to be applied cautiously or otherwise.169 Undoubtedly the HRA has been dogged by misinterpretation and myth as reflected in several reports. The Joint Committee on Human Rights reported:

3. The Human Rights Act reached the statute book ten years ago, with the support of all the main political parties. Today it is under threat. It is frequently and inaccurately derided in the tabloid press as a charter for terrorists, criminals and illegal immigrants. The Leader of the Opposition has even called on a number of occasions for the Act to be repealed. Calls from a high level for the Human Rights Act to be repealed or substantially modified first gained momentum in the wake of the infamous Anthony Rice case, in which the Government followed the media in asserting that the Human Rights Act had been responsible for the tragic death of Naomi Bryant because it had required her killer to be released. We inquired carefully into the matter to ascertain if this was true and established that there was no evidence that Naomi Bryant had been killed as a result of officials misinterpreting the Human Rights Act. Despite our clear finding, however, both the Government and the media have continued to repeat the unfounded assertion that the Human Rights Act caused the death of an innocent woman. Similarly, before that, the Human Rights Act had not been responsible for the provision of a takeaway meal to a prisoner making a rooftop protest or the provision of pornography to a serial killer in prison (an application which, in any case, failed): unfortunately the catalogue of mythology continues to grow.170

The current Government has accepted that there is no case for repealing the Act and is committed to developing human rights legislation. In 2007 a Green Paper171 was published providing for a bill of rights and responsibilities.

A Bill of Rights and Duties could provide explicit recognition that human rights come with responsibilities and must be exercised in a way that respects the human rights of others. It would build on the basic principles of the Human Rights Act, but make explicit the way in which a democratic society’s rights have to be balanced by obligations…However, a framework of civic responsibilities—were it to be given legislative force—would need to avoid encroaching upon personal freedoms and civil liberties which have been hard won over centuries of our history.172

168 Cf. the consequences of the European Communities Act 1972, which also, technically, can be explained consistently with classical parliamentary sovereignty.
Both the Conservative and Liberal Democrat parties are also committed to developing a domestic Bill of Rights. In 2008 the JCHR determined that there was a case for a Bill of Rights and Freedoms which would encompass a wider range of rights than under the HRA.

We recommend for inclusion, amongst others, the right to trial by jury, the right to administrative justice and international human rights as yet not incorporated into UK law. We believe that there is a strong case for a Bill of Rights and Freedoms having detailed rights for children, and we recommend that the public should be consulted about including specific rights for other vulnerable groups. In addition, we argue that there is a strong case for including the right to a healthy and sustainable environment in a Bill of Rights and Freedoms. One of the biggest controversies in the debate on the Bill of Rights is whether it should include social and economic rights. We believe that there is strong public support for including rights to health, housing and education.

The Labour Government’s motivation for a Bill of Rights includes:

1. To provide a means of balancing rights with responsibilities;
2. To provide a framework for our shared national values as part of the Prime Minister’s ‘Britishness’ agenda;
3. To educate the public, by providing greater clarity for people about their rights and responsibilities;
4. To provide greater ownership of the protected rights than is the case with the HRA;
5. To include some recognition of the importance of social and economic rights such as health and education; and
6. To protect the weak and vulnerable against the strong and powerful.

In addition, the JCHR found other arguments in favour of a Bill of Rights to include:

1. Would provide ownership and promote citizenship;
2. Would ‘help form a common bond across our increasingly mobile and diverse nation because it can help emphasise our togetherness and jointly shared political values’;
3. Would ‘reinvigorate our democracy’ and ‘ingrain fundamental principles that otherwise might remain implied or implicit’;
4. Would ‘renew […] and strengthen […] democracy in 21st century Britain, and empower […] the individuals and communities in its embrace’;
5. Would be a ‘defence against incursions by transnational jurisdictions’ and strengthen the position of the UK before international courts;
6. Would protect people from state power and commercial bodies and strengthen the means of remedying individual grievances against such bodies;
7. Would have a ‘symbolic’ or ‘iconic’ role
8. Would set out ‘the long-term values and commitments of society at large, around which it agrees to be ordered for the foreseeable future’;

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175 Ibid., p. 5.
176 Ibid., p. 16.
177 Ibid., p. 17.
would ‘provide human rights with superiority over all ordinary law’;
would provide a ‘unifying force in a diverse society’;
could ‘restore the checks and balances that have been eroded by the torrent of counter-terrorism laws and practices…[and] confer positive rights on all communities’;
would protect the right to privacy and other traditional civil liberties;
would provide ‘constitutional stability’; and
could remedy the problems caused by the HRA.

NOTES

1. Despite the implementation of the HRA there have been a number of areas in which civil liberties have been eroded, including the legislation to introduce identity cards; broad legislation directed towards the prevention of terrorism; and vastly increased powers of surveillance and data collection. Is the HRA inadequate in this respect or is it inevitable that the Government of the day will ensure considerable flexibility to legislate under any rights instrument? Would a stronger Bill of Rights necessitate a move away from the current parliamentary model of rights protection to one where the courts were able to strike down legislation?

2. The HRA has often received a negative press and public reaction. Is the demand for a domestic Bill of Rights based on a misunderstanding of the current scope and powers available under the HRA or the result of a genuine demand for a domestic rights instrument?

3. Given that the UK is a signatory to the ECHR it is likely that new proposals will have to operate alongside the existing rights framework rather than replace it altogether. It should also be noted that the ECHR is a guarantor of a minimum level of rights and therefore in this sense any new document ought to add to, rather than take away from current rights.

4. There will inevitably be considerable debate as to what the Bill of Rights ought to include, such as social and economic rights, but there is also a wider question of whether such a Bill should contain rights that are real and effective or whether it should also have an aspirational dimension. Evidence gathered by the JCHR appeared to find public support for the inclusion of social and economic rights.

150. In the most recent Joseph Rowntree State of the Nation poll, in October 2006, 88% of people questioned thought that the right to hospital treatment on the NHS within a reasonable time should be included in a Bill of Rights. This was only 1% less than the 89% who thought that the right to a fair trial before a jury should be included. 65% thought that the right of the homeless to be housed should also be included.

151. Opinion polls conducted on behalf of the Northern Ireland Human Rights Commission as part of the consultation process leading towards the adoption of a Northern Ireland Bill of Rights convey the same message. The Commission found a high level of support in Northern Ireland for economic and social rights. 87% of Protestants and 91% of Catholics supported including the rights to health care and an adequate standard of living in a Bill of Rights.

The most frequently heard argument against the adoption of economic and social rights is that decisions about the allocation of scarce resources would be taken away from elected representatives and given to an unelected judiciary. Are the courts already engaged in such activity through their powers of judicial review?

5. The JCHR also discusses the relevance of ‘third generation’ rights to a domestic Bill of Rights. Such rights fall outside the scope of the traditional civil and political and social and economic classification. Most pertinently in the modern age is a debate as to whether environmental rights ought to be given consideration.

6. A new Bill of Rights will involve attention to a number of major constitutional questions such as the relationship between the judiciary and the executive; possible entrenchment of rights; the ability of Parliament to override the Bill; and what powers should be available in times of national emergency. Such controversial questions will inevitably provide a fertile ground for debate in the coming years.