

# Human Rights Law Conference

## 25 Years On

Thursday 2 October 2025



## Keynote speech



Lord Carnwath



# The top human rights cases of the 2020s



David Blundell KC



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# The top human rights cases of the 2020s



David Blundell KC



# Four 'top' cases

- A case that sets a new direction:
- *R (AB) v Secretary of State for Justice* [2021] UKSC 28, [2022] AC 487
- A case that settles an old debate:
- *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56, [2023] AC 559
- A case that recognises the special nature of the UK experience:
- *In re JR123* [2025] UKSC 8, [2025] 2 WLR 435
- A case that no-one can ignore:
- *Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs* [2025] UKSC 30



# *R (AB) v SSJ* – the decision and the challenge

- A case which establishes the nature of the relationship between domestic courts and the Strasbourg Court
- Sets the limits of what the courts can and should do in applying the HRA
- Challenge to the use of solitary confinement in a YOI against a 15 year-old boy
- AB placed in “single unlock” (could not leave cell when other detainees were out of their cells, except when three other officers present – “three-officer unlock”): effectively in solitary confinement
- AB treated like this “essentially for the protection of others and for his own protection” (CoA)
- Challenged removal from association by judicial review on Art 3 grounds



## ***R (AB) v SSJ* – the issues below**

- Ouseley J made a number of findings in AB's favour – SSJ failed to comply with rules on procedural oversight of removal from association and provision of education => breach of Art 8
- But dismissed the claim under Art 3, holding that the treatment did not meet the high threshold for such a finding; applied a fact-sensitive approach
- In CoA, AB argued that:
  1. Solitary confinement of under-18s was automatically a breach of Art 3, or, alternatively, "prolonged" solitary confinement was a breach; or
  2. Presumption of Art 3 breach in such circumstances; or
  3. Breach of Art 3 on the facts
- All arguments were rejected by the CoA: Art 3 required a highly fact-sensitive inquiry



# *R (AB) v SSJ* – the issues in the Supreme Court

- In the Supreme Court, there were 2 issues:
  1. Solitary confinement of a person under-18 is automatically a breach of Art 3, *a fortiori* where it is prolonged
  2. Alternatively, solitary confinement of a person under-18 is always a breach of Art 3 unless there exist exceptional circumstances in which such treatment is strictly necessary





## *R (AB) v SSJ* – the decision

- Both arguments rejected
  1. “Solitary confinement” had no defined meaning in English law or ECtHR case-law
  2. There were no Strasbourg cases applying Art 3 to removal from association of under-18s
  3. But cases applying Art 3 to detention of under-18s could offer some guidance and did not suggest that a different approach from the standard one of applying a fact-sensitive assessment to determining whether the minimum threshold was reached
  4. Rejected argument that should lay down a definition of solitary confinement and hold that such treatment is automatically a breach of Art 3 for under-18s, at least if it exceeds a minimum duration – “a major departure” from the current principles in the cases



## *R (AB) v SSJ* – the background

- The case involves the application of the *Ullah* principle (*R (Ullah) v Special Adjudicator*): per Lord Bingham, domestic courts are required “to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”
- See also *R (SB) v Governors of Denbigh High School*: “the purpose of the Human Rights Act 1998 was not to enlarge the rights or remedies of those in the United Kingdom whose Convention rights have been violated but to enable those rights and remedies to be asserted and enforced by the domestic courts ... and not only by recourse to Strasbourg”
- And see Lord Brown in *R (Al-Skeini) v SSD*: “that last sentence could as well have ended: ‘no less, but certainly no more.’”
- An important question of emphasis



# *R (AJ) v SSJ* – the principle

- See [54]-[60], [77]: ECtHR *might* develop the principle in an appropriate case
- “But it is not the function of this court to undertake a development of the Convention law of such a substantial nature... the Human Rights Act was intended to give effect in domestic law to an international instrument, the Convention, which could only be authoritatively interpreted by the Strasbourg Court.”
- In particular, developed and applied the warning of restraint by Lord Brown in *Al-Skeini* based on the fact that if the Supreme Court developed the law further than Strasbourg would do, the losing public authority has no right of appeal to challenge the decision – cf the position for a losing individual

“It follows from these authorities that it is not the function of our domestic courts to establish new principles of Convention law. But that is not to say that they are unable to develop the law in relation to Convention rights beyond the limits of the Strasbourg case law. In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law. Indeed, that is the exercise which the High Court and the Court of Appeal undertook in the present case. The application of the Convention by our domestic courts, in such circumstances, will be based on the principles established by the European court, even if some incremental development may be involved.”



## ***R (Elan-Cane) v SSHD – the background***

- An important application of the *AB* principle in the context of the margin of appreciation
- E-C was born with female physical sexual characteristics but identified as having no gender
- E-C sought judicial review of the HM Passport Office policy of only stating “male” or “female” in the “sex” field
- Art 8, and Art 8 read with Art 14
- Argued for positive obligation to provide E-C with a passport with a non-gendered “X” marker in the “sex” field
- The issue: did Art 8 impose such a positive obligation?



## ***R (Elan-Cane) v SSHD – the issue***

- Undisputed that identification as non-gendered was an aspect of Art 8 private life
- No Strasbourg judgment established a positive obligation to recognise a gender category other than male or female and none which would require passports to be issued without any indication of gender
- No cases in Strasbourg by the time of the hearing involving non-gendered persons
- 6 CoE Member States recognised genders other than male or female on their passports; and 9 other non-CoE states
- Clear that “questions whether other gendered categories should be recognised beyond male and female, including a non-gendered category, and if so, on what basis such recognition should be given, raise complex issues with wide implications”



## *R (Elane-Cane) v SSHD – the decision*

- The appellant's interests in being issued with an "X" passport were outweighed by the public interest advanced by the Secretary of State
- In addition, clear that Strasbourg would accord a wide margin of appreciation having regard to the absence of consensus, the complexity and sensitivity of the issue, and the need for a balance between private and public interests
- Recognising such an obligation would go "well beyond" the Strasbourg case-law and breach the principle in *AB*
- So Art 8, and Art 14 with Art 8, arguments rejected
- But E-C also argued that, even if Strasbourg would permit a wide margin of appreciation and conclude that there was no violation of the Convention, the Court should hold that the HRA obliged the SSHD to grant an X passport
- Relied on *dicta* in *In re G*



## *R (Elan-Cane) v SSHD – the shadow of In re G*

- *In re G* concerned NI legislation preventing unmarried couples from adopting children
- Majority found that where the Strasbourg Court had declared a question was within the margin of appreciation, it was for domestic courts to interpret the Convention provisions and apply them as appropriate
- *Per* Lord Hoffmann: the question “is one for the national authorities to decide for themselves and it follows that different Member States may well give different answers”



# ***R (Elan-Cane) v SSHD – the margin of appreciation***

- Supreme Court decisively rejected the *dicta* in *In re G*
- “The margin of appreciation is a principle of interpretation of the Convention, based on the need for judicial restraint on the part of the European Court”
- Identifying that a State’s conduct is within the margin of appreciation “does not mean that [the Strasbourg Court] is declining to interpret the Convention, or declaring that the interpretation of the Convention is something which it is leaving to the national authorities to decide”. On the contrary, “The question whether there has been a violation of the Convention is answered by the European court”
- “The margin of appreciation doctrine is not an abdication of the task of interpretation, but an important aspect of that task”
- Contracting States remained free to create rights going beyond those protected by the Convention; but that power was independent of the Convention and the Human Rights Act





## ***In re JR123 – the background***

- Applicant convicted in NI of criminal offences and sentenced to 5 years' and 4 years' imprisonment concurrently
- Effect of Art 6(1)(b) Rehabilitation of Offenders (Northern Ireland) Order 1978 was that the convictions were incapable of being “spent” for the purposes of rehabilitation because they were longer than 30 months
- Consequence: applicant would have to disclose them for the rest of his life
- Argued incompatible with Art 8 since no possibility of review
- As alleged incompatibility arose from secondary legislation, sought a common law declaration of incompatibility
- NB: the regime in NI was modelled on that in E&W, but the E&W regime had been amended with the effect that the same offences in E&W (and S) would not have imposed a lifelong obligation of disclosure on the applicant



## *In re JR123 – the issue*

- The issue was whether under Art 8 the state was entitled to legislate for a system of rehabilitation based on categories of offences defined by bright line rules, which exclude the application of rehabilitation effects in the most serious category, or whether it has to provide for individual case-by-case assessment
- The Court held that it was so entitled
- But what about the margin of appreciation across a system of home nations?



## *In re JR123 – the margin of appreciation*

- How does the margin of appreciation apply in a federalised system or a system of home nations?
- Lord Sales and Sir Declan Morgan LCJ (NI) rejected the argument that there was an emerging consensus in the other nations of the UK
- “[C]ommon practice within the nations of the United Kingdom does not show that there is a consensus among member states of the Council of Europe, which is the relevant factor affecting the width of the margin of appreciation”
- In any event, no common practice in other UK home nations that Art 8 required a fact-specific assessment



# *In re JR123 – the conclusion on the margin within the UK*

- The Court held overall (at [53]) that:

“Generally, there is no requirement pursuant to article 8 that the different nations of the United Kingdom should adopt the same approach to the issue of the rehabilitation. The relevant margin of appreciation applies to each legislature or legislator in those distinct nations which has to make the relevant choices as how to frame the rehabilitation regime which will apply in their jurisdiction. The point of analysing compliance with article 8 in terms of a margin of appreciation is that it allows for the adoption of different approaches, all and any of which can be compatible with article 8 ... Article 8 contemplates that different legislative solutions may be adopted in different jurisdictions provided that each solution falls within the parameters of the relevant margin of appreciation. Also, “in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes”: SC ...”

- So consensus within the UK is not sufficient to establish a consensus in the CoE and does not assist with the application of the margin



## *Shvidler v SSFCDA – the background*

- Two cases (*Shvidler* and *Dalston Projects*) each involving designation (sanctions) under the Russia sanctions regime
- S was a British citizen, born in the USSR but who left before the Russian Federation was formed and so was never a citizen of that state; business associate of Roman Abramovich and also had business interests in Russia (director of Evraz)– designated on basis of association with Mr A and obtaining a benefit from Russian government through directorship of Evraz
- Complained of the impact of sanctions on his rights under Art 8 and A1P1
- Dalston Properties was a special purpose vehicle holding legal title to a yacht, the Phi – beneficial title held by Mr Naumenko who was not designated



## *Shvidler v SSFCDA – the issue*

- The issue in the case was: how should the proportionality test be applied?
- NB: the Court considered both the approach at first instance and the approach on appeal
- The majority held that the decisions in question were proportionate
- But... NB2: a powerful dissent from Lord Leggatt on the proportionality of the *Shvidler* decision



## ***Shvidler v SSFCDA – proportionality at first instance***

- The Court carried out a comprehensive review of the case-law
- Confirmed that a first instance court makes its own assessment of whether a measure is proportionate – it does not merely review for error of law
- But when carrying out that assessment, it should give appropriate respect and weight to the views of the public authority as to how the balance between the interest of the individual and the general community ought to be struck
- Relevant context includes:
  - Importance of the right
  - Degree of interference with the right
  - Ability of court to adjudicate given issues of institutional competence and democratic accountability



## ***Shvidler v SSFCDA – proportionality in this case***

- In the cases before it, the court could assess for itself the individual impact
- But this did not mean it was a primary decision-maker “in the full sense of that term” – the public authority decides what action it will take, but the court reviews it against the requirements of proportionality
- SSFCDA (SST in *Dalston*) had special constitutional responsibilities in relation to response to Russia’s invasion of Ukraine and superior institutional competence to determine whether individual sanctions might serve useful purpose – national security / international relations context
- As such, SSFCDA and SST were to be accorded wide margin of appreciation in making judgements about the 4 stages of the proportionality test (sufficient importance to limit a fundamental right, rational connection, no less intrusive measures, fair balance)
- That wide margin also applied to reasons provided after the decision





# ***Shvidler v SSFCDA – proportionality on appeal***

- Court recognized two possible approaches on appeal from a first instance assessment of proportionality – review or fresh assessment
- There had to be flexibility in deciding which approach to adopt
- But there was also a need for a principled approach and it ought to be the same at each appellate stage
- The appropriate provisional starting point was that ordinarily the review approach was likely to be appropriate
- Fresh assessment would have to be justified by special factors as constitutionally appropriate in the public interest / to uphold rule of law
- Paradigm case for fresh assessment approach would involve first appellate consideration of new legislative regime of general application, especially with considerable societal significance
- Paradigm case for review approach would be one-off application of well-established law to facts of a case



# ***Shvidler v SSFCDA – relevant factors***

- Court identified six relevant factors in deciding whether to adopt fresh assessment approach:
  1. Relevance of assessment of proportionality across a range of cases, whether in establishing a point of general principle or approach, proper interpretation of legislation or proper development of the common law
  2. Nature of the measure in question
  3. Whether claim is that measures is outside competency of devolved legislature on ECHR grounds
  4. Significant incompatibility alleged between primary legislation and ECHR rights
  5. Resolution of divergent strands of authority in lower courts
  6. High importance for society of resolution of issue
- NB: not an exhaustive list – may be “other compelling reasons” for court to adopt fresh assessment “to fulfil its constitutional responsibilities”



# The top human rights cases of the 2020s



Miranda Butler



# Three 'top' cases

- The evolution of Article 3 in removal cases:
- *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17, [2021] AC 633
- A reminder that Lord Kerr was never wrong:
- *R (Elgizouli) v SSHD* [2020] UKSC 10, [2021] AC 937
- Disapplication of legislation breaching the ECHR in Northern Ireland:
- *Re Dillon's Application for Judicial Review* [2024] NICA 59 (UKSC/2025/0013)



# When does removing the seriously ill breach the ECHR?

- Opening chapter: *D v UK* (1997) 24 EHRR 423
- ECtHR held: deporting a critically ill man suffering from advanced AIDS to St Kitts and Nevis (leading to death in 4-5 months) would breach Article 3
- *“Compelling humanitarian considerations”; “a real risk of dying under most distressing circumstances”*
- However: *N v SSHD* [2005] UKHL 2 AC 296: removal of a person who would likely die within two years due to absence of treatment for AIDS.

Principle: *“whether the applicant's illness has reached such a critical stage (i.e. he is dying) that it would be inhuman treatment to deprive him of the care which he is currently receiving and send him home to an early death unless there is care available there to enable him to meet that fate with dignity”*

- ECtHR agreed that there were no *“exceptional circumstances”*: *N v UK* (2008) 47 EHRR 39)

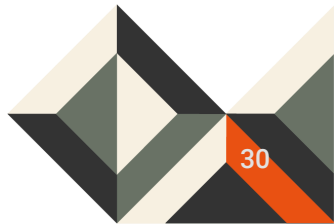


# *Paposhvili v Belgium* [2017] Imm AR 867

Development of the ‘*exceptional circumstances*’ test:

Serious offender suffered from life-threatening conditions which had been stabilised by treatment in Belgium. Life expectancy < 6 months if deported.

“Other very exceptional cases” include where “**substantial grounds have been shown for believing that [a seriously ill person], although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy**”



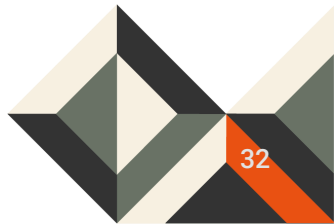
# The *Paposhvili* changes

- Do not need to show reduction in life expectancy
- “*Intense suffering*” sufficient for Art. 3 breach
- Lack of access to treatment, for instance due to its unaffordability, can be a sufficient ground to resist removal
- Still must establish substantial grounds and show serious, rapid, and irreversible decline



# *AM (Zimbabwe) v SSHD* [2020] UKSC 17 and the aftermath

- Supreme Court adopted and applied *Paposhvili* approach.
- Overruled CoA's finding that principle only engaged by “*imminent*” death or intense suffering. Substantial reduction in life expectancy, although not “*imminent*” would be sufficient.
- Must show “*minimum level of severity*” to breach Article 3
- These principles also **apply in mental health cases**:
  - *R (Carlos) v Secretary of State for the Home Department* [2021] EWHC 986 (Admin)
  - *Savran v Denmark* 57467/15, [2022] Imm AR 485, [137]
  - *MY (Suicide risk after Paposhvili)* [2021] UKUT 00232 (IAC)





# *R (Elgizouli) v SSHD* [2020] UKSC 10

US requested mutual legal assistance in a criminal investigation into offences where the death penalty might be imposed.

US refused to provide assurance sought by SSHD that death penalty would not be sought against someone found guilty as a result of the investigation.

SSHD nevertheless provided assistance sought (inc. provision of personal data).

- Was it contrary to the Data Protection Act 2018?
- Was contributing to imposition of the death penalty in violation of fundamental principles of justice and the rule of law, including international law?



# *R (Elgizouli) v SSHD* [2020] UKSC 10

UKSC held:

- No established principle under the common law, ECHR or otherwise that prohibited sharing of information in these circumstances.
- However, appeal allowed as SSHD had not considered Data Protection Act 2018, which required appropriate safeguards, including to ensure that the data would not be used to impose the death penalty.



## ***Elgizouli***: data protection

S. 76(1) DPA 2018 required transfers of personal data to be “*necessary*” for an identified statutory purpose and “*based on special circumstances*” (s. 73(3)(c)). Specific consideration is needed by the data controller, applying a strict test of necessity.

- Lord Carnwath: *“It is apparent that the decision was based on political expediency, rather than strict necessity under the statutory criteria. There was no consideration as to whether transfer of personal data as such was required. There was also a notable lack of any assurance, if the information were made available, as to the prospects of a prosecution in fact taking place in the US. Given that there was insufficient evidence to prosecute in the UK, it is not clear why the legal position was thought to be any different in the US. So long as the prospects of any prosecution was uncertain, it would seem premature to say that any particular information was strictly necessary for that purpose”*



# *R (Elgizouli) v SSHD* [2020] UKSC 10

Majority: No common law prohibition on such assistance.

- Court's power to develop the common law to be exercised **with caution** and **in line with, but not beyond** the ECHR
- Death penalty had never received the attention of the common law
- Developments came from Parliament or the ECHR
- Development of common law absolutely prohibiting transfer would be difficult to reconcile with DPA 2018's detailed and carefully calibrated regime for transfer of personal data.



# *R (Elgizouli) v SSHD* [2020] UKSC 10

## Lord Kerr's dissent

- Common law should recognise a principle that it is unlawful to facilitate provision of material to a third country where there is a risk of execution.
- Parliament has not *“legislated definitively”*
- ECHR is a *“comprehensive charter forbidding the death penalty in all circumstances”*
- *“the common law should be seen as an autonomous organism, open to external influence but developing on its own initiative rather than in response to perceived deficiencies in other systems of law”*

**144** Law, whether enacted or developed through the common law, if it is operating as it should, must be responsive to society's contemporary needs, standards and values. It is a commonplace that these are in a state of constant change. That is an essential part of the human condition and experience. As a deeper understanding of the human psyche and the enlightenment of society increase with the onward march of education, tolerance and forbearance in relation to our fellow citizens, the law must march step-by-step with that progress. I am convinced that the adjustment to the common law which I propose reflects the contemporary standards and values of our society.

## *Dillon*– the ongoing impact of EU law

Provisions of Northern Ireland Troubles (Legacy and Reconciliation Act 2023), which grants conditional immunity from prosecution in Troubles-related proceedings and barred civil actions, were incompatible with Arts. 2, 3, and 6 ECHR and Art. 2 of the Windsor Framework.

- Art. 2(1) of the Windsor Framework imposes an obligation on the UK to ensure that there is no diminution in rights, safeguards and equality of opportunity for those resident in NI as a result of Brexit.
- Diminution in rights contrary to EU Victims' Directive and Charter of Fundamental Rights.
- Offending provisions disapplied pursuant to the EU (Withdrawal) Act 2018.
- EU law retains supremacy over primary legislation in this context



## ***Dillon*– watch this space**

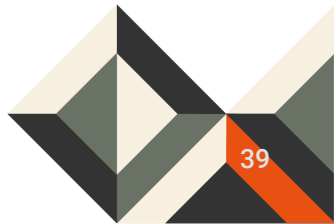
ECHR: Immunity from prosecution is a breach of Art. 2 and 3 positive obligations unless part of wider reconciliation efforts.

Declarations of incompatibility made re conditional immunity provisions by High Court ([2024] NIKB 11), point conceded in the CoA. CoA agreed: *“the clear emphasis of the law promulgated by the ECtHR is that breaches of articles 2 and 3 must be investigated and should not go unpunished.”*

Current method in which Independent Commission for Reconciliation and Information Recovery dealt with complaints, in breach of Art 2.

Legacy Act’s restrictions on civil actions contrary to Art 6.

UKSC hearing 14 October 2025



# Themes from *AM (Zimbabwe), Elgizouli, Dillon*

- Ongoing development of human rights jurisprudence, including in 'hard' cases
- What role is there for the common law?
- Ongoing role for EU law in Northern Ireland, including direct effect





# The top human rights cases of the 2020s



Alistair Mills



## Three ‘top’ cases

- A human rights case that was very relevant, then wasn’t:
- *R (AAA (Syria)) v Secretary of State for the Home Department* [2023] UKSC 42, [2023] 1 WLR 4433
- A case that was relevant to human rights, as a mirror for the HRA:
- *Attorney General’s Reference Re UNCRC (Incorporation) (Scotland) Bill* [2021] UKSC 42, [2021] 1 WLR 5106
- A case which was relevant to human rights because it wasn’t:
- *R (Devonhurst Investments Ltd) v Luton BC* [2023] EWHC 978 (Admin), [2023] PTSR 1787



# ***R (AAA (Syria)) v SSHD* – the decision and the challenge**

- The ‘Rwanda’ case
- Challenge to the erstwhile government’s policy to send certain asylum seekers to Rwanda [1]

‘This appeal is concerned with the Secretary of State’s policy that certain people claiming asylum in the United Kingdom should not have their claims considered here, but should instead be sent to Rwanda to claim asylum there. Their claims will then be decided by the Rwandan authorities, with the result that if their claims are successful, they will be granted asylum in Rwanda’.

- Challenge before UKSC determined on the basis of the principle of refoulement, and retained EU law



## ***R (AAA (Syria)) v SSHD* – the issues**

Refoulement:

‘the duty of the contracting parties under article 3 not to subject persons to torture or to inhuman or degrading treatment also imports an obligation not to remove persons to other states where there are substantial grounds for believing that they would be at real risk of such ill-treatment’ [23]

(Similar obligation under the Refugee Convention, given effect by Asylum and Immigration Appeals Act 1993, s.2)

- SoS successful before DC; CA overturned that decision as to (i) the correct legal test and (ii) the approach to evidence
- Issues for the SC: was the CA correct in terms of legal test, and in the conclusion it reached according to the test?



## *R (AAA (Syria)) v SSHD* – the test

- It was for *a court* to decide whether there were substantial grounds for believing that removing asylum seekers to Rwanda would expose them to a real risk of ill-treatment, due to refoulement.
- The DC might have considered that the question was merely of *review*; whether the SoS was *entitled* to find that there was no real risk of refoulement [38]-[39]
- If that is what it was saying, it was wrong!



## *R (AAA (Syria)) v SSHD* – the approach to evidence

The DC did not engage with the UNHCR's evidence regarding problems with the asylum process in Rwanda, relying on Government's expertise

'the Government is not necessarily the only or the most reliable source of evidence about matters which may affect the risk of refoulement' [55]

The DC erred in giving no particular weight to the UNHCR's evidence [64]

Given that the DC had erred in its assessment of the evidence, it was correct for the Court of Appeal to interfere with the DC's conclusion

It was not, however, necessary for a court to reach certainty regarding the position in Rwanda, as the question is 'whether there are substantial grounds for believing that there is a real risk of refoulement' [74]



# *R (AAA (Syria)) v SSHD* – the assessment of evidence

The SC referred to a number of concerns identified by the CA:

- The general human rights situation in Rwanda, including protesting refugees being shot dead [76]
- Substantial defects the asylum system in Rwanda led to concerns that these would not be resolved, at least in the short term [93], [103]
- A previous system, whereby asylum seekers from Israel were relocated to Rwanda, had serious defects [96]

‘As matters stand, the evidence establishes substantial grounds for believing that there is a real risk that asylum claims will not be determined properly, and that asylum seekers will in consequence be at risk of being returned directly or indirectly to their country of origin.’ [105]

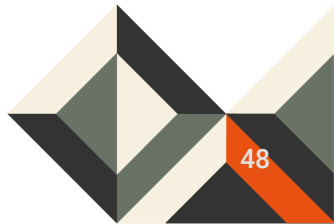


# *R (AAA (Syria)) v SSHD* – the aftermath

The 'Rwanda case' was about (1) the role of the court and (2) the application of evidence to an established test

Aftermath:

- Safety of Rwanda Act 2024
- Legislative deeming Rwanda to be safe
- Separation of powers, parliamentary sovereignty
- Relationship between HoC and HoL
- Change in administration





# ***Attorney General's Reference Re UNCRC (Incorporation) (Scotland) Bill***

Reference process, assessing consistency of Scottish legislation with the Scotland Act 1998

Did draft legislation affect the power of the UK Parliament to legislate for Scotland (therefore in breach of s.29(2)(c) Scotland Act 1998)?

Subject-matter: United Nations Convention on the Rights of the Child, and the European Charter of Local Self-Government (both ratified but not incorporated wholesale into UK law)

Effect of Scotland Act 1998 is that Scottish legislation cannot affect or modify 'the power of the Parliament of the United Kingdom to make laws for Scotland' (ss 28(7), 29(2) and Sch 4)

Broad meaning of 'modify': *Continuity Bill Reference* [2019] AC 1022, [51]



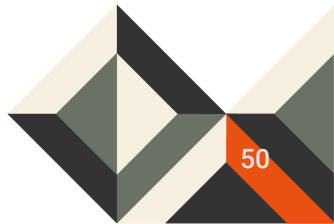
# ***UNCRC Reference*** – interpretation and human rights

Section 19 of the draft legislation required interpretation of legislation, 'so far as it is possible to do so' compatibly with the UNCRC

Such legislation to be interpreted included Acts of (UK) Parliament

Provision modelled on s.3 HRA

'A provision which required the courts to modify the meaning and effect of legislation enacted by Parliament would plainly impose a qualification upon its legislative power' [28].



## ***UNCRC Reference* – compatibility and declarations**

The Scottish legislation proposed that primary legislation passed after its entry, which was incompatible with the UNCRC, would be subject to an ‘incompatibility declarator’

This was modelled on s.4 HRA: the legislation would remain in force [51]

‘Section 21 would therefore confer on the courts the power to pass judgment on the compatibility of Acts of Parliament with provisions of an international treaty to which the Scottish Parliament, but not Parliament itself, has chosen to give domestic effect.’ [49]

‘Parliament can itself qualify its own sovereignty, as it did when it conferred on the courts the power to make declarations of incompatibility with rights guaranteed by the ECHR, under section 4 of the Human Rights Act.’ [50]



## ***UNCRC Reference* – the HRA in the mirror**

What does the UNCRC case show us about the HRA?

Section 3 HRA as changing the meaning and effect of legislation

Section 4 HRA as a self-qualification of parliamentary sovereignty

The muscular effect of the HRA: by contrast, Scottish legislation could not provide such powers to the court



## ***R (Devonhurst Investments Ltd) v Luton BC* - standing**

Residential development was constructed in breach of planning permission

Local planning authority took enforcement action, including requiring that residential use of the premises cease

The claimant, the owner of the site, argued that there was failure on the part of the LPA to *consider* the Article 8 impacts upon the occupants (not on the claimant itself)

The LPA did not object regarding standing, but the ground of challenge was hopeless due to s.7 HRA: the claimant was not a 'victim', and any alleged victims (the occupants) could speak for themselves



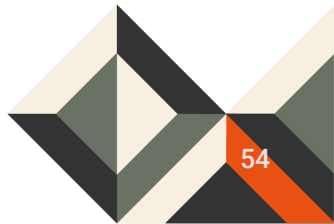
## ***R (Devonhurst Investments Ltd) v Luton BC* - merits**

Steyn J found the Article 8 arguments to be misconceived on their merits

*R (SB) v Governors of Denbigh HS* [2007] 1 AC 100 – what matters is whether the decision disproportionately interfered with the Article 8 rights of occupants, not whether the LPA considered this

[Query if this is suitable approach in all contexts? ‘Judgement and Judgments: The Role of Courts in Proportionality Challenges in the United Kingdom’ [2024] EHRLR 374]

The claimant provided no evidence of breach, and therefore none was demonstrated [91]



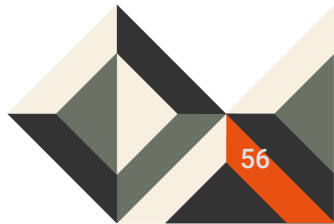
## ***R (Devonhurst Investments Ltd) v Luton BC* - lessons**

- Human rights arguments can crop up in unexpected places
- We are all human rights lawyers?
- Watch out for process points, particularly standing
- Human rights arguments different in 'feel' to standard judicial review



# Themes from *AAA*, *UNCRC* and *Devonhurst*

- Still (25 years on) grappling with the role of the court
- Human rights inevitably raising constitutional issues?
- Does the HRA water down parliamentary sovereignty?
- ‘Procedural’ matters (evidence, standing) remain important





# Q&A



# Refreshment break

11:30 – 11:50



# Breakout sessions

**Article 14 ECHR: a path through the maze**

Lecture Theatre

**Current issues regarding protests: balancing rights in a democracy**

Lower ground floor breakout room





# Current issues in democracy



Alex Goodman KC



Admas Habteslasie



Charles Bishop



# Balancing rights to protest with other rights: the general approach



Admas Habteslasie



# When does court typically need to weigh rights to protest against other rights?

- ‘Horizontal’ conflict between right to protest and private law rights, usually to the land on which the protest activity takes place;
- ‘Vertical’ interference with the right to protest by the state: e.g. conviction/sentencing under criminal law; proscription e.g. in the Palestine Action case; other measures e.g. ASBOs (e.g. *R v Jones (Annwen)* [2006] EWCA Crim 2942)
- Normally the first type of case is concerned with actually preventing the protest or its recurrence (application for an injunction or seeking of a possession order); the latter with ECHR compliance of state measures in response to a protest that has occurred or is to occur



# Overarching propositions

- Scope of Articles 10/11 is wide (particularly the former), but some protest activity would fall outside.
- Subject to that, the approach to assessing conflict of rights in the context of protests is highly fact-sensitive: *Samede*.
- In principle, right to protest is not excluded on privately owned land. In reality, however, where a protest is on privately owned land, it will be very difficult/practically impossible for right to protest to be afforded any real priority.
- A closer or more balanced proportionality analysis is likely to be necessary where the protest activity takes place on land that the public have some entitlement to access



# The nature of the protest – scope/weight

- Some protests fall outside the scope of Article 10/11:
- Article 17: does protest involve speech that explicitly calls for violence or other criminal acts, comprises attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population or constitute an attempt to be attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it
- Where protests are violent/non-peaceful, Articles 10/11 will not be engaged: *Attorney General's Reference (No 1 of 2022) (Colston)* at [120]





# The nature of the protest – scope/weight

- Most protest activity (including direct action) will fall within Article 10/11; then the question will be where it sits on the core/periphery of the protection afforded thereunder; and consequently what weight it attracts in the proportionality analysis
- Some acts of protest will by their nature have less weight: *R v Hallam* in relation to JSO protestors throwing soup onto Van Gogh's "Sunflowers"; *Vural v Turkey* (pouring paint on Ataturk statues); *"physical conduct purposely obstructing traffic and the ordinary course of life in order to seriously disrupt the activities carried out by others is not at the core"* of protection under Article 11: *Kudrevičius v Lithuania* (2015) 62 EHRR 34 at [97]; *"It is clear that... intentional action by protesters to disrupt by obstructing others enjoys the guarantees of articles 10 and 11"*: Supreme Court in *DPP v Ziegler*, [70]
- Courts have drawn a distinction between persuading and compelling others to act in the desired manner: *"the essence of the rights of peaceful assembly and freedom of expression is the opportunity to persuade others... ...persuasion is very different from attempting (through physical obstruction or similar conduct) to compel others to act in a way you desire"* (*Cuadrilla Bowland Ltd*, [2020] EWCA Civ 9, [94]-[95])



# Factors relevant to proportionality

Per *City of London v Samede & Ors* [2012] EWCA Civ 160 factors that relevant for the proportionality exercise in context of an application for an injunction to restrain protest:

- (1) Extent to which the continuation of the protest would breach domestic law.
- (2) Importance of the precise location to the protesters.
- (3) Duration of the protest.
- (4) Degree to which the protesters occupy the land.
- (5) Extent of actual interference caused to the rights of others, including the property rights of the owners of the land and the rights of any members of the public.
- (6) Whether views giving rise to the protest relate to “very important issues” and whether they are “views which many would see as being of considerable breadth, depth and relevance”.
- (7) Whether protesters “believed in the views that they were expressing’



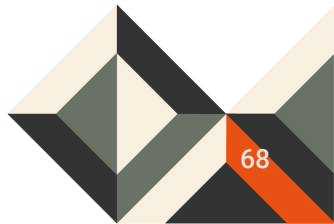
# 'Horizontal' disputes

- Where the Court is adjudicating whether a right to protest or a right to use/possess (etc) the site of the protest should prevail, the question is which right should prevail
- Therefore, in practical terms, the outcome and the reasoning will depend heavily on whether the person(s) exercising the right to protest have a pre-existing entitlement to access the land in question
- Spectrum:
  - **A protest that does not involve going beyond rights that the protestor already has**
  - **A protest that involves accessing land that protestor is entitled to access, but going beyond their rights to use that land**
  - **A protest that involves private land that the protestor otherwise has no right to access/enter onto**
- In all cases the approach is the same but in practical terms the third category is treated differently



# Protests on private land

- Cases where the protestors has no right to access/be on the site of the protest
- Case law is clear that Articles 10 or 11 do not “*bestow any freedom of forum*”: see *Appleby v United Kingdom* (2003) 37 EHRR 38 (but importance of location of protest is relevant to proportionality of an interference per *Samede*)
- In *DPP v Cuciuerean* [2022] 3 WLR 446, Burnett LCJ held that there was no basis for arguing that right to protest “*includes a right to protest on privately owned land or upon publicly owned land from which the public are generally excluded*”
- Courts have generally shied away from absolutist approach and instead apply proportionality analysis and conclude interference is justified. In later case of *R v Hallam* [2025] EWCA Crim 199, Court of Appeal put the point a different way: “*a protester who commits an act of trespass*” does not “*automatically loses their rights under Article 10 or 11 altogether*”
- In reality, the courts will always conclude that the protest could always take place in some other way or somewhere else that is not on the private land...?



# Recent Protest Cases



Alex Goodman KC



# Article 10 ECHR

1. Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema.

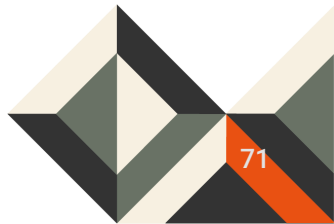
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public 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 the maintaining of the authority and impartiality of the judiciary.



# Article 11 ECHR

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.



# Climate Protest Cases

*Direct Action is within scope of Articles 10 and 11:*

*Hashman v UK* (2000) 30 EHRR 241 - ECtHR confirmed that the activities of hunt saboteurs were protected by Article 10 and found that the vagueness of prospective “binding over” breached article 10).

*Steel v UK* (Judgment of 23 Sept 1998) - disrupting a grouse shoot, and others breaking into a construction site to protest against an expansion to the M11.

*Murat Vural v Turkey* (Judgment of 21 Oct 2014) - defendant threw paint over statues of Ataturk (see in particular paras 52-54).

*Hall v Mayor of London* [2011] 1 WLR 504, Lord Neuberger described attempts to remove a protest camp from outside Parliament as “*undoubtedly*” engaging Arts 10/11 (para 7).





# Section 78 of the Police, Crime, Sentencing and Courts Act 2022

(1) A person commits an offence if—

(a) the person—

(i) does an act, or

(ii) omits to do an act that they are required to do by any enactment or rule of law,

(b) the person's act or omission—

(i) creates a risk of, or causes, serious harm to the public or a section of the public, or

(ii) obstructs the public or a section of the public in the exercise or enjoyment of a right that may be exercised or enjoyed by the public at large, and

(c) the person intends that their act or omission will have a consequence mentioned in paragraph (b) or is reckless as to whether it will have such a consequence.

(2) In subsection (1)(b)(i) "serious harm" means—

(a) death, personal injury or disease,

(b) loss of, or damage to, property, or

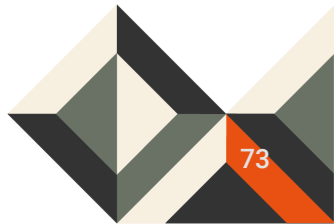
(c) serious distress, serious annoyance, serious inconvenience or serious loss of amenity.

(3) It is a defence for a person charged with an offence under subsection (1) to prove that they had a reasonable excuse for the act or omission mentioned in paragraph (a) of that subsection.

(4) A person guilty of an offence under subsection (1) is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, to a fine or to both.



# Climate Protest Cases

*Roberts* [2019] 1 WLR 2577

Court of Appeal reduced custodial sentences to conditional discharges in respect of an anti-fracking protest that brought an A-road to a standstill for three-and-a-half days.

*Brown* [2022] 1 Cr App R 18

Court of Appeal reduced the sentence to four months of an Extinction Rebellion protestor who managed to glue himself to the fuselage of an aeroplane.



# Climate Protest Cases

*R v Trowland* [2024] 1 W.L.R. 1164

“Reasonable excuse” (section 78(3)) withdrawn from the jury on grounds protester activities amounted to trespass. 3 years and 2 years 7 months respectively. Appeal against sentence rejected.

“74 The article 10 and article 11 protections, whilst not removed, were significantly weakened on the facts. As set out above, the section 78(3) defence of “reasonable excuse”, which incorporates article 10 and article 11 protections, was not available to the protesters. The protest was taking place on land from which the public were excluded. The further away from the core article 10 and 11 rights a protester is, the less those rights merit an assessment of lower culpability or, putting it another way, a significant reduction in sentence (see Kudrevicius (2016) 62 EHRR 34 at para 97). In fact, by ascending the bridge, the protesters were committing a criminal offence under the Dartford-Thurrock Crossing Act 1988 (as set out above). This is relevant to an evaluation of whether the sentences were manifestly excessive and/or proportionate

75 Further, the article 10 and article 11 protections were weakened by the fact that the disruption here was the central aim of the protesters conduct, as opposed to a side-effect of the protest...”



# Climate Protest Cases

## *R v Hallam* [2025] 4 W.L.R. 33

Four sets of Just Stop Oil protesters: M25 conspirators, M25 gantry climbers, Thurrock tunnellers and Sunflowers (tomato soup).

Convictions under s. 78 PCSCA 2022 and for criminal damage.

Sentences of 15 months-5 years. Six out of sixteen appeals allowed and corresponding sentences reduced on appeal.

In 'Sunflowers' case judge was wrong that articles 10 and 11 didn't apply because the protest was "violent".

In M25 conspirators case, judge had not considered conscientious motivation nor articles 10 and 11 as relevant to sentence, such that sentences were manifestly excessive.

Para 30 "... the assessment of proportionality applies at each stage, ie prosecution, conviction and sentence."

Appeal to Supreme Court outstanding.



# Protests in Support of Proscribed Organisations- S.11 and 12(1)(a) Terrorism Act 2000

Palestine Action proscribed pursuant to Schedule 2 of the Terrorism Act 2000 (subject to challenge).

## Terrorism Act 2000

s.11(1) A person commits an offence if he belongs or professes to belong to a proscribed organisation

s.12(1) A person commits an offence if—

(a) he invites support for a proscribed organisation

*Choudary* [2018] 1 WLR 693 - a person could only be convicted for knowing support for a proscribed organisation. S. 12(1) did not prohibit the expression of views or opinions supportive of a proscribed organisation – led to s. 12(1A) being enacted.



# Section 12 (1A) Terrorism Act 2000

(1A)A person commits an offence if the person—

(a)expresses an opinion or belief that is supportive of a proscribed organisation, and

(b)in doing so is reckless as to whether a person to whom the expression is directed will be encouraged to support a proscribed organisation.



## ***Section 12(1A) Terrorism Act***

*R v ABJ and R v BDN* [2025] 1 WLR 1909

Defendant expressing a belief or opinion supportive of Harakat al-Muqawama al-Islamiyya (Hamas).

The judge ruled that no proof of that the defendant was aware that Hamas was a proscribed was required.

The judge ruled that proof of the ingredients of the offence itself ensured that a conviction was proportionate: no proportionality direction to the jury was required for art 10/11 compliance. CoA agreed.

Para 29: Jury must be sure in order to convict under section 12(1A) that “i) the organisation in question is proscribed; ii) the defendant expressed an opinion or belief that is supportive of that organisation; and iii) the defendant was reckless as to whether the person to whom the expression was directed would be encouraged to support that organisation.”

No requirement that Defendant knew of proscription.



# Palestine Action Protests

Section 13 of the Terrorism Act 2000

## 13 Uniform and publication of images

(1) A person in a public place commits an offence if he—

(a) wears an item of clothing, or

(b) wears, carries or displays an article,

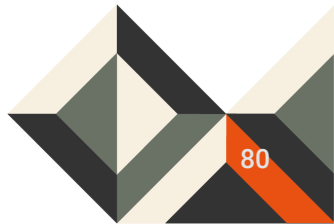
in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organisation.

(1A) A person commits an offence if the person publishes an image of—

(a) an item of clothing, or

(b) any other article,

in such a way or in such circumstances as to arouse reasonable suspicion that the person is a member or supporter of a proscribed organisation.





# ***Pwr v Director of Public Prosecutions [2022] UKSC 2, [2022] 1 WLR 789.***

Protesters carried flags of the PKK, the Kurdistan Workers Party in protest against the actions of the Turkish state in Northern Syria. The PKK is proscribed under the Terrorism Act 2000.

Section 13 is an offence of strict liability. The offence of “arousing reasonable suspicion” required no element of *mens rea*.

At [57]: “...strict liability offences almost inevitably have unfortunate consequences for what have been termed “luckless victims”... And if there are harsh but unlikely consequences, that are not resolvable in practice by prosecutorial discretion, we regard that as an insufficiently strong reason to override the reasons we have set out above for why section 13(1) should be interpreted as imposing strict liability.”

No incompatibility with article 10: law clearly stated and Appellants could have accessed the list of proscribed organisations. Proscription pursued a legitimate aim (national security) and was proportionate in that maximum six months sentence and procedural safeguards available in criminal process and trial.



# “Emergencies”, protests and Article 15



Charles Bishop



# The context

- Political violence may be seen as a manifestation of protest.
- But in the modern era political violence is being subsumed into the concept of terrorism: is there a difference? See Conor Gearty, *Homeland Insecurity: The Rise and Rise of Global Anti-Terrorism Law* (2024).
- Crack-down on protest movements is strongly linked to an anti-terror response and perhaps increasingly so: *R (Ammori) v SSHD* [2025] EWHC 2013 (Admin).
- In Europe, anti-terrorist responses make appeals to concept of “emergency” to justify departing from prevailing rights standards.



## Article 15 ECHR

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.



# The theory

*Salus populi suprema lex esto*

Or: the safety (or welfare?) of the state (or people?) is the supreme law.

- Cicero De Legibus (On the Laws) (Book III, Pt 3).

But see Lord Hope in *Ahmed v HM Treasury* [2010] UKSC 2, [6] “[e]ven in the face of the threat of international terrorism, the safety of the people is not the supreme law. We must be just as careful to guard against unrestrained encroachments on personal liberty”



# Public emergency

- (1) it must be actual or imminent;
- (2) its effects must involve the whole nation;
- (3) the continuance of the organised life of the community must be threatened;
- (4) the crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.

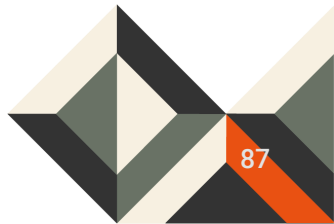
*The Greek Case – Denmark & ors v Greece (3321/67), 5 November 1969, [153].*



# Strictly required by the exigencies of the situation

Influential factors (see *Law and Practice of Human Rights* para 20.20)

- (1) whether the derogation was a 'genuine response' and not simply a 'reaction' to a negative judgment;
- (2) the application of the ordinary law had proved unable to check the growing danger which threatened the state, in particular where the ordinary criminal courts, or even special criminal courts or military courts, could not suffice to restore peace and order, such as because of the difficulties in amassing necessary evidence;
- (3) the presence of safeguards within a derogated system to prevent abuses, such as constant supervision by parliament and the ability to refer cases to an oversight commission;
- (4) the availability of the remedy of habeas corpus to test the lawfulness of arrest and detention;
- (5) the ability to consult a solicitor 48 hours after the time of arrest;
- (6) an entitlement to inform a relative or friend about detention; and
- (7) the ability to access a doctor;



## Past use by the UK

- UK made a number of declarations between 1954 and 1966 in respect of powers put in place to quell uprisings in a number of now former colonies: eg a derogation from Art 5 contained in a Note verbale dated 24 May 1954 and running until 12 December 1963 relating to a state of emergency in the Federation of Malaya and Colony of Singapore (ie the 'Malayan Emergency'), as well as Kenya and British Guiana.
- Art 15 implemented in UK via "designated derogations" which circumscribe the application of the Convention rights in UK law: s. 1(2) and s. 14 HRA 1998. Designated derogations take effect as a statutory instrument.
- HRA 1998 commenced with a derogation in place in respect of Northern Ireland, but withdrawn with effect from 1 April 2001: Human Rights Act (Amendment) Order 2001.





## Past use by the UK

- Only designated derogation made since then was the Human Rights Act 1998 (Designated Derogation) Order 2001, two months after 9/11.
- Purported to authorise derogation from Art 5(1)(f) to enable indefinite detention of foreign nationals in certain cases. In the *Belmarsh* case ([2004] UKHL 56), the HoL quashed the order, and this was later reflected in the Grand Chamber (2009) 49 EHRR 29.
- But in *Belmarsh* the HoL accepted the presence of an emergency, a view accepted by the GC: *“As previously stated, the national authorities enjoy a wide margin of appreciation under Article 15 in assessing whether the life of their nation is threatened by a public emergency. While it is striking that the United Kingdom was the only Convention State to have lodged a derogation in response to the danger from al-Qaeda, although other States were also the subject of threats, the Court accepts that it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them.”*



# Protests and derogation in Europe

- No public emergency was found in relation to mass protests in Yerevan following the election in 2008: *Dareskizb Ltd v Armenia* (61737/08), 21 September 2021.
- Court found a violation of Art 2 of Protocol No 4 in respect of home-curfew orders imposed on two climate activists during the COP21 in 2015. France had been entitled to derogate in light of the terrorist threat (following the 13 November attacks) but the measures adopted did not have a sufficiently strong link to the purpose pursued at the time of the derogation: *Domenjoud v France* (34749/16), 16 May 2024.
- Turkey's derogation following a coup attempt in July 2016 was valid, but many violations have still been found. In *Yüksel Yalçınkaya v Türkiye* (15669/20), (2024) 78 EHRR 30, a teacher was convicted of membership of a proscribed terrorist organisation considered to be behind the coup relying on his use of a messaging app. The court found violations of Arts 7, 6 and 11.



# Lunch

12:50 – 13:50



# Article 14 ECHR: a path through the maze



Tim Buley KC



Julia Smyth KC



Claudia Hyde



# Article 14 ECHR: a path through the maze



Julia Smyth



## Article 14 ECHR

*The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act 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*



## Some essentials

- Operates in ancillary fashion i.e. only in relation to another substantive ECHR right – which is unusual though not unique for ECHR rights (cf Article 16)
- “t]he principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions ... ” *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [1006] 1 AC 173, [10]
- Applies not just to legislative measures, but also policies and practices



# Phew ...

“ ... over-analysis in discrimination claims is to be avoided ... ” - *R (AB) v Secretary of State for the Home Department* [2024] EWCA Civ 369 at [41], per Carr LCJ, citing *Carson*, at [3]:

"... I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."





# What are the key questions in an Article 14 claim?

- Do the facts fall within the ambit of one or more Convention rights?
- Are the claimants being treated: (a) differently from persons in analogous / relevantly similar situations, or (b) similarly to persons whose situation is relevantly different?
- Is such treatment based on a status recognized under Article 14 ECHR, including “other status”?
- If so, is there an objective justification for the failure to treat the claimants similarly, or differently, as appropriate?
- NB – no such thing as justified discrimination, since justification negatives the very existence of discrimination.



# 1 - ambit

- “not exact and precise in [its] meaning ... “*R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, per Lord Bingham, [13].
- “ .. the English courts have made rather heavy weather of the ambit point” - *In re McLaughlin* [2018] 1 WLR 4250 per Baroness Hale, [20]
- Much-cited passage in concurring judgment of Sir Nicholas Bratza in *Zarb Adami v Malta* (2006) 44 EHRR 3 (cited recently by PC in *AG of the Cayman Islands v Bush* [2025] UKPC 39):

“The central question which arises is what constitutes ‘the ambit’ of one of the substantive articles, in this case article 4. It has been argued that ‘even the most tenuous links with another provision in the Convention will suffice’ for article 14 to be engaged. ... Even if this may be seen as going too far, it is indisputable that a wide interpretation has consistently been given by the court to the term ‘within the ambit’. Thus, according to the constant case law of the court, the application of article 14 not only does not presuppose the violation of one of the substantive Convention rights or a direct interference with the exercise of such right, but it does not even require that the discriminatory treatment of which complaint is made falls within the four corners of the individual rights guaranteed by the article. This is best illustrated by the fact that article 14 has been held to cover not only the enjoyment of the rights that states are obliged to safeguard under the Convention but also those rights and freedoms that a state has chosen to guarantee, even if in doing so it goes beyond the requirements of the Convention ... This would indicate in my view that the ‘ambit’ of an article for this purpose must be given a significantly wider meaning than the ‘scope’ of the particular rights defined in the article itself.”



# 1 - ambit (cont'd)

- Not often in issue
- NB – ambit and benefit claims: A1P1 or Article 8?
- Addressed in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [39] – [43]
- See also GC in *Beeler v Switzerland* (78630/12) (2023) 76 EHRR 33 at [57] onwards.

“[66] An analysis of the case-law ... indicates that the Court has not always been entirely consistent in defining the factors leading it to find that complaints concerning social welfare benefits fell within the ambit of Article 8 of the Convention.

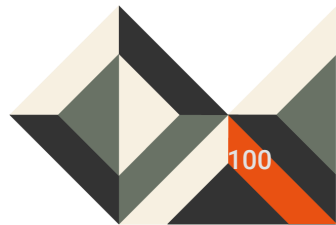
[67] The Court notes at the outset that all financial benefits generally have a certain effect on the way in which the family life of the person concerned is managed, although that fact alone is not sufficient to bring them within the ambit of Article 8. Otherwise, all welfare benefits would fall within the ambit of that Article, an approach which would be excessive.

[68] It is therefore necessary for the Court to clarify the relevant criteria in order to specify, or indeed to circumscribe, what falls within the ambit of Article 8 in the sphere of welfare benefits ...



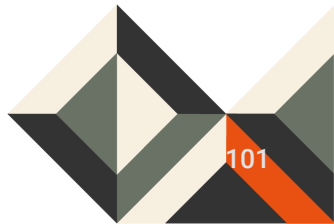
# 1 - ambit (cont'd)

[72] Accordingly, for Article 14 of the Convention to be applicable in this specific context, the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 of the Convention, in the sense that the measures seek to promote family life and necessarily affect the way in which it is organised. The Court considers that a range of factors are relevant for determining the nature of the benefit in question and that they should be examined as a whole. These will include, in particular: the aim of the benefit, as determined by the Court in the light of the legislation concerned; the criteria for awarding, calculating and terminating the benefit as set forth in the relevant statutory provisions; the effects on the way in which family life is organised, as envisaged by the legislation; and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit is paid.”



## 2 – relevantly similar or relevantly different

- Identify comparator(s) – which group am I being treated differently from (when my situation is relevantly similar), or being treated the same as (when my situation is relevantly different)?
- Look at whether there is a difference as regards: (a) the aim of the measure (*R (SC)* [2022] AC 223 at [49]); and (b) the facts of the case more generally, including the relevant legal framework.
- Not an exact science!
- Relevantly similar does not mean identical



## 2 – cont'd

- Important not to be overly focused on this question, since difficult to separate out from justification – e.g. *Carson / R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] WLR 1449, [9].
- For a recent example where situations not analogous, see *Re Hilland's Application for Judicial Review* [2024] UKSC 4, [2024] 4 All ER 81



### 3 - status

- “Other status” relatively easy to satisfy, but still limits
- Useful recent-ish analysis by SC in *R (A) v CICA* [2021] 1 WLR 3746 at [40] – [67], per Lord Lloyd-Jones
- NB: status cannot be defined solely by the difference in treatment. “There must be a ground for the difference of treatment in terms of a characteristic which is something more than a mere description of the difference in treatment ...” – A, [66]
- NB 2: Court does not necessarily take state’s explanation for difference in treatment at face value. See e.g. *EB v France* (43456/01) (2008) 47 EHRR 21



## 4 - justification

- A difference of treatment of persons in an analogous position – or the same treatment of persons in a significantly different situation - will only be discriminatory *‘if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background’* - per Lord Reed in *R (SC)*, [37 ].
- What needs to be justified is the difference in treatment (or same treatment). It is not enough simply to justify the underlying measure or policy (except in an indirect discrimination case)





## 4 – legitimate aim

- State must identify what legitimate aim actually is – and there may be a dispute about it
- Examples of legitimate aims: protection of national security; protecting economic wellbeing of country; environmental protection.
- But what might have been legitimate at one time can cease to be so e.g. in the light of changing social conditions



## 4 – proportionality and margin

- See *R (SC)* at [98]-[142]
- There are a range of factors which tend to heighten, or lower, the Court's intensity of review. Sometimes a number of factors may be present at once, pulling in different directions.
- Some factors have greater weight than others.
- A stricter review applies to "suspect" grounds, although this category is "inexact"
- It is also possible to require "very weighty" or "very serious" reasons, while at the same time according the state a wide margin of appreciation
- The width of the margin can be affected to a considerable extent by the existence, or absence, of common standards
- A number of other factors can also bear on the width of the margin
- The approach is "nuanced"



# Key forms of discrimination

- Direct discrimination
- Indirect discrimination – measure neutral on face but disproportionately prejudicial impact on particular group
- *Thlimmenos* discrimination – failure to treat differently persons whose situations significantly different
- Positive obligation to take action to secure equal treatment
- Discrimination by association – less favourable treatment on basis of another person's status or protected characteristic



## A note on proof

- Applicant has to prove their allegation – so must show that their complaint falls within the ambit of one of the Convention rights, and that they have been treated differently from a person in a comparable position, or the same as someone in a relevantly different situation
- The state must then show reasonable and objective justification
- In an indirect discrimination case, applicant must show a *prima facie* case that there is a disproportionate impact on a particular group, and state must show that the difference in the impact of the legislation was the result of objective factors unrelated to the specific ground of discrimination on which the applicant relies.
- Strasbourg Court's approach is essentially pragmatic e.g. adjusting approach where facts are within knowledge of authority



## Some Article 14 FAQ ...

- Is manifestly without reasonable foundation still a thing?
- What is the relevance of international instruments?
- What about if the state didn't think about justification at the time the measure was introduced?
- What about Parliamentary privilege?
- Did the courts really mean it when they said not to be overly analytical ...?



# Strategic Considerations in Article 14 claims



Claudia Hyde



# Overview

- The essential test for claimants to meet
- Article 14 versus the Equality Act
- Basis of the claim and ‘other status’
- Identifying the comparator group
- Evidence
- Key takeaways



# The starting point

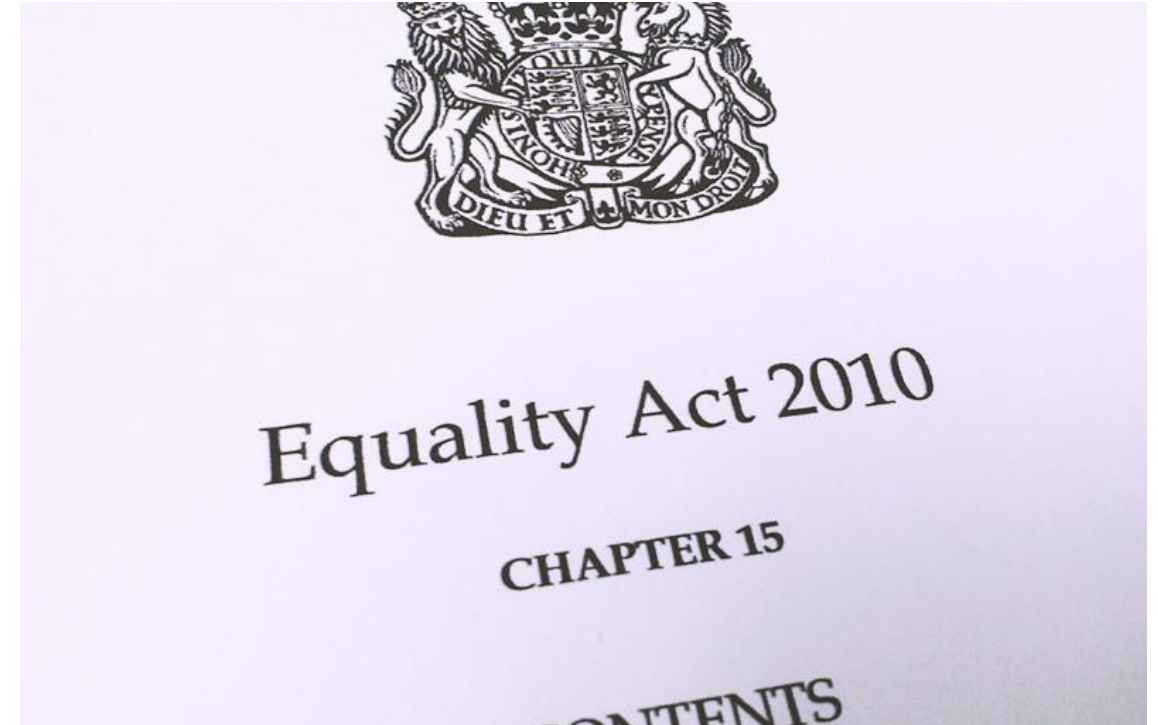
1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?
2. If so, is such difference – or absence of difference – objectively justified?
  - Does it pursue a legitimate aim?
  - Are the means employed reasonably proportionate to the aim pursued?
  - “Manifestly without reasonable foundation”





# Article 14 or the Equality Act?

- Discretionary versus statutory remedies?
- Substantial or procedural breach?
- A 'marginal' margin of appreciation?
- Limitation issues
- **Key takeaway:** start from your strategic litigation objective and work backwards



# Identifying 'status' (1)

Article 14: "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."

Per Lord Bingham in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52:

"The expression "other status" is plainly incapable of precise definition. The Strasbourg court in *Kjeldsen, Busk Madsen and Pedersen v Denmark* ... spoke of "discriminatory treatment having its basis or reason a personal characteristic ('status') by which persons or groups of persons are distinguishable from each other". The House adopted this test in *R (S) v Chief Constable of the South Yorkshire Police* ... and again in *R (Clift) v Secretary of State for the Home Department* ..., and imprecise though it is it may be hard to formulate any test which is more precise."



## Identifying 'status' (2)

However...

Status pleaded must actually capture the entirety of the discrimination alleged: see *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26 at [72]-[77]

Range of 'statuses' is not limited. Includes:

- Country of residence (*Carson v UK* (2010) 51 EHRR 13)
- Homelessness (*R (RJM) v SSWP* [2008] UKHL 63)
- Military rank (*Engels v Netherlands* (No 1) (1976) 1 EHRR 647)

Not infinite. **Key takeaway:** be clear, and be realistic.



# Identifying comparators: where is the grass greener?

Challenge is to identify with precision: the claimant group; the comparator group; and to demonstrate they are similar in relevant respects apart from the ground of alleged discrimination

Strictness of this requirement is being relaxed: see e.g. *In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)*

**But:** still need to identify analogous situations and difference in treatment.

**Key takeaways:** heed wisdom of Lord Wilson in *R (DA) v Secretary of State for Work and Pensions*: “adroit advocates will commend the [comparator] which would best serve their purpose in relation to the issues which follow”



# Evidence

Questions of (1) difference in treatment and (2) justification often turn on the evidence.

On difference in treatment: see e.g. *Mathieson v SSWP* [2015] UKSC 47- importance of collaborative, joined-up approach to strategic litigation and evidence-gathering.

On justification: wide margin of appreciation does not elide need for robust evidence, but can tilt balance. See *R (Stott) v Secretary of State for Justice* [2018] UKSC 59.

**Key takeaway:** do your research, plan ahead, work collaboratively!



# Lunch

12:50 – 13:50



# Article 14 ECHR: a path through the maze



Matthew Fraser



Natasha Jackson



Edward-Arash Abedian



# The HRA: a practitioner's guide



Edward-Arash Abedian





## Section 3, Human Rights Act 1998

(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.



## Section 3, Human Rights Act 1998

*Ghaidan v Godin-Mendoza* [2004] UKHL 30

*Sheldrake v DPP* [2004] UKHL 43

*Christian Institute v Lord Advocate* [2016] UKSC 51

*Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27

*In re United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill* [2021] UKSC 42

*Secretary of State for Business and Trade v Mercer* [2024] UKSC 12



# When is it appropriate to use section 3?

*Secretary of State for Business and Trade v Mercer [2024] UKSC 12:*

*“102. Persuasively as these submissions were advanced, I do not accept them. In my judgment, the Court of Appeal was correct to hold that a Convention compatible interpretation of section 146 of TULRCA is not possible and would amount to impermissible judicial legislation rather than interpretation. I recognise that section 3 of the HRA can require a court to read in words which change the meaning and the effect of the legislation to achieve a compatible interpretation. However, I do not consider that there is a single, obvious legislative solution that will ensure compliance with article 11 while at the same time maintaining an appropriate balance between the competing rights of employers and their workers in this politically and socially sensitive context. Moreover, to interpret section 146 in the way proposed by the appellant would contradict a fundamental feature of the legislation.*

[...]

*105. For this reason, seeking to interpret section 146 using section 3 of the HRA in this way, is tantamount to judicial legislation. It fundamentally alters the scope and structure of the rights conferred by TULRCA, re-drawing the balance between workers' and employers' rights. There is no formulation that does not involve making a series of policy choices that may have far-reaching practical ramifications. This goes beyond the permissible boundary of interpretation.”*



## Section 4, Human Rights Act 1998

(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) [...]

(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.



## Section 4, Human Rights Act 1998

(5) In this section “court” means—

- (a) the Supreme Court;
- (b) the Judicial Committee of the Privy Council;
- (c) the Court 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.
- (f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Chancellor of the High Court or a puisne judge of the High Court.



## Section 4, Human Rights Act 1998

*R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68

*Christian Institute v Lord Advocate* [2016] UKSC 51

*Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27

*R (RR) v Secretary of State for Work and Pensions* [2019] UKSC 52

*R (JCWI) v National Residential Landlords Association* [2020] EWCA Civ 542

*In re Abortion Services (Northern Ireland)* [2022] UKSC 32

*JR123, Re Application for Judicial Review (Northern Ireland)* [2025] UKSC 8



# When is it appropriate to use section 4?

*Secretary of State for Business and Trade v Mercer [2024] UKSC 12:*

*“120. In my view this is not one of those cases where it is inappropriate to make a declaration of incompatibility. The ultimate legislative solution to the problem identified in this case may call for enquiry. Questions of policy will have to be addressed and evaluated, their practical ramifications considered, and a fair balance struck between all the competing interests at stake.*

*But the existence of policy choices in the means of giving effect to the lawful strike rights protected by article 11 is a reason in favour of making a declaration of incompatibility, not refusing one. It is for Parliament to decide whether to legislate and, if so, the scope and nature of such protection. Moreover, resolution of these issues being pre-eminently a matter for Parliament, it may consider that section 146 is not after all the correct vehicle to remedy the problem. That too is not a reason for refusing a declaration in this case. No legislation is pending or envisaged in this area, that might make it premature to make a declaration. Indeed, I can discern no good reason for rejecting the remedial measure provided for by section 4 of the HRA by making such a declaration.”*



# Framing declaratory relief under section 4

Special rule for “*ab ante*” challenges – i.e. a prospective challenge to the provision in advance of its application to any particular facts

*ab ante* rule = court will not strike down provision unless its application would be incompatible with Convention rights in all or nearly all cases

Rule does not apply where there is a breach of Convention right in an individual case – there may be scope for a wider declaration, see *JR123* [2025] UKSC 8 at [87]-[92]:

*“92. ... If, at the point of granting a remedy, the court can see that the Convention rights of any individual who is in the same class of persons as the individual claimant must inevitably be violated by the same provision which has been applied to the claimant, it may be appropriate to grant a declaration that the provision is generally incompatible with Convention rights of that whole class rather than limiting the declaration to say that it is incompatible with the Convention rights of the claimant in the particular circumstances of the case.”*





# The HRA: a practitioner's guide



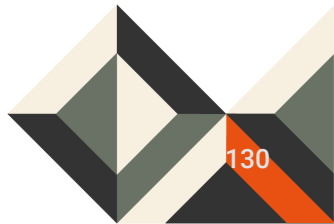
Matthew Fraser



## Section 6, Human Rights Act 1998

White Paper for the Human Rights Bill, entitled “Rights Brought Home”, dated October 1997, (para. 2.2):

*“Although the United Kingdom has an international obligation to comply with the Convention, there at present is no requirement in our domestic law on central and local government, or others exercising similar executive powers, to exercise those powers in a way which is compatible with the Convention. This Bill will change that by making it unlawful for public authorities to act in a way which is incompatible with the Convention rights.”*



## Section 6(1)

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.



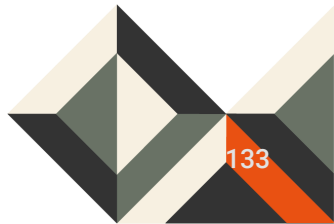
# Before the Human Rights Act 1998

*Wainwright v Home Office* [2004] 2 AC 406



# Two key features of the section 6 requirement

1. The ambit of “public authority”: the public/private divide and application to courts / tribunals.
2. The exceptions to preserve Parliamentary sovereignty.



# Public authority

## Section 6(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

## Section 6(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.



# Parliamentary Sovereignty

## Section 6(3)

In this section “public authority” ... does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

## Section 6(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.



# Parliamentary Sovereignty

## Section 6(1):

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

## Section 6(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.





# Primary v secondary legislation

*RR v SSWP* [2019] UKSC 52



# The HRA: a practitioner's guide



Natasha Jackson



## Section 7, Human Rights Act 1998

7(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.



# Appropriate court or tribunal

ss.7(2) and (6)

NB lower tribunals cannot issue a s.4 DOI → on transfer, see CPR 30.3(g) and *G (A Child)* [2017] EWCA Civ 2638

## Any legal proceedings

Can raise as counterclaim s.7(2)

## CPR requirements

CPR PD 16 para 14 – pleading requirements for Statement of Case



# Victim requirements

Art 34 ECHR, as amended by Protocol 11:

*“The Court may receive applications from any person, NGO or group of individuals claiming to be a victim of violation...”*



# Victim requirements: Strasbourg approach

Need “a sufficiently direct link between the applicant and the harm which he considers he has suffered as a result of the alleged violation”: *Tauira and Others v. France*, (28204/95), 4 December 1995; also *Lizarraga v Spain* (62543/00), (2004) 45 EHRR 45, [35]; *Zakharov v Russia* (47143/06), (2016) 63 EHRR 17, [164].

Some flexibility:

- State surveillance e.g. *Klass v Germany* (A/28), (1970–1980) 2 EHRR 214; *Zakharov v Russia* (47143/06), (2016) 63 EHRR 17; *Big Brother Watch v United Kingdom* (58170/13), (2022) 74 EHRR 17, [467]–[472], *Privacy International v Secretary of State for Foreign and Commonwealth Affairs* [2021] EWCA Civ 330, [2021] QB 1087, [127], *R (Reprieve) v Prime Minister* [2021] EWCA Civ 972)
- Death of victim (Art 2) / during course of HRA proceedings: *Rabone v Pennine Care NHS Trust* [2012] UKSC 2
- Representative orgs on behalf of actual / potential victims: *Lizarraga v Spain* (62543/00), (2004) 45 EHRR 45; *Centre for Legal Resources on behalf of Campeanu v Romania* (47848/08), (2014) 37 BHRC 423
- Climate change? *Klimaseniorinnen v Switzerland* (2024) (53600/20), c.f. *Careme v France* (2024); *Duarte Agostinho v Portugal* (2024); *Cannavacciuolo v Italy* (2025) (51567/14); and see: *R (Friends of the Earth) v SSEFRA* [2025] EWHC 2707 (Admin), per Chamberlain J at [152]–[155] (obiter)

Don't need victim status for s.4 DOI



# Victim requirements: Domestic courts

*“Convention rights are not free-floating entities which are available to and enforceable by anyone who disagrees with a decision of a public authority on the ground that it breaches, or may breach, somebody’s Convention rights”: R (Reprive) v Prime Minister [2021] EWCA Civ 972*

Strasbourg has allowed applications to proceed where there is *“reasonable and convincing evidence of the likelihood that a violation affecting [the applicant] personally will occur; mere suspicion or conjecture is insufficient in this respect”*: *Ada Rossi v Italy* (55185/08), 16 December 2008. See *Klass v Germany* (A/28), (1970–1980) 2 EHRR 214; *Marckx v Belgium* (A/31), (1979) 2 EHRR 330; *Norris v Ireland* (10581/83), (1988) 13 EHRR 186; for a domestic decision, see obiter comments by Lord Hoffman in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29 at [59]).

Domestic courts generally stricter: see e.g. *R (DXK) v SSHD* [2024] EWHC 579 (Admin) for issues this raises in pursuing systemic challenges



# Interventions

CPR 54.17 in High Court JR; application 'on notice' to CA; SC Rules 15, 26 and PD 6

*Re E* [2008] UKHL 66, [2009] 1 AC 536

EHRC has standing if there would be at least one victim: s.30(3) Equality Act 2006





## s.8 HRA 1998: judicial remedies

### 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.



*“The great advantage of the scheme laid down in the Act is its flexibility. It enables the courts to mark violations of the Convention rights in whatever way it considers just and appropriate”: Ali v Headteacher and Governors of Lord Grey School [2006] UKHL 14, per Lady Hale*



# Damages

*“just satisfaction”* - HRA 1998, s 8(3). See *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124, [59]; *R (KB) Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2004] QB 936, [22]

Courts should seek to restore the victim to the position they would have been if there had been no breach of their Convention rights: *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406

Will other remedies suffice? Main concern of the Court is to bring infringement of ECHR rights to an end: *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; *R (Faulkner) v Secretary of State for Justice* [2013] UKSC 23



# Refreshment break

14:40 – 15:00



# Breakout sessions

**What difference do human rights make?  
Articles 2, 3, 5 and the common law**

Lecture Theatre

**Article 8 and A1P1: how does the ECHR  
protect property?**

Lower ground floor breakout room



# What difference do human rights make? Articles 2, 3, 5 and the common law



Miranda Butler



Alex Goodman KC



Charles Bishop



# The common law and the ECHR: current debates



Charles Bishop



# Three themes

1. Contested origins: the chicken or the egg?
2. Modern-day exceptionalism
3. The common law “safety net”: just a myth?





# Contested origins: the chicken or the egg?

- ECHR rights can trace their theoretical foundation to many concepts explored in the common law.
- Regular claims that ECHR is British and/or “Conservative” invention, best explored in Jesse Norman and Peter Osborne, “Churchill’s Legacy: the Conservative Case for the Human Rights Act” (2009).
- Recently contested in Conor Casey and Yuan Yi Zhu, “Revisiting the British Origins of the European Convention on Human Rights” (2025), with foreword by Lord Sumption.
- Does it matter?

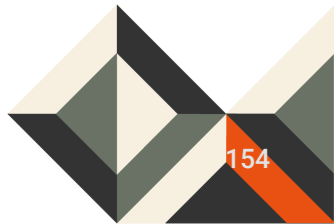


# Modern-day exceptionalism

*"I do think we need to look again at the interpretation of some of these provisions ... that's Article 3 ... I believe in those instruments I believe in the rule of law ... but all international instruments ... have to be applied in the circumstances as they are now ... we're seeing mass migration in a way we haven't seen in previous years. I believe those genuinely fleeing persecution should be afforded asylum. There's a difference between someone being deported to summary execution and someone who is simply going somewhere they don't have the same level of healthcare or for that matter the same prison conditions. ... I think there's quite an appetite to look at issues like that again."*

The Rt Hon Sir Keir Starmer KCB KC MP, author of  
*European Human Rights Law* (1999, LAG)

1 October 2025, interview on BBC News



# Modern-day exceptionalism

## Soering v UK (1989)

“What amounts to “inhuman or degrading treatment or punishment” depends on all the circumstances of the case ... inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice” (para 89)



# Modern-day exceptionalism

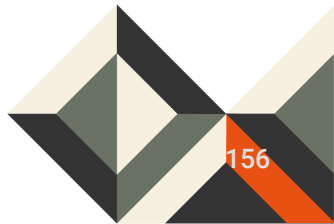
## Chahal v UK (1996):

UK argued Art 3 not absolute in removal cases, which required an uncertain prediction of future events, and so facts including the danger posed by the person to security should be taken into account or alternatively you could give greater weight to security in assessing risk (para 76). UK relied on Soering para 89.

Court rejected this: “The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.”

Compare to Court of Appeal decision: *“Of course there may very well be occasions when the individual poses such a threat to this country and its inhabitants that considerations of his personal safety and wellbeing become virtually irrelevant.”*

See also Saadi v Italy (2009) and the UK's intervention.



# The common law “safety net”: just a myth?

- Review of primary legislation, the *R (Jackson) v Attorney General* nuclear threat and the lessons from the Safety of Rwanda (Asylum and Immigration) Act 2024.
- The “law of humanity” and positive systems duties under Arts 2 and 3 ECHR.
- The importance of practical accessibility to adjudication of legal rights: the import of “bringing rights home”.



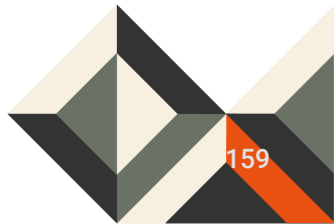
# The common law and the ECHR: current debates



Alex Goodman KC



# Germans



# Basic Law for the Federal Republic of Germany

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

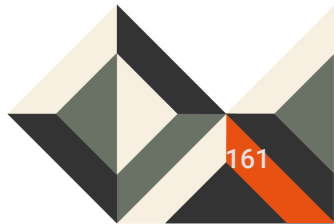




# Law of Humanity

*'R v Inhabitants of Eastbourne (1803) 4 East 103*

*"the law of humanity, which is anterior to all positive laws obliges us to afford them relief to save them from starving".*



# ***Oppenheimer v Cattermole* [1976] AC 249 (HL) at 282B per Lord Salmon**

- Nazi decree of 1941 deprived German Jews abroad of nationality and property, such property to be “used to further the aims connected with the solution of the Jewish problem”.
- Question for UK courts was for tax purposes whether Appellant remained a dual national.
- “Whilst there are many examples in the books of penal or confiscatory legislation which according to our views is unjust, the barbarity of much of the Nazi legislation, of which this decree is but an example, is happily unique. I do not consider that any of the principles laid down in any of the existing authorities require our courts to recognise such a decree and I have no doubt that on the grounds of public policy they should refuse to do so.”



# Common Law, ECHR, and Constitutions

Human Rights Development in UK over time:

1. Common Law (including fundamental or constitutional rights) and domestic statute (pre-1951).
2. Common law, statute and the European Convention on Human Rights (1951-2000 with right of individual petition from 1966). 650 cases reference the Convention between 1964 and 2000. Convention could be relied on where interpretation of statute or common law was ambiguous or uncertain.
3. Common law, statute, ECtHR and ECHR incorporated (2000- to date).
4. Revert to 1 or 2? A constitution?



## Article 3 and UK antecedents

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

- 1640 Long Parliament abolished Torture
- 1689 Bill of Rights prohibits “cruell and unusuall punishments”
- “Law of humanity” *R v Inhabitants of Eastbourne* (1803) 4 East 103; *R v Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.
- “Common Humanity”- *R v Lincolnshire County Council ex parte Atkinson* (1996) 8 Admin LR 529, 535, Sedley J



# Article 5 and UK antecedents

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

- Clause XXIX of Magna Carta (using 1297 numbering)
- Writs of habeas corpus and damages for false imprisonment pre-date Magna Carta: see *R (Jalloh (formerly Jollah)) v Secretary of State for the Home Department* [2020] UKSC 4, [2021] AC 262, [1] (Lady Hale).
- *Somerset v Stewart* (1772) 98 ER 499
- *Christie v Leachinsky* [1947] AC 573, 595A. ‘...the liberty of the subject and the convenience of the police or any other executive authority are not to be weighed in the scales against each other’.



# A few oversights of the common law (per Professor Gearty)

- The maltreatment of gays purely on account of their sexual orientation (*Dudgeon v United Kingdom* (1981) 4 EHRR 149);
- corporal punishment in schools (*Campbell and Cosans v United Kingdom* [1982] ECHR 1);
- inhuman and degrading treatment of internees (*Ireland v United Kingdom* (1978) 2 EHRR 25);
- deliberate shooting of suspected terrorists (*McCann v United Kingdom* (1996) 21 EHRR 97);
- draconian contempt laws that prevented campaigning newspapers from exposing wrong (*Sunday Times v United Kingdom* (1979) 2 EHRR 245);
- long periods of detention without trial *Brogan v United Kingdom* (1988) 11 EHRR 117);
- cruel invasions of privacy (*Kaye v Andrew Robertson and Sports Newspapers Ltd* [1991] FSR 62).



# A few more oversights

*R (AAA (Syria)) v Secretary of State for the Home Department*  
[2023] UKSC 42, [2023] 1 WLR 4433 (Rwanda Scheme- Contra Lord Carnwath)

*D v UK* (30240/96), (1997) 24 EHRR 423, [52] (inhuman deaths abroad)

*R (MA and BB) v SSHD* [2019] EWHC 1523 (Admin) (Positiveart 3 investigative obligations)

*R (CSM) v SSHD* [2021] 4 WLR 110

*R (ASY) v SSHD* [2025] KB 87, 2024 EWCA Civ 373

*R (DMA and others) v Secretary of State for the Home Department*  
[2021] 1 W.L.R. 2374

(Some examples of systems duties)



# Differences on Damages Convention v Common Law

*Abdi v United Kingdom* (27770/08), 9 April 2013

*VM v United Kingdom (No 2)* (62824/16), 25 April 2019

*R (Lumba) v Secretary of State for the Home Department*  
[2011] UKSC 12, [2012] 1 AC 245, [97]–[101],

*R (Kambadzi) v Secretary of State for the Home Department*  
[2011] UKSC 23, [2011] 1 WLR 1299, [74].





# Absorbing the Convention into the Section 8 HRA 1998

*R (Sturnham) v Parole Board; R (Faulkner) v Secretary of State for Justice*  
[2013] UKSC 23, [2013] 2 AC 254, [29] per Lord Reed

... ‘...section 8(3)(4) of the Act have been [sic] construed as introducing into our domestic law an entirely novel remedy, the grant of which is discretionary, and which is described as damages but is not tortious in nature, inspired by article 41 of the Convention. Reflecting the international origins of the remedy and its lack of any native roots, the primary source of the principles which are to guide the courts in its application is said to be the practice of the international court that is its native habitat. I would however observe that **over time, and as the practice of the European court comes increasingly to be absorbed into our own case law through judgments such as this, the remedy should become naturalised.** While it will remain necessary to ensure that our law does not fall short of Convention standards, we should have confidence in our own case law under section 8 once it has developed sufficiently, and not be perpetually looking to the case law of an international court as our primary source.’



# Absorbing the Convention into the Common Law

In *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71, [2006] 2 AC 221, [52]. Per Lord Bingham

‘[t]he principles of the common law, standing alone, in my opinion compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention’.

*Campbell v MGN Ltd* [2004] 2 AC 457 at [50]-[51] (misuse of private information).





Miranda Butler



# Article 8 and A1P1: how does the ECHR protect property?



Richard Turney KC



Admas Habteslasie



Natasha Jackson



# Article 8 and A1P1: how does the ECHR protect property?



Admas Habteslasie



# The ECHR and protection of property: some general themes

- The courts are generally reluctant to allow ECHR rights to undermine pre-existing property rights, especially of private persons;
- Where position is governed by common law: very difficult to undermine a property right using human rights arguments;
- Where a statutory scheme regulates property rights in some way/strikes a balance, very unlikely court will unpick that on the basis of ECHR arguments one way or the other



# Common law property rights

- Property rights heavily protected by common law (e.g, trespass to land, nuisance); ECHR more likely to arise in an attempt to undercut such rights
- (but NB development of the common law – *Fearn v Tate* not quite an example, but almost)
- Right to protest theoretically applies in relation to a protest on private property, but in reality the courts will tend to conclude that rights under Article 10/11 do not require the protest activity to be undertaken on private land



# Common law property rights

## *Fearn v Tate:*

- Claimants owned flats opposite Tate Modern gallery; Tate gallery visitors regularly viewed, photographed and video-recorded their properties (which had wall to ceiling windows) from the Tate viewing platform.
- Claimants sought injunctive relief on the basis of private nuisance; alternatively on the basis of a breach of s.6 of the HRA 1998 (i.e. against the Tate) by contravention of their Article 8 rights and/or nuisance in light of Article 8
- Judge at first instance considered the various ways claim was put separately (and dismissed the claim)
- Supreme Court allowed the nuisance claim and said that there was no need to consider Article 8 ECHR





# Statutory schemes

The general position: where there is a statutory scheme in some way regulating property, ECHR unlikely to affect the position. E.g.:

- Statutory scheme for adverse possession
- Procedure relating to the obtaining of possession orders in relation to residential property:
- Sanctions regimes
- For a rare example of a statutory scheme being found to contravene A1P1, see *Salvesen v Riddell* [2013] UKSC 22, which dealt with retrospective Scottish legislation concerned with agricultural land security of tenure



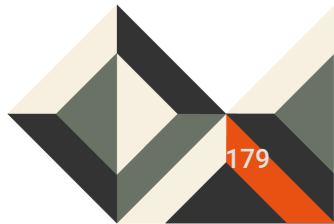
# Adverse possession: property moves from paper owner to squatter

- Law prior to the Land Registration Act 2002 – 12 years of possession = extinguishes title/entitlement to be registered as owner
- Grand Chamber of the ECtHR in *Pye v United Kingdom (44302/02 (2007))* concluded that A1P1 was engaged but not contravened and that the relevant statutory provisions “*were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals and that this was a control of land and not a deprivation of possessions within art. 1 of the First Protocol*”
- See also *Brown v Ridley* [2025] UKSC 7 in relation to the new, less squatter-friendly regime introduced by 2002 Act



# Possession orders – eviction

- Private law relationship between a landlord and tenant is supplemented by statutory security of tenure; imposes (amongst other things) an obligation on landlord to obtain a court order in order to evict the tenant. See, inter alia:
- (in relation to private landlords) Protection from Eviction Act 1977; s.5 Housing Act 1988;
- S.82, Housing Act 1985
- Does court additionally need to be satisfied that eviction complied with Article 8(2)?



# Possession orders – eviction

## Public authority landlord

- House of Lords initially answered this question ‘no’: *Harrow LBC v Qazi* [2003] UKHL 43.
- Supreme Court subsequently departed from that line of authority: *Manchester CC v Pinnock* [2010] UKSC 45 and *Hounslow LBC v Powell* [2011] UKSC 8, finding:
- Court must have the power to assess proportionality of making a possession order and to resolve any disputed questions of fact;
- Court only expected to do so if tenant raises the issue and it is seriously arguable
- *“Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality.”*



# Possession orders - eviction

In relation to possession claims brought by a private landlord, the Supreme Court concluded in *McDonald v McDonald* [2016] UKSC 28 at [40] that:

- Article 8 may be engaged;
- Court is a public authority for purposes of s.6(1) of HRA 1998
- But *"it is not open to the tenant to contend that art.8 could justify a different order from that which is mandated by the contractual relationship between the parties"*
- *"at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants"*



# Sanctions: the state takes all of your property

- Recent Supreme Court decision in *Shvidler v SSFCA* [2025] UKSC 30 considered two appeals concerned with *Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855)*
- *Shvidler*: British citizen designated
- *Dalston Projects*: Detention of a luxury yacht owned by Russian citizen and Russian company





# Sanctions: the state takes all of your property

Per dissenting judgment of Lord Leggatt:

*“247. The basis on which Mr Shvidler's assets have been frozen is twofold: first, that he is “associated with” a person, Mr Roman Abramovich, who is or has been involved in obtaining a benefit from or supporting the Government of Russia; and second that, until shortly before his designation, Mr Shvidler was a non-executive director of Evraz plc, a mining company listed on the London Stock Exchange which operates through subsidiaries in Russia as well as in the United States, Ukraine, Canada and the Czech Republic. These tenuous connections to the Russian government are said on behalf of the Foreign Secretary to justify depriving Mr Shvidler, indefinitely, of his right to deal with any of his own funds and other “economic resources”, wherever in the world they are located.”*





# Sanctions: the state takes all of your property

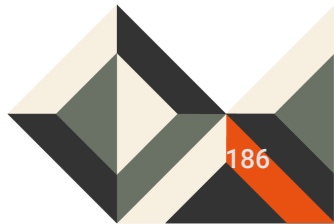
- Claimant was British citizen (which allowed effect of sanctions to extend to worldwide funds/assets)
- Criminal offence to use his funds for any purpose whatsoever (e.g. including food)
- Must apply to the Treasury for a licence to meet basic needs, which Treasury grants if it considers it appropriate; and certain limited extraordinary expenses



# Sanctions: the state takes all of your property

- Lord Leggatt:

*“264. The public explanation given for the decision to designate him by name on 24 March 2022 does not inspire confidence in the rationality of the decision-making process. In a press release issued on that day which singled out for special mention five individuals being sanctioned, the first of whom was Mr Shvidler, the Foreign Secretary (Liz Truss) said: “These oligarchs, businesses and hired thugs are complicit in the murder of innocent civilians and it is right that they pay the price.” This was followed by tweets published by the Secretary of State for Transport, Grant Shapps MP, on 26 March and 8 April 2022 which described Mr Shvidler as one of “Putin's friends” and “Putin's cronies”, as “benefitting from Russia's illegal action” in invading Ukraine, and as “not welcome here”.*



# Sanctions: the state takes all of your property

*“265. These aspersions were all baseless. According to Mr Shvidler's uncontradicted evidence, he has no involvement in Russian politics and no relationship with President Putin. He is not an oligarch. He has not benefited from, let alone been complicit in, the invasion of Ukraine. To describe Mr Shvidler as “not welcome here” is repugnant when he is a British citizen (as are his five children) of unblemished character.”*



# Sanctions: the state takes all of your property

- Courts at all levels found interference with Article 8 and A1P1 proportionate (with exception of dissent from Lord Leggatt)
- Important judgment in a number of respects; approach of appellate court to proportionality assessment of lower courts and when appropriate to make a fresh assessment (see [162] in particular)
- And see also approach to ‘deference’/latitude; judgment of majority at [130] to effect that Sec of State “*should be accorded a wide margin of appreciation in making their judgments about*” not only the initial stages of the proportionality assessment but also “*whether a fair balance has been struck between the relevant Convention rights of the individuals and others concerned and the interests of the community*”; cf. Lord Leggatt at [256]



# Article 8 and A1P1 in planning and environment law



Richard Turney KC



# The conventional position: setting the scene

- *Hatton v UK* (2003) 37 EHRR 611
- *Marcic v Thames Water Utilities Ltd* [2004] 2 AC 42
- *Lough v First Secretary of State* [2004] 1 WLR 2557



## *Lough* principles

- Not every loss of amenity involves a breach of article 8(1).
- The margin of appreciation may be wide when the implementation of planning policies is to be considered.
- Article 8 made no significant impact upon the task to be performed by a planning decision-maker.
- Article 8 does not achieve a radical change in planning law that consideration should have been given to the possibility that the benefits achieved by the grant of permission could have been achieved in some other way or on some other site.



# Broadening scope?

- R (Richards) v Environment Agency [2022] 1 WLR 2593
- Fearn v Tate Britain [2024] AC 1
- Verein Klimaseniorinnen Schweiz v Switzerland (53600/20), (2024) 79 EHRR 1





# Role of A1P1

- Difference of scope: property interest v home
- “Possessions” may be in play: for developer (*Pine Valley*) and for the person impacted (e.g. *Fearn*)
- Control and deprivation issues arise (see *R (Mott) v Environment Agency* [2016] EWCA Civ 564)
- Intensity of review and margin of appreciation: *Hatton*; *Hamer v Belgium*



# Positive duties

- *Hatton*
- *Klimaseniorinnen*
- *Richards*



# A1P1 – Leasehold and Freehold Reform Act 2024



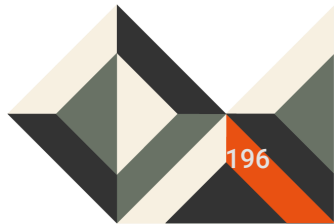
Natasha



# LFRA 2024

A1P1 challenge to provisions: (i) 'removing' marriage value from enfranchisement premiums, (ii) capping the ground rent value when calculating the premium, (iii) requiring landlords to pay their own litigation costs. (Charity claimants also raised Art 14)

Relief sought: s.4 Declaration of Incompatibility



# ***James v UK (1983)***

Leasehold Reform Act 1967: (i) right to acquire the freehold of houses, and (ii) right to a single 50-year lease extension on houses at a 'modern ground rent' BUT only houses and with a residence test

'Deprivation' of property

Legitimate aim: "*securing greater social justice in the sphere of people's homes*"; 1966 White Paper and the notion of 'equity'

A1P1 does not "*guarantee a right to full compensation in all circumstances*"; measures to achieve economic reform or greater social justice "*may call for less than reimbursement of the full market value*"



# *James v UK* (1983): moving the dial

1. Series of extensions and reinforcements to leasehold enfranchisement statutory rights since *James* was decided in 1983
2. Development of Strasbourg jurisprudence

Maxwell, “*The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR*” (2022): “while domestic courts have continued to apply *James* in the context of leasehold enfranchisement, as a living instrument, and since the enactment of the HRA 1998, there can be no doubt that the ECtHR and domestic courts have strengthened the requirement that compensation is required to satisfy the fair balance” [8.139]-[8.140]

- ‘Communist cases’: *Radovici v Romania* (2010) 51 EHRR 32; *Urbarska Obec Trencianske Biskupice v Slovakia* (2009) 48 EHRR 49; Maltese cases (*Gauci v Malta* (2011) 52 EHRR 24; *Aquilina v Malta* [2014] ECHR 3851/12; and *Zammit v Malta* (2017) 65 EHRR 17): “burden involved in the transformation and reform of the country’s housing supply ... cannot, as in the present cases, be placed on one particular social group, however important the interests of the other group or the community as a whole”
- *Lindheim v Norway* (2015) 61 EHRR 29; *Karibu Foundation v Norway* (2317/20), 3 April 2023: must assess the actual impact of the measure under challenge

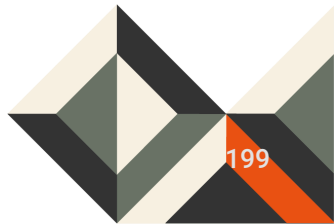


# A tension? Strasbourg scrutiny vs. Art 9 Bill of Rights

*Friends v United Kingdom* (2010) 50 EHRR SE6 at [56]: Court should consider “the extent to which the contested legislation was the subject of consideration and debate in Parliament, and the extent to which the national authorities considered whether a fair balance had been struck”; **Lindheim**

VS.

*Wilson v First County Trust Ltd* [2003] UKHL 40 at [13], [116]-[118]; *R (SC) v SSWP and ors* [2021] UKSC 26 at [182]-[184]: “the courts must not treat the absence or poverty of debate in Parliament as a reason supporting a finding of incompatibility”



# Closing panel

## Human rights in the next 25 years



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Miranda Butler



Alistair Mills



Dr Lewis Graham



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Richard Drabble KC

# Inaugural Richard Drabble KC essay prize for Human Rights Law



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