The Impact of the Human Rights Act 1998 in Twenty-Five Cases

Professor Richard Ekins KC (Hon), Sir Stephen Laws KCB, KC (Hon) and Dr Conor Casey

Foreword by Lord Howard of Lympne CH KC

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Policy Exchange

Endorsements

"The focus on human rights in English law following the Human Rights Act has undoubtedly increased the power and influence both of the ECHR and the English judiciary. This paper provides a powerful argument, based on numerous authorities, that this has been detrimental to the proper development of English law. Agree with them or not, the authors raise serious issues which cannot simply be ignored."

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"There are those, like the current Attorney -General, who describe themselves as "militant" about human rights and the Human Rights Act 1998. They seem to be quite unable to accept any evidence that the legislation has produced decisions which have undermined the UK's constitutional settlement.

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Foreword

Rt Hon Lord Howard of Lympne CH KC
Formerly Home Secretary and Leader of the Opposition

In my forty-one years in Parliament, I have seen the continual expansion of judicial power in our constitution – at the expense of the rightful power of Parliament and the electorate. This expansion has had many forms and many causes, not least the willingness of the European Court of Human Rights in Strasbourg to remake European human rights law in each new case. But amongst the most important was Parliament's fateful decision to enact the Human Rights Act 1998.

The fanciful promise of the 1998 Act was to "bring rights home", as if human rights had not long been protected in Britain by a watchful Parliament and by common law courts who decided cases without fear or favour but who did not purport to stand in judgement over Parliament itself.

What the Act introduced into Britain was a new, uncertain and open-ended ground for challenging the lawfulness of government policy and for questioning – undermining – other Acts of Parliament. As I pointed out at the time, deciding how best to protect human rights involves difficult judgements about competing priorities, judgements which should be made by politicians accountable to the people, rather than by unelected judges who, for good reason, cannot be removed from office.

In my last speech in the House of Commons [in 2010], I warned about the expansion of judicial power and the challenge this posed to our democracy. Five years later, Policy Exchange's Judicial Power Project began its study of the changing role of the courts in the Westminster constitution, developing a masterful critique of the rise of judicial power and defending forcefully the traditional balance of the constitution, in which courts have a vital, but vitally limited, role. I have been pleased to support its work since then and to see the sharp improvement that it has made to the quality of public deliberation in this country, including in Parliament, about the power of courts.

In its latest paper, Policy Exchange has addressed a vital question, which is *how* the Human Rights Act has unfolded in practice, which includes the new techniques that have been introduced into our constitutional law and practice and the types of questions that are now routinely considered by our judges. The paper considers the impact that the Act has had on our law and government by exploring twenty-five cases decided between

2000 and 2024, each of which helps highlight the way in which the Act has worked a change, for the worse, in our constitutional arrangements.

In striking fashion, the paper illustrates the many shortcomings of human rights law, making vivid the transfer of power from Parliament to the courts that the Act has helped bring about – and the resulting, negative, change in judicial culture that has taken place in consequence. The uncertainty and imprecision that the cases reveal, not to mention the unstable meaning of the Act itself, also brings home the extent to which human rights law undermines the rule of law.

In publishing this paper by Professor Ekins, Sir Stephen and Dr Casey, Policy Exchange has made a major contribution to future debate about the Human Rights Act and its place in our public life. The paper makes clear the continuing significance of human rights law. Parliamentarians and jurists cannot responsibly look away, but rather should confront the Act's importance and undertake to address its drawbacks. This heavyweight study of twenty-five cases should help parliamentarians and jurists engage with the voluminous case law that has been decided over the years since the Act came into force. It will greatly improve the evidence base that will inform future debate.

Policy Exchange's critique of the Act, in this paper as in all its other work, is not party-political but rather is driven by an appreciation of the balance of the Westminster constitution, and an aversion to the evils of substituting political litigation for parliamentary deliberation and electoral accountability. It may be unsurprising, but is nonetheless striking, how many of the cases that this paper explores concern Labour government policy, with or without the sanction of primary legislation. One pivotal case, from 2009, concerns the lawfulness of the discretion exercised by the then Director of Public Prosecutions, Keir Starmer, with the authors of the present paper fiercely criticising, for very good reasons, the judgment of the House of Lords which sought to distort his constitutional role and in effect to force a change in the law of assisted suicide by stealth.

The twenty-five cases that this paper considers range across the policy domain, including criminal justice, immigration, welfare, counter-terrorism and lawfare, assisted suicide, press freedom, health and foreign affairs. Some of the cases enjoyed some notoriety at the time they were decided, but I doubt whether any parliamentarians will be aware of the full range and significance of the case law decided under the Human Rights Act. This paper is of course only a sample of that full body of case law, but it is effective precisely because it helps highlight what has been going on in our courts.

This extension of the role of the courts is far from being of only academic interest. It can and does have severe practical consequences. To take but one example, the paper refers to the case of *Huang* which, in 2007, transformed immigration adjudicators into primary decision- makers, making the lawfulness of Home Office decisions about immigration turn on the subsequent application of an unpredictable proportionality test. As the authors say the case transfers much of the of the effective authority

to decide who enters and remains in the country – which is otherwise for Ministers accountable to Parliament and ultimately to the electorate – to the judiciary. Quite apart from the constitutional questionability of this transfer it has had significant damaging practical consequences, making the decision-making process more cumbersome and protracted and contributing to the harmful delays in processing asylum claims which are proving so problematical.

This paper does not outline how Parliament should reform human rights law, a question that Policy Exchange has addressed before and I am sure will address again soon enough. What it does instead is to make clear the compelling need for reform, in view of the nature of the nature of the political questions that the Human Rights Act has put before our courts and the reasoning that they have undertaken in consequence. For the reasons given in this powerful paper, it is past time for Parliament to take seriously its responsibilities and to restore the constitution.

I. Introduction

The Human Rights Act 1998 has undoubtedly had a major impact on how the UK is governed and on the way in which many important questions about public policy have been resolved. Since October 2000, when the Act came into force, British courts have been required to consider questions that would never previously have been put before our courts – questions that would otherwise have been thought to be political questions, unsuited for determination in the course of judicial adjudication. The way in which British judges have answered these questions has, of course, varied over time and from case to case, partly in response to shifts in judicial temperament, the choice of litigation tactics on the part of the parties, and the vagaries of the case law of the European Court of Human Rights.

The structural features of the European Convention on Human Rights and the Strasbourg Court's case law inevitably generate uncertainty, raising questions ill-suited for consideration by any court – and not traditionally considered by our courts. The general indeterminate nature or ambit of many of the rights recognised in the Convention is aggravated by the insistence by the Strasbourg Court that the Convention is a "living instrument" that should be given a dynamic or evolutive interpretation, thus bringing within its reach matters that would not have been thought to have been embraced when its provisions were ratified, and by the insistence that the rights conferred must be practical and effective, rather than theoretical or illusory. In practice, this has been used to generate rights and obligations not conferred explicitly or by necessary implication. The ambit of Convention rights, as understood and applied in the Strasbourg Court's case law, is thus often uncertain and may develop in entirely unexpected and novel ways.

This instability is part of the problem of how the Act impacts on the workings of our legal system. It is no answer to concerns about the Act to point to the cases in which the courts have not used their new statutory powers to second-guess Parliament's reasoning and choice or to hamstring government policy or to invent new, cumbersome legal obligations. The constitutional dynamic that the Act sets in motion, and the structural features of the Strasbourg Court's case law, means that there is now always a risk that European or domestic courts will break new ground, or undo a past settlement, in response to litigation that is often politics by another means.

The impact of the Human Rights Act 1998 on British public life and

government is a vast topic. Its study cannot be limited to the case law alone, which is voluminous, but must extend also to the ways in which anticipation of litigation distorts policy making and legislative deliberation. Policy Exchange's Judicial Power Project has considered this dynamic in some of our past work and we intend to examine the wider phenomenon in more detail in future work. However, it is true and important that much can be learned from the case law itself, not only from what one case, or line of cases, reveals about the new judicial dispensation but also from the sheer volume of cases, which confirms that human rights litigation has become a major feature of legal practice and, relatedly, as the courts themselves have recognised, of political agitation by means of litigation.

This paper contributes to the study of the impact of the Human Rights Act by picking out, from each year of the Act's operation, one striking case that illustrates some of the problems to which the Act gives rise.[1] The main body of the paper is an analysis of each of these twenty-five judgments, set out in chronological order, an analysis which aims to be intelligible to the lay reader while still providing the technical detail that is necessary to understand what the court decided and to see why there is reason for concern about the mode of decision and/or its practical consequences.

Before considering each case in turn, the paper begins by placing the Human Rights Act in historical context, noting the significance of the changes over time in how it has been understood and applied. The paper then explains the grounds for selecting the cases in question. It then goes on briefly to summarise – in two or three lines – each of the twenty-five cases, before outlining some of the problems that they jointly illustrate, problems that concern the framework within which important decisions have been made and the drawbacks in the reasoning by which they have been made.

These twenty-five cases, drawn from across the years in which the Human Rights Act has been in force, help explain why many jurists have long argued that the Act unsettles the UK's constitution and distorts its government. This paper aims to enrich future public deliberation about the merits of the 1998 Act – about the case for its amendment or repeal – by improving public understanding about the impact that the Act has had in our courts and thus, by extension, on government and Parliament. In thinking about human rights law reform, parliamentarians, lawyers, civil servants, and members of the public should consider how the Act has operated in practice, a process of reflection which will be greatly aided by close engagement with the twenty-five cases that this paper profiles.

1. As noted above, the Act came into force in October 2000. Our first case is chosen from the latter months of 2000, and our final case has been chosen from 2024.

II. The Human Rights Act over time

The Human Rights Act (HRA) received royal assent on 9 November 1998. The main provisions of the Act came into force on 2 October 2000. The HRA has been controversial since its enactment. The Labour government that introduced the Act quickly found itself at the sharp end of human rights litigation, with some ministers later railing against the way in which British courts had understood and applied Convention rights. The Conservative Party has repeatedly undertaken to repeal the HRA and/or to replace it with a British Bill of Rights. The Coalition Government that ruled from 2010-2015 agreed to investigate the enactment of a British Bill of Rights and set up a Commission to this end, which recommended, by a majority of seven to two, enactment of a new Bill of Rights. (The members of the Commission, including the majority, were clearly divided on the merits of the 1998 Act and the nature of any new Bill of Rights that might replace it.) The Conservative governments that held office from 2015-2024 made various commitments in relation to human rights law reform, even introducing a Bill of Rights Bill in 2022, but have not delivered any meaningful reform to the 1998 Act.

Policy Exchange's Judicial Power Project was established in March 2015, shortly before the 2015 general election. While much of our work since that time has concerned matters other than the Human Rights Act and the European Convention on Human Rights, we have had a consistent, principled concern about the impact that human rights law has had on constitutional government in this country. More specifically, we have long argued that the HRA is in tension with parliamentary democracy, good government, and the rule of law. Parliament was of course entitled to enact the 1998 Act and for so long as it remains in force, that is until its repeal, judges (like everyone else in the country) have been obliged to give faithful effect to its terms. We make no criticism of judges for doing their legal duty under the Act (indeed, we have criticised judgments that seem to us to have *failed* to comply with the terms of the Act). However, we have critiqued Parliament's decision to enact the HRA in the first place. And we have also considered and critiqued many decisions that our judges have made in applying and interpreting the HRA – either because the judgments in question reveal the Act's design problems or because they subvert (and worsen) the scheme that Parliament chose to introduce in

1998.

The Human Rights Act has not been stable since its main provisions came into force in October 2000. The way in which judges (and thus government lawyers and parliamentarians) have understood the Act's temporal and territorial scope has changed in important ways over the years. So too has the way in which judges have understood the relationship between Convention rights, which are set out in Schedule 1 to the HRA, and the case law of the European Court of Human Rights. Relatedly, the meaning and application of Convention rights – the rights to which persons in the United Kingdom have been entitled as a matter of domestic law – has changed sharply from time to time as our judges have followed, or sometimes raced ahead of, the Strasbourg Court's jurisprudence. For these reasons, any intelligent evaluation of the Human Rights Act requires one to be aware that its meaning and effect has changed, sometimes radically, over time and that it remains unstable. The instability in the meaning and application of the 1998 Act follows from (i) the dynamic for change that is deliberately built into the HRA by virtue of the relationship between Convention rights and Strasbourg case law and (ii) the standing risk, which has repeatedly been realised, that British courts will change, even radically, how they interpret and apply the Act, both in general and in relation to particular cases.

Much discussion about the Human Rights Act is divorced from an understanding of the twists and turns of the case law across the last twenty-five years. Many jurists robustly defend the Act from criticism – arguing that it is an ideal enactment that strikes the perfect balance between the competing considerations that arise from ECHR membership and from the UK's constitutional tradition – while gliding over the HRA's instability and ignoring the extent to which it has repeatedly been interpreted and applied in quite different ways, not only in relation to particular Convention rights but notably in relation to its key operative provisions.[2]

Policy Exchange's Judicial Power Project has been a critic of some key judgments adjudicating disputes about Convention rights, especially judgments that have been decided since the Project was launched in March 2015, shortly before the general election of that year. We have had much to say about the development of the HRA since 1998, arguing for Parliament either (a) to repeal the HRA (without replacing it with a British Bill of Rights, which risks being a cure that is worse than the disease) or at least (b) to enact legislation amending the Act to address some important judicial misinterpretations of its scope and intended effect.[3] Relatedly, we have challenged the misuse of section 10 of the HRA (the ministerial power to make remedial orders) to amend the Act itself, a change which further confirms that the HRA has scarcely stood still since its enactment in 1998.[4]

Parliament did not enact legislation amending the HRA in the ways for which we had long argued but in 2021 the Supreme Court made a series of judgments that did address some of the critical points that we had made, departing from previous lines of authority that had, in our view,

2. This is the broad thrust of the report of the Independent Human Rights Act Review, which was established by Ministry of Justice in December 2020 and published in December 2021.
3. See Richard Ekins and John Larkin QC, *Human Rights Law Reform: How and Why to Amend the Human Rights Act 1998* (Policy Exchange, 2021); Richard Ekins, *Thoughts on a Modern Bill of Rights* (Policy Exchange, 2022).
4. Richard Ekins, *Against Executive Amendment of the Human Rights Act 1998* (Policy Exchange, 2020).

badly misconstrued Parliament's intention in enacting the 1998 Act.[5] These judgments of the Supreme Court departed from the status quo, but a status quo that had in any case fluctuated throughout the more than 20 years during which the Act had been in force. These judgments confirm the HRA's instability in practice and undermine the argument made by some jurists and parliamentarians that the Act is a masterful exercise of legislative craft, giving principled effect in domestic law to European human rights law, such that the Act's amendment (let alone its repeal) is unthinkable. This type of advocacy for the HRA overlooks or brushes aside the Act's instability and its significance.

We have commended the Supreme Court for addressing its errors. However, while important, the judgments in question are not fixed in stone and the relevant errors may well recur, which is why we maintain that Parliament should have legislated on point and should still do so. (The amendments to the HRA for which we have argued are alternatives to the bolder course of action, which in our judgement is certainly warranted, namely, outright repeal of the HRA without replacing it with a British Bill of Rights.) Further, while the Supreme Court's recent judgments are welcome, they cannot address some of the central problems to which the 1998 Act gives rise, notably the extent to which the HRA invites and requires domestic courts to stand in judgement over Parliament's legislative choices and the extent to which the Act glosses the statute book with an uncertain and unstable body of case law.

5. See *R (Elan-Cane) v Secretary of State* [2021] UKSC 56, *Re McQuillan* [2021] UKSC 55, *R (AB) v Secretary of State for Justice* [2021] UKSC 28, and *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26. For commentary, see Richard Ekins, "Under Lord Reed, the Supreme Court itself is pushing back against judicial activism", Conservative Home, 17 December 2021 and Ekins and Larkin, *Human Rights Law Reform* (Policy Exchange, 2021).

III. Selecting the cases

The point of this paper is to contribute to public deliberation about human rights law by considering some of the most striking cases that have been decided by our courts, applying the Human Rights Act 1998, since it came into force almost twenty-five years ago. The HRA has been considered and applied in a great many cases, which means that the case law is extensive and is very difficult for the non-specialist, which includes most lawyers and judges, to consider in full. There is simply too much material to consider, and the twists and turns of the case law are obscure and technical. The volume and complexity of the case law is itself a problem for the rule of law – the law should not be left in this sorry state. Further, the relative impenetrability of the case law is liable to exclude non-lawyers, or even non-specialists, which is concerning insofar as human rights law is deployed to frame – to distort and prematurely to limit – policy-making in general and legislative activity in particular.

With a view to helping illustrate the case law, the paper selects a subset of cases that warrant attention, which anyone thinking about the merits of the 1998 Act should consider because they illustrate the problems to which the Act has given rise. That is, they are examples of ways in which the HRA has unsettled the constitution, undermined legal certainty, and distorted government or other public sector decision-making in some cases in line with the intended design of the Act, so that responsibility for the mischief is Parliament's), but in other cases because Parliament's design has been left behind, or even subverted.

To make the task manageable, and thus to make our analysis of the case law intelligible to parliamentarians and the public, we decided to limit ourselves to one case from each year. One incidental advantage of this mode of selection is that it showcases the case law over time, making clear that the cases about which critics of the HRA are concerned are not confined to "initial teething problems" and do not arise only in one small period of time, as defenders of the HRA sometimes suggest. The drawback of this approach is that it meant, of course, that we were able to present only one striking case from each year, when in some years there were several that deserve to be highlighted on any shortlist.

In selecting the twenty-five cases in question, we first drew up a long list of cases (nearly always appellate judgments) that were of concern to us and to other long-standing critics of the Act. From this long list, which included high-profile judgments and less well-known judgments, we selected twenty-five with our eye on picking out the cases that seemed to us (i) the most significant, in terms of displaying the importance of the

HRA in operation, (ii) the worst, in terms of their legal reasoning and/or practical consequences, and (iii) the most diverse, in terms of showing the range of the Act's application, both in terms of the subject of disputes (and thus the questions adjudicated by the courts and the domains of policymaking distorted by litigation) and the types of problems in play. These criteria may not always point in the same direction and this set of cases is not the only selection one might make. Still, what we have set out to do is to select cases that showcase the impact that the HRA has had, by way of (appellate) judgments, on how the UK is governed, which help show both the Act's importance and the damage that its deployment in the courtroom has done to parliamentary democracy, good government, and the rule of law.

IV. The cases in summary

The twenty-five cases that this paper highlights are as follows:

- ***Offen* (2000)**, the Court of Appeal reversed the intended effect of legislation requiring judges to impose life imprisonment on persons convicted of two specified offences.
- ***R v A* (No 2) (2001)**, the House of Lords turned the meaning of rape shield legislation on its head, allowing cross-examination of complainants whenever the judge thinks this is justified.
- ***Roth* (2002)**, the Court of Appeal denounced as disproportionate legislation imposing penalties on transport companies in relation to illegal migrants.
- ***Sim* (2003)**, the Court of Appeal reversed the statutory presumption that the parole board should only release an offender if satisfied that he no longer posed a risk to the public.
- ***Belmarsh* (2004)**, the House of Lords denounced legislation authorising indefinite detention of foreign terror suspects pending their deportation.
- ***Sylvannie Morris* (2005)**, the Court of Appeal denounced housing legislation for failing to provide adequately for non-citizens.
- ***D* (2006)**, the Court of Appeal rejected the adequacy of an extensive investigation into an attempted suicide in prison and overruled the Home Secretary to order that a new inquiry into the events be held in public.
- ***Huang* (2007)**, the House of Lords ruled that it is for the court, rather than the Home Secretary, to decide whether refusal of leave to remain in the UK is justified.
- ***Thompson* (2008)**, the Court of Appeal ruled that it is an unlawful breach of privacy for the police to enter a (dangerous) convicted paedophile's property to review his internet use.
- ***Purdy* (2009)**, the House of Lords ordered the Director of Public Prosecutions to publish a policy in order to give assurances to a person seeking to commit a clear criminal offence.
- ***Pinnock* (2010)**, the Supreme Court introduced serious uncertainty into a public authority's ability to fairly allocate its limited supply of housing.
- ***McCaughey* (2011)**, the Supreme Court held that the Human Rights Act has retrospective effect in relation to deaths caused during the Northern Ireland Troubles.

- ***Rabone* (2012)**, the Supreme Court imposed a new positive duty on the NHS in relation to the risk of suicide on the part of mentally ill adult patients.
- ***Smith* (2013)**, the Supreme Court held that the Human Rights Act has wide extra-territorial effect and applies to deaths taking place in the course of military action abroad.
- ***Nicklinson* (2014)**, the Supreme Court considered denouncing the UK's prohibition on assisted suicide, despite the fact the legislation was clearly compatible with the ECHR.
- ***Tigere* (2015)**, the Supreme Court quashed regulations that limited non-citizen entitlement to student loans and ordered that the applicant receive a student loan.
- ***Reilly* (2016)**, the Court of Appeal denounced Parliament's legislation retrospectively validating regulations about welfare entitlement.
- ***Benkharbouche* (2017)**, the Supreme Court denounced legislation that upheld state immunity and that was enacted to facilitate compliance with international obligations.
- ***DSD* (2018)**, the Supreme Court imposed a new positive duty on the police in relation to inadequate investigation of crime, overturning the common law rule against such litigation.
- ***RR* (2019)**, the Supreme Court took itself to be entitled to rewrite welfare regulations.
- ***AM (Zimbabwe)* (2020)**, the Supreme Court blocked deportation of an HIV-positive foreign criminal because of the inadequate health service in Zimbabwe.
- ***Ziegler* (2021)**, the Supreme Court made it much harder to convict, or even to arrest, "protestors" for public order offences, including obstruction of the highway.
- ***Bloomberg LPC* (2022)**, the Supreme Court held that it is unlawful for the media to publish information that a person is being investigated for a serious crime.
- ***AAA* (2023)**, the Supreme Court held that it is unlawful to remove an illegal migrant to Rwanda on the grounds that Rwanda cannot be trusted to honour its assurances.
- ***Dillon* (2024)**, the Northern Ireland High Court denounced legislation that aimed to reform the tangle of legal proceedings arising out of the Northern Ireland Troubles.

V. The problems that these cases illustrate

In the common law constitutional tradition, courts do not supervise Parliament's lawmaking choices and their jurisdiction to review the lawfulness of government action is subject to principled limits. The Human Rights Act departs sharply from this tradition insofar as it requires British judges to undertake a similar line of reasoning to that which will be taken by the European Court of Human Rights in considering whether the UK has acted compatibly with Convention rights. In some cases, the British court will be able to take the Strasbourg Court's case law to be a kind of fixed point, establishing the meaning of the ECHR as a matter of international law, which will then directly inform the meaning and application of Convention rights. But often the application of this case law, which is routinely unstable and imprecise (new rights are conjured up; old rights are left behind), will require the British court to apply vague legal standards that make the lawfulness, in ECHR terms, of legislation (or policy) turn on the judge's evaluation of the legislature's reasoning and choice.

We flatly deny that the merits of Parliament's lawmaking choices must be, or should be, subject to judicial supervision. The undoubted moral importance of human rights does not sanctify human rights *law*, viz. the jurisdiction of courts, domestic or European, to decide how the ECHR, and Convention rights in domestic law, should be understood and applied. There is no good reason to accept that judges have any competence or skill set that gives them special insight into whether legislation or policy is necessary in a democratic society, fulfils a compelling state interest, or strikes a proportionate or otherwise appropriate balance between an individual's claim and the public good to be achieved by a relevant measure under challenge or between different competing Convention rights or other rights. Rather, there is good reason to be sceptical that any of these types of questions can be answered by what we would typically consider legal learning or lawyerly skills, precisely because they involve decisions in respect of which there are no scales and metrics available suitable to the judicial role and its typical competences and would typically be made in proceedings in which only the claimant's interests were properly represented. Decisions concerning the proportionality and necessity of legislation, in truth, involve a kind of moral and practical evaluation and reasoning that judges and lawyers are neither responsible nor institutionally equipped for. Giving judges the power to review

statutes for their consistency with the open-ended and morally laden language typical of a bill of rights thus risks converting courts into largely unaccountable legislative bodies in permanent law-reform session to make retrospective changes in the law, while the subjects of the law are left unable to know what law will be taken to apply to their conduct.

The twenty-five cases that this paper highlights display a series of different failures of judicial and lawyerly craft, and the exercise of an extravagant, unprincipled jurisdiction. In some cases, the fault is Parliament's in enacting legislation that requires judges to undertake a task for which they are wholly unsuited (the fault lies also with successive Parliaments for failing to reform the law). In other cases, the fault lies with the court, which has misunderstood the HRA and has introduced new problems that are not strictly speaking Parliament's responsibility (although again, successive Parliaments should have acted more boldly in responding to this unhappy case law).

The cases we have selected span a wide range of public policy questions.

- criminal justice, sentencing and parole (*Offen*, *R v A (No 2)*, *Sim*, *Purdy*, *Ziegler*)
- migration and asylum (*Roth*, *Huang*, *AM (Zimbabwe)*, *AAA*)
- welfare, housing and rights of non-citizens (*Sylvannie Morris*, *Pinnock*, *Tigere*, *Reilly*, *RR*)
- counter-terrorism (*Belmarsh*)
- lawfare against UK forces and legacy cases (*McCaughey*, *Smith*, *Dillon*)
- assisted suicide (*Purdy*, *Nicklinson*)
- press freedom (*Bloomberg PLC*)
- policing and prisons (*D*, *Thompson*, *DSD*, *Ziegler*)
- health (*Rabone*)
- foreign affairs (*Benkharbouche*, *AAA*)

Some of these cases involve judges making, and/or second-guessing, high-level political judgements about the allocation of scarce resources. Human rights law has led the courts to intervene in ways which, prior to the HRA, would have been unthinkable. The courts have been transformed into a democratically unaccountable forum upon which judgment is passed on, for instance, the fairness of complex welfare schemes.

In some cases, the courts have deployed Convention rights to undermine and challenge Parliament's considered judgment on questions of serious moral principle. This should not be lightly accepted by anyone who adheres to the traditional balance of the Westminster constitution and the British model of rights protection, in which it is for Parliament, accountable to the people, to decide what our law should be and thus what justice requires in the context of lawmaking.

The cases usefully illustrate that there are good reasons to be sceptical that courts have any special claim to expertise when addressing questions about "proportionality", particularly when what that involves an assessment of the likely future effectiveness of particular legislative responses to practical

social problems.

The cases show up the effective discretion that the courts enjoy under section 3 of the HRA to rewrite the clear terms of legislation. In this respect some of the cases we profile pose a serious challenge to a basic aspect of our constitutional structure, namely that "Parliament makes laws, the judiciary interpret them".[6]

The cases also show how the deployment of human rights law can undermine legal principle. One sees this, in particular, with cases like *Ziegler* (2021). That is, engagement with general standards, which the rule of law requires, has, on occasion, given way to a "wilderness of single instances", as Lord Alfred Tennyson put it in Aylmer's Field (1793). One sees this risk throughout European human rights law, with the courts effectively adopting, or taking themselves to be required to deploy, an unpredictable case by case approach. On occasion, as our list of cases confirms, the courts have used the proportionality device to disrupt general standards, like the offence of obstructing the highway, such that we now risk arbitrary adjudication.

More broadly, the twenty-five cases that this paper profiles help to capture the newfound role of the courts within our constitution. It is one which was partly thrust upon the courts, yet also one which many judges have taken up in earnest.[7] Whatever its putative benefits, one serious cost has been the deterioration of the lawyerly craft which one sees in at least some of the cases on this list. At times the reasoning in these judgments is not recognisably legal. There is no careful engagement with doctrine, and no effort is made to identify underlying principles in any analytically precise way.

We noted in our introduction some of the limitations of studying the HRA's impact by reference to case law alone. One disadvantage of using case law to develop a critique of the legal regime established by the ECHR and the HRA – but also one mischief that is amply illustrated by that case law – is the overemphasis that a focus on the case law, as well as the whole regime itself, appears to give to a misconceived understanding of the purpose of law, one that is distorted by a perspective confined to litigation and to the interests of litigants and litigators. The case law has the unavoidable effect of prioritising the incidental function of law as a mechanism for resolving disputes over its primary functions, first, of setting the context in which government and members of the public plan and carry on their day to day activities (usually so far as possible to avoid disputes and litigation,) and secondly, of being a mechanism for implementing changes to that context that improve the well-being of society as a whole. By definition, the cases all involve litigation and the decisions are all made by those who are experts in litigation. All the cases demonstrate law being assessed primarily for its qualities as a dispute resolution mechanism, and indeed appear to be framed as such partly in recognition of the fact that their wider impact on society (which is real enough) is a matter beyond the proper competence of the judiciary. It is for this reason that the human rights regime is likely to err repeatedly

6. *Duport Steels v Sirs* [1980] 1 WLR 142 at 157, per Lord Diplock.
7. On 27 January 2021, in oral evidence to the Joint Committee on Human Rights, in their inquiry into The Government's Independent Human Rights Act Review, HC 1161, 27 January 2021, Q1, Lord Neuberger, the former President of the Supreme Court, said: "From the point of view of the judge of the courts, I think the Human Rights Act has injected a number of beneficial factors into the system." One factor, he says, is that the Act has "made the job of a judge much more interesting and worthwhile." See further Ekins and Larkin, *Human Rights Law Reform* (Policy Exchange, 2021), nn7-8. Note also Lord Justice Elias, "Are Judges Becoming Too Political?" (2014) 3 *Cambridge Journal of International and Comparative Law* 1, noting that the way in which (the enthusiasm with which) British judges have interpreted and applied the HRA turns in part on their temperament, including their relative self-confidence.

in favour of the interests of the individual over the interests of society as a whole (including the interests of *other* individuals) and to disregard the prudential handling of complex (often incommensurable) considerations that is an essential component, in the real world, of any society-wide modification of the legal context for decision making.

One can say with confidence that in giving effect in domestic law to the European Convention on Human Rights, and to the case law of the Strasbourg Court, the Human Rights Act 1998 has worked a major change in British law, including judicial culture. Our courts have had to grapple with a new set of responsibilities and to reckon with a new set of temptations. Quite how the courts will exercise these responsibilities, and whether they will resist these temptations, is not always easy to predict, which is itself part of the problem. Putting the point at its lowest, the HRA has had a major, negative effect on a wide range of policy questions and has changed the balance of our constitution in ways that wrongly put important constitutional principles in doubt.

VI. The twenty-five cases

1. *R v Offen (No 2)* [2000] EWCA Crim 96, [2001] 1 WLR 253, 9 November 2000

In *Offen*, the Court of Appeal relied on section 3 of the HRA to reverse the intended effect of legislation requiring courts to impose a sentence of life imprisonment on specified offenders.

In section 2 of the Crime (Sentences) Act 1997,[8] Parliament provided that a court "shall impose a life sentence" for a second conviction of a serious offence, "unless the court is of the opinion that there are exceptional circumstances relating to either of the offences or to the offender which justify its not doing so".

The rationale for the section is that those who have been convicted of two qualifying serious offences present such a serious and continuing danger to the safety of the public that they should be liable to indefinite incarceration and, if released should be liable indefinitely to recall to prison. These offences include attempted murder, manslaughter, rape, grievous bodily harm, statutory rape, and armed robbery. Despite the clear wording of the statute, and relevant precedent that predated the commencement of section 3 of the HRA, the Court of Appeal held that a life sentence is *not* required if a judge believes the offender poses no serious risk to the community – regardless of the fact that Parliament had clearly judged that such persons *always*, absent exceptional circumstances, are to be treated as constituting a serious risk.

The logical foundation of the Court of Appeal's judgment was that a requirement to imposes a life sentence in cases where the judge took the view that an offender was not a serious risk would be disproportionate and thus would breach Articles 3 and 5 of the ECHR. The Court did not reason carefully to this conclusion, but instead took the point to be obvious. The merits of mandatory sentencing provisions are highly contested, for good reason,[9] but it is scarcely obvious that legislation requiring a life sentence be imposed unless there are exceptional circumstances amounts to the infliction of inhumane treatment (Article 3) or a violation of the right to liberty (Article 5). Importantly, the fact that a judge believes that an offender does not pose a serious risk to the community cannot itself be an *exceptional* circumstance relating to the offender.

The Court of Appeal invoked s.3 of the HRA to justify reading s.2 of the 1997 Act so as to avoid a reading that the Court reasoned would otherwise be incompatible with Articles 3 and 5 of the Convention. The court was concerned that implementing the ordinary and natural wording of the

8. This section is restated in s.283 of the Sentencing Act 2020.
9. Warren Brookbanks and Richard Ekins, "The Case Against the 'Three Strikes' Sentencing Regime" [2010] New Zealand Law Review 689.

section might lead to a sentence which is wholly disproportionate. The worry was that it might be "easy to find examples of situations where two offences could be committed which were categorised as serious by the section but where it would be wholly disproportionate to impose a life sentence to protect the public".[10]

The court's preferred reading was that the section should be applied by judges so that it "does not result in offenders being sentenced to life imprisonment when they do not constitute a significant risk to the public".[11] Where the court is satisfied an offender is a significant risk, the court can impose a life sentence under s.2 1997 Act without contravening the Convention. The court said this would allow the statute to be implemented in a "more just, less arbitrary and more proportionate manner". Regardless of whether this conclusion would result in a more just sentencing policy, what is clear is that it involved a complete rewriting of the section, which reversed the policy choice actually made by Parliament.

Parliament' intention had been to limit the discretion of the courts when sentencing and, despite the court's attempt to argue that it was "possible" for the purposes of applying section 3 of the 1998 Act, to construe the provision in the way it did the practical effect of the decision was that the discretion was no more restricted after than before the legislative change had been effected.

2. *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, 17 May 2001

In *R v A*, the House of Lords deployed section 3 of the HRA to undermine a statutory provision that limited judicial discretion in sexual offence cases, simply failing to give effect to the rule that Parliament had clearly enacted.

To protect rape victims from degrading treatment, and to prevent juries relying on misconceptions about sexual offending and consent, Parliament enacted section 41 of the Youth Justice and Criminal Evidence Act 1999, which prohibited the cross-examination of the complainant about her sexual behaviour, subject to narrow exceptions. Section 41 prohibited evidence and cross examination of any sexual behaviour of the complainant unless (a) the behaviour occurred "at or about the same time" as the subject matter of the charge against the accused when consent is in issue or (b) where the similarity of the sexual behaviour to that charged or occurring at or about the same time is such that "the similarity cannot reasonably be explained as a coincidence".

This came before the House of Lords, which considered that the ordinary and natural interpretation of the provision disproportionately restricted the Article 6 procedural rights of defendants. The Court then invoked section 3 of the HRA in order to prevent a clash between the statute and Article 6. The House of Lords took a very strong view of the interpretative obligation imposed by s.3 HRA, going as far as to say that it will sometimes be:

> *"necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express*

10. [2001] 1 WLR 253 at 276.
11. [2001] 1 WLR 253 at 277.

> *language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so."*[12]

Some of the Law Lords stressed that there were limits to s.3 HRA, namely that it "does not entitle the court to legislate; its task is still one of interpretation".[13] A construction should not be given if "legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible".[14] But even with these qualifications, the interpretative authority asserted by the Law Lords pursuant to the HRA was still extremely broad, giving them ample scope to reshape the policy and object of a statute enacted by Parliament.

In *R v A* the House of Lords did precisely this by relying on s.3 HRA to offer a construction of the Criminal Evidence Act 1999 that seriously undercut the strong prohibition on examining prior sexual history. The majority of the Law Lords held in effect that Article 6 required this section to be read "as subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible." This effectively removed the restrictions deliberately imposed by Parliament and restored the legal status quo ante, which had been deliberately reversed by the 1999 Act, namely that evidence and cross examination of the complainant's sexual experience could only be given with leave under s.2 of the Sexual Offences (Amendment) Act 1976 when "it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked."

The Law Lords treated the s.3 HRA duty as warranting what can only be called an absurd interpretation of the statute, one that upended Parliament's policy choice to exclude, in all but the exceptional circumstances specified in the legislation, any evidence relating to a complainant's prior sexual activity in rape cases.

3. *International Transport Roth GmbH v Home Secretary* [2002] EWCA Civ 158, 22 February 2022

In *Roth*, the Court of Appeal refused to defer to, and instead denounced, Parliament's judgement about how best to tackle the problem of illegal migration.

Roth concerned a scheme under the Immigration and Asylum Act 1999, Part II of which imposed penalties for persons bringing clandestine entrants into the UK. The legislation was designed to prevent illegal migration by way of clandestine travel into the UK by those without legitimate travel documents, usually by concealment in freight vehicles. It therefore imposed liability for a fixed penalty of several thousand pounds on the person responsible for a clandestine entrant, in respect of each entrant concealed in their transporter. The person responsible was defined to include the owner, hirer, driver or operator of the transporter. Under the Act, there was no need to demonstrate that the personal responsible had knowledge there was an illegal entrant on the transporter before a penalty could be imposed. There were several statutory defences, however,

12. [2002] 1 AC 45 at 68.
13. [2002] 1 AC at 87.
14. [2002] 1 AC at 87.

including that the person responsible had no reason to believe there was an illegal entrant present, that they had a reasonable system in place for making sure, and that this system was in operation at the time.

The court found that Article 6 of the Convention was engaged by the fact the statute fixed liability without requiring knowledge of whether an illegal entrant was on the transporter and put the burden on the person responsible to affirmatively establish their defence. In a split decision, the Court of Appeal held that the statute was incompatible with Article 6 (the right to a fair hearing) and issued a declaration to that effect under s.4 HRA. The court subjected the statute to a searching proportionality test, considering whether the statute struck a fair balance between the importance of fair procedures protected by Article 6 and the public interest in tackling and deterring illegal migration.

In his dissenting judgment Laws LJ outlined several reasons for why the court should defer to Parliament's judgment that the statute was a fair and reasonable way to tackle the serious problem of illegal migration. First, the issue concerned the regulation of a highly sensitive and complex policy that is within the constitutional responsibility of the Government and Parliament and not the courts. Second, deciding how to tailor a statute to tackle an issue effectively and prudently, like illegal migration through stowing away on transportation, is the kind of subject matter within the expertise of the political branches and not the courts. Third, the statute involved an issue where it is difficult to draw a precise line about where the balance lies between procedural fairness and effectively addressing a serious issue in the public interest. As such, the choice of where the balance lies should largely reside with the democratically responsible decision-makers.

Notwithstanding these factors, the majority felt that the combination of the reverse burden of proof placed on carriers and the level of the fixed fine made the statute unfair and disproportionate, notwithstanding its legitimate and important objective. In other words, the court substituted its assessment of the fair balance between the competing interests at stake in lieu of that struck by Parliament.

4. *R (Sim) v Parole Board* [2003] EWCA Civ 1845, 19 December 2003

In *Sim*, the Court of Appeal reversed the statutory rule about *when* the Parole Board should release a prisoner, so that the provision now means the opposite of what Parliament intended.

Section 44A(4) of the Criminal Justice Act 1991 provided that "On a reference [for the re-release of prisoners serving an extended sentence]… the Board shall direct the prisoner's release if satisfied that it is no longer necessary for the protection of the public that he should be confined (but not otherwise)". In other words, this statute only permitted the parole board to release a prisoner if the Board concluded that the prisoner no longer posed a danger to the public.

The applicant in this case was serving an extended sentence for sexual

offences committed against a minor. When he applied for parole, the Board applied the test in s.44A and were not satisfied that it was no longer necessary for the protection of the public that the applicant remained confined. He was subsequently refused parole. The High Court held, and the Court of Appeal agreed , that the Parole Board, had acted entirely consistently with a "conventional construction" of the Act.[15]

However, the Court of Appeal held that this provision had to be read and given effect so as to comply with Article 5 of the Convention (the right to liberty). The Court said that this required the Parole Board to direct release of an offender unless the Board was positively satisfied that it was necessary for the protection of the public that he be confined. This was said, implausibly, merely to involve a "possible" construction of the word "necessary" in s44A(4). In reality, the Court thus changed the question that Parliament had required the Parole Board to consider and what it was to be satisfied about. Whereas Parliament had directed that offenders should continue to be detained when the Board was unsure whether continued detention was necessary, the Court of Appeal decided otherwise, thus exposing the public to a risk that Parliament had chosen to prevent. The difference is not immaterial given the uncertainties of future risk assessment in such cases.

The court was candid that its reading of the 1991 Act was not the ordinary or natural meaning of the statute but also considered itself satisfied that its interpretation was not an "impossible" construction that blurred the line into judicial legislation.[16] t turns on what is or is not "possible", a point that the s.3 HRA case law fails to address coherently. What is clear is that the Court relied on s.3 in order to support an interpretation of the Act that undoubtedly significantly altered the duty that Parliament had imposed on the Parole Board and thus the policy for release of prisoners that Parliament had chosen to implement.

5. *A v Home Secretary* [2004] UKHL 56, [2005] 2 AC 68, 16 December 2004

In *A v Home Secretary*, which is usually termed the *Belmarsh* case, the House of Lords launched a direct challenge to Parliament's judgement in the context of national security, denouncing the measures taken to address the risks of terrorism posed by foreign terror suspects.

In *Chahal v United Kingdom* (1997) 23 EHRR 413, the European Court of Human Rights held that Article 3 (the right to be free from torture or inhuman treatment), being absolute, cannot be weighed up against the reasons to deport, no matter how compelling. The Court thus concluded that the state cannot deport an individual if that individual can articulate substantial grounds for believing that deportation will expose him to a risk of inhuman treatment. (For reasons Policy Exchange has set out elsewhere, this is a very bad misreading of Article 3, which in truth does not limit the state's freedom to deport a person, save to the extent that the state intends to return the person to his persecutors and is thus complicit in his mistreatment.) Under the principles in *Hardial Singh* [1984] 1 All

15. [2003] EWCA Civ 1845 at [38].
16. [2003] EWCA Civ 1845 at [51].

ER 983, the general power to detain pending deportation is limited to a period reasonably necessary to achieve the purpose of deportation.

On 11 September 2001, al-Qaeda hijacked four planes, crashing two into the World Trade Centre in Manhattan, New York and one into the Pentagon, with their murderous plans for the fourth being foiled by passengers. In the wake of this attack, Parliament enacted emergency anti-terrorism legislation, which became the Anti-Terrorism Crime and Security Act 2001.

Part 4 of the 2001 Act contains its key provisions. Under s.21, the Home Secretary may certify a non-British citizen as a suspected terrorist. Under s.23, non-citizens who are so certified may be detained even if they cannot, at present, be deported. Suspected terrorists are thus detained *pending* deportation, which for the time being cannot be carried out (because of the Strasbourg Court's *Chahal* judgment), but which the government must continue to attempt to make possible (by addressing the risk of mistreatment), with the justification for continuing detention to be reviewed at regular intervals by the Special Immigration Appeals Commission.

Under Article 15 of the Convention, states can derogate from certain provisions of the Convention if necessary due to an emergency. Aware that a court might find the scheme of detention set out in the 2001 Act to be contrary to the Article 5 right to liberty, which authorises detention pending deportation, the government chose to make a Derogation Order prior to the enactment of the 2001 Act. This was a precaution not a concession: in making the order, the government did not admit that the Act was otherwise incompatible with Convention rights.

But the Law Lords held that the detention of foreign terror terrorists was not necessary to protect national security. They therefore quashed the Derogation Order, despite the fact that Article 15 had not been incorporated into UK law by the HRA (it is not set out in Schedule 1 to the Act).s, which unequivocally indicated that it was Parliament's intention that the question whether a UK derogation was authorised by Article 15 was a question for international law alone and was not an issue that could be raised in domestic law as a basis for challenging the vires of the Order designating the derogation. Having nevertheless crushed the Designation Order, the Law Lords then declared, under s.4 HRA, that the 2001 Act was incompatible with Article 5. The House of Lords also declared that the 2001 Act treats foreign nationals differently from UK citizens in a manner incompatible with the Article 14 prohibition against discrimination.

The Court took the 2001 Act's application only to foreign nationals, rather than to suspected British terrorists, to undermine its justification. It is true that, if reducing the risk of terrorism was the *only* thing of value, the power to detain should cover both foreign nationals willing to leave and UK citizens. But, in choosing to condition the power to detain on liability to deportation, Parliament struck a particular balance between the need to stop terrorism and the different rights of both foreign nationals and UK citizens (only the former may lawfully be removed from the country).

In her speech, Lady Hale denied the rationality of this choice. She said that those detained under s.23 of the 2001 Act:

> *"are just like a British national who cannot be deported. The relevant circumstances making the two cases alike for this purpose are the same three which constitute the problem: a suspected international terrorist, who for a variety of reasons cannot be successfully prosecuted, and who for a variety of reasons cannot be deported or expelled."* [17]

Here, Lady Hale points out that a foreign national does not, simply by virtue of being a foreigner, pose a greater risk of terrorism. To then say the foreign national is "just like" a UK citizen, however, has the following startling implication: that a political community must tolerate the same risk of terrorism from its own members as it must from foreigners. This cannot be correct.[18] The United Kingdom must tolerate greater risks from its own members at least insofar as, unlike foreigners, they cannot lawfully be removed from, or (limited exceptions aside) denied entry into, the country.

There is a related problem with the Court's reasoning. After quashing the Derogation Order, the House of Lords assumed that the 2001 Act is straightforwardly incompatible with the Article 5 right to liberty. This ignores s.23(2) of the 2001 Act, which clearly links detention to deportation. So, s.23 plainly does not authorise detention unless the person is detained with a view to their subsequent deportation.[19] Even if this were not the plain meaning of the legislation, then s.3 HRA surely mandates it. Strikingly, the Court never once considers the relevance of s.3 despite its mandatory terms. It is true that the government failed to raise this point – or to refer the Court to s.3. But a silent omission by the government cannot alter the meaning of the legislation.

Had the Lords squarely confronted this issue, they would have needed to explain why detention, despite an ongoing purpose of deportation, is unlawful. The explanation must be an erroneous conflation of (i) deportation being impossible *at this time*, with (ii) deportation being forever impossible. Clearly the government cannot detain UK citizens to deport them, for they are never subject to deportation. But given efforts to remedy the Article 3 obstacle to deport foreign nationals (agreeing terms with the home country or finding a safe third country), it is surely *possible* that detention will be necessary for their deportation. What s.23(1) removes is an absolute bar to detention if there is no immediately foreseeable end to the Article 3 obstacle (the absolute bar being suggested in *Hardial Singh*). But the Lords do not explain how this, alone, violates the right to liberty under Article 5. In making provision for detention of foreign terror suspects pending their future deportation, Parliament did not act unreasonably.

The *Belmarsh* judgment is the single most important case ever decided under the HRA. The Court badly misunderstood the rationale of the 2001 Act, denouncing the legislation (promoted by the government that had introduced the HRA in 1998) in the strongest possible terms, imposing

17. [2005] 2 AC 68, at [235].
18. John Finnis, 'Nationality, Alienage and Constitutional Principle' (2007) 123 LQR 417, 442-45.
19. Ibid. 429-34; John Finnis, "Judicial Power: Past, Present and Future" in Richard Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), 26, 41-47.

political pressure on the government to propose the 2001 Act's subsequent repeal. The judgment is wrongly understood by many lawyers and judges to prove the worth of the HRA, which was used to strike a death blow to an unprincipled regime of racially discriminatory indefinite detention. In fact, the judgment vividly illustrates the power that the HRA gives the courts to superintend Parliament's decision-making, and to decide for themselves what best protects the general populace from terrorism – a power that is likely, as in this case, often to be misused.

6. *Westminster City Council v Sylvianne Morris* [2005] EWCA Civ 1184, 14 October 2005

In this case, the Court of Appeal denounced a statutory scheme that addressed the politically sensitive question of the relationship between welfare and immigration control.

Sylvianne Morris was a British citizen. But her young daughter was not. Although Morris entered the United Kingdom lawfully, her daughter was subject to immigration control. Once in the United Kingdom, Morris came under the threat of homelessness. She therefore sought housing assistance under the Housing Act 1996.

Often, the housing stock available to local authorities is severely restricted. The difficult question therefore arises as to how best to allocate scarce housing. Under s.189 Housing Act 1996, the following have a "priority need": (a) pregnant women; (b) those who reside, or can be expected to reside, with dependent children; (c) those who are, or will reside with one who is, vulnerable due to old age, disability, or other special reason; (d) those homeless, or threatened with homelessness, due to an emergency; (e) those homeless due to domestic abuse.

Because Morris had a young daughter, she would, but for s.185(4) Housing Act 1996, have been entitled to accommodation by virtue of having a "priority need" under (b). She lacked a "priority need" because, under s.185(4) HA 1996, those subject to immigration control must be disregarded when assessing eligibility for priority accommodation. Her daughter, being subject to immigration control, could not establish Morris's eligibility . Since she lacked a dependent child eligible to be considered within the category of a "priority need", her application for housing was treated as an ordinary case of threatened homelessness. It followed that Morris lacked a "priority need", in circumstances when she would have possessed it had her child been a UK citizen.

As an initial matter, the Court had to consider whether this legislation fell within the ambit of the right to family life under Article 8 of the European Convention of Human Rights. Article 8 does not guarantee any right to be provided with accommodation, so there was no question that failing to provide it violates Article 8. But even absent a violation, if a court finds that the matter falls within the 'ambit' of Article 8, it can then trigger the right against discrimination under Article 14.

The Housing Act 1996 enacts a wide-ranging scheme of social welfare. The legislation and the definition of a "priority need" is not focused on

family life in particular. But the court found that the priority of those with dependent children, in particular, was "designed specifically to keep families together".[20] A difficulty with this analysis is that the legislation could just as well be viewed, consistent with the broader aim of the general welfare scheme, as intended to supply housing to those in particular need - which surely includes children dependent on the care of others. The priority of those with whom dependent children reside could be explained on this basis. The statute does not require the local authority to house dependent children separate from their caregiver, which would be difficult to square with respect for family life. But the fact that the statute does not interfere with the Article 8 right to family life does not establish that the legislation falls within the ambit of that right.

Having found the legislation within the ambit of Article 8, the court went on to assess whether the limitation of "priority need" to children not subject to immigration control amounts to unjustified discrimination under Article 14. The court concluded that it was unjustified discrimination. To reach this conclusion, the court focused on the status of the mother, Sylvianne Morris, as a UK citizen. The court accepted that the denial of welfare benefits can be a legitimate way to discourage unlawful entry into the country. But Morris, a UK citizen, arrived lawfully. The court refused to accept the legitimacy of "driving a British parent out of the country because of the immigration status of her child".[21]

What the court never considers, however, is whether citizens—and those who possess lawful immigration status—have *special* claims on the state which those unlawfully resident lack. The question is one of fairness. It is whether the state, while allocating scare housing, is entitled to prioritise those who have a right to remain. The Court of Appeal failed to recognise this justification, issuing a declaration that the legislation was incompatible with Convention rights. In doing so the domestic court went further than even the Strasbourg Court, which later went on to find that the divergence was justified.[22]

7. *R (D) v Home Secretary* [2006] EWCA Civ 143, 26 February 2006

In *D*, the Court of Appeal deployed section 6 of the HRA to question the adequacy of an investigation into an attempted suicide in prison and to rule that a new inquiry must be held in public.

A prison inmate attempted suicide. There had previously been signs he was at risk of this. Staff were told to be extra vigilant. Despite this, bed linen was left in his cell. Using it he sought to hang himself. The staff were able to intervene in time to save his life. But the inmate suffered serious, permanent brain damage.

The prison service launched an internal investigation into the matter. This led to a senior investigating officer, Carole Draper, writing a 22-page report. It contained 11 recommendations for the prison service going forward. The report and investigation were accepted to have been "conscientious, thorough and in some respects critical of the prison service." However, Draper was not independent from the prison

20. Morris at [23].
21. Morris at [45]
22. Bah v United Kingdom (2012) 54 EHRR 21.

service, the report was not made public, and the inmate was not given an opportunity to participate in the investigation. The inmate, by way of the Official Solicitor, argued that this investigation and report did not comply with Article 2 ECHR.

In arguing that there had been no breach of Article 2, the Home Secretary relied to some extent on the Draper investigation and report but relied in particular on his proposal that the Prisons and Probation Ombudsman should carry out a new ad hoc inquiry. The meetings would not be public, but the final report would be published. Since the inmate had no next of kin, legal funds would be made available so the inmate could assist the investigation. Such assistance could include the provision of questions for witnesses, but not cross-examination.

The inmate argued that the Home Secretary's proposal was unlawful given section 6 of the Human Rights Act, arguing inter alia that a new inquiry had to be held in public and that his counsel should be entitled to cross-examine witnesses. The Court of Appeal agreed in part, directing that the new inquiry be held in public.

Article 2(1) of the ECHR sets out the right to life. In *McCann v United Kingdom* (1995) 21 EHRR 97 GC, the European Court of Human Rights invented a new procedural right, distinct from the substantive right (which the text of Article 2 expressly affirms) prohibiting the state from depriving a person of his life.[23] The new procedural right requires the state to take positive steps to investigate the circumstances around the deprivation of life. In a series of cases, the Strasbourg Court has developed the requirements of this new procedural right, finding member states, including notably the UK in relation to events arising out of the Northern Ireland Troubles, to be in breach of new duties which the Court has effectively invented at the time of adjudication.

The Court of Appeal was bound by domestic law precedents to accept this aspect of the ECtHR's Article 2 jurisprudence. So the task for the Court of Appeal, in attempting to apply that jurisprudence, was to consider whether the proposed inquiry by the ombudsman violated the procedural obligation to investigate because the inquiry's proceedings would not be held in public.

The starting point was *Paul and Aubrey Edwards v United Kingdom* (2002) 35 EHRR 19. The case concerned a prisoner who, due to the prison service's failure, was killed by a cellmate. There, the ECtHR held the UK in violation of its procedural duty to hold an effective investigation. This was despite the UK having had a Queen's Counsel lead a three-year inquiry at a cost of approximately a million pounds. The ECtHR's focus was on the position of the parents of the deceased. The parents "had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred". So, it was said, they were not sufficiently involved in the investigation.

This led the House of Lords, in *R (Amin) v Home Secretary* [2004] 1 AC 632, to require a fresh inquiry into the murder of a prisoner by a cellmate. There was reason to suspect the murder was racially charged. A series

23. Lord Hughes (a Justice of the Supreme Court from 2013-2018) speaking at Goldsmiths Law's annual criminal justice symposium at the British Academy, 27 March 2019:

"Article 2 does not say anything at all about investigation, but it's a perfectly rational extension on the basis that the primary right won't be effective unless you also have a secondary right to investigation. But it is pure judicial legislation of the kind which – if it happened in relation to an English statute by an English court – would attract, rightly, some would say, a great deal of criticism".

of investigations were initiated in response. But, in light of the ECtHR's decision in *Edwards*, the Lords were not convinced that any sufficed. The police investigations into the murder were, appropriately, kept private and without the involvement of the victim's family. The subsequent trial was focused on culpability, rather than the failures of the Prison Service. An internal inquiry, led by a serving governor within the Prison Service, it was held, lacked the requisite institutional independence. Finally, the Commission for Racial Equality carried out its own investigation, but its remit was limited to race-related issues.

None of these flaws was present in the proposed ombudsman inquiry in *D*. The ombudsman was to involve the victim. The victim was to be given funds to secure legal representation. He was to be given an opportunity to provide questions for the witnesses. The witness statements and interviews were to be made available to him. Indeed, he was to be given the entirety of a draft report beforehand, with the opportunity to comment prior to any final resolution.

Nonetheless, the Court of Appeal held that such an inquiry would violate the inmate's (procedural) right to life under Article 2 – because the inquiry was not to be held in public. In ruling in this way, the Court pushed the bounds of the Article 2 duty to investigate. This case concerned an attempted suicide, whereas the cases before it, concerned intentional killing by a third party. But the Court of Appeal did not think it especially relevant that suicide was thwarted, despite the ECtHR's position that application of the requirements of Article 2 in this context is highly fact-sensitive.

The fact-sensitivity of the case law is partly the problem. This case involves the Court of Appeal, like the court at first instance, second-guessing not only the adequacy of the initial investigation and report, but also the Home Secretary's decision about how best to frame a new inquiry. The Court decides for itself that there is no good reason not to hold the inquiry in public, gliding past concerns (amply vindicated in a range of other contexts) that public inquiries are slow and costly and may be less, rather than more, effective at getting to the truth and providing speedy resolution. Because no two cases are the same, the court effectively substitutes itself as the decision maker in every case – unless the public body forestalls this by taking a maximalist approach to what is required, with all the implications that has for prolonging the process and for the use of public resources.

8. *Huang v Home Secretary* [2007] UKHL 11, [2007] 2 AC 167, 21 March 2007

In *Huang*, the House of Lords introduced substantial uncertainty into immigration law and practice, effectively transforming adjudicators into the primary decision-makers and making the lawfulness of Home Office decisions about immigration turn on the subsequent application of an unpredictable proportionality test.

The Immigration and Asylum Act 1999 provides for appeal from

a Home Office decision (e.g. to grant or refuse leave to enter), on the ground that the decision-maker acted in breach of the appellant's human rights. Appeal lies first to an adjudicator (now the First-tier Tribunal or FTT) and from there to the Immigration Appeal Tribunal (now the Upper Tribunal (Immigration and Asylum Chamber) or UT).

The applicants did not qualify for a grant of leave to remain in this country under the Immigration Rules then in force. The applicants nonetheless argued that the refusal of leave to remain was incompatible with their right to respect for family life under Article 8 of the Convention. There were two key questions in *Huang*. First, what was the proper role of an adjudicator hearing a human rights appeal from a Home Office decision? Second, what weight should an adjudicator place on the balance struck by the Immigration Rules between the public interest and rights under Article 8?

In respect of the first question, counsel for the Secretary of State urged the House of Lords to affirm *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, where the Court of Appeal held that an adjudicator's task is to assess whether the decisionmaker acted within its discretion, such that it can "reasonably be regarded as striking a fair balance between the competing interests in play".[24] The House of Lords rejected this argument. Instead, it held that the adjudicator must "decide for itself whether the impugned decision is lawful".[25] This led the House of Lords to hold that an adjudicator must engage in a full proportionality assessment. It must consider afresh whether, for instance, the denial of leave strikes a fair balance on the basis of the facts established before the adjudicator.[26] In effect it thus made the adjudicator the primary decision-maker, rather than giving effect to the adjudicator's statutory function as an appellate authority considering the lawfulness of the decision of the immigration authorities. This effectively makes the latter's decision a "dress rehearsal" for judicial determination.

In respect of the second question, the House of Lords rejected the contention that the Immigration Rules, made by the Secretary of State and laid before Parliament, should be afforded deference in their treatment of Article 8 and the proper balance to be maintained between the interests of the individual and those of the community. Rejecting the contention that the Immigration Rules enjoyed 'the imprimatur of democratic approval' – despite being made by a Secretary of State accountable to the House of Commons – the House of Lords said the judgements of the executive made in the rules might be given "appropriate weight" as a special source of knowledge and advice.[27] *Huang* therefore transfers much of the effective authority to decide who enters and remains in the country – which is otherwise for Ministers accountable to Parliament and subject to legislation – to the judiciary. *Huang* does this by providing judges with the final say on the question of whether the impact on a claimant's family life of a refusal of entry or leave to remain is too serious to implement, notwithstanding entirely legitimate public purposes.

The effects of *Huang* on immigration law and policy have been

24. [2007] 2 AC 167 at [20].
25. [2007] 2 AC 167 at [11].
26. [2007] 2 AC 167 at [15].
27. [2007] 2 AC 167 at [16]-[17]

profound, exacerbating the subjectivity and unpredictability of the state's administration of entry, leave to remain, and deportation decisions. *Huang* has stressed that cases in these domains must now be weighed on their individual merits by one of over several hundred adjudicators empowered to hear appeals from Home Office decisions (now in practice FTT judges), and cannot be determined in practice by reference to rules established by the Home Secretary using the statutory authority vested in them by Parliament. Because almost all refusals of leave engage the rights in Article 8 (as construed by the Strasbourg Court), the FTT now decides hundreds of appeals concerning Article 8 on a case-by-case basis each year, effectively as the primary decision-maker. Such decisions are made on an extremely open-ended and wide-ranging criteria and effectively disregarding the specific rules made by Ministers accountable to Parliament.

These decisions – like whether a refusal of entry in a particular case or run of factually similar cases can be said to maintain a fair balance between an individual's interests and those of the community – implicate morally and empirically contentious judgements, which judges are neither structurally well-equipped to make, nor responsible for if they should decide poorly. FTT and UT judges have limited access to information that is critical to sound decision-making in respect of immigration. Their knowledge base is limited, and they lack any responsibility for the policy judgment involved in balancing the need to maintain a workable immigration scheme with the need to be fair in individual cases.

9. *R v Thompson* [2008] EWCA Crim 3258, 18 September 2008

In *Thompson*, the Court of Appeal held that a court order allowing the police to check the internet use of those previously convicted of possessing indecent images of children was unlawful.

The applicant was convicted of possessing extensive amounts of indecent images and videos of children. As part of the sentencing, the applicant was made subject to a sexual offence's prevention order pursuant to the Sexual Offences Act 2003, for a term of 5 years. The order provided that the applicant was not to use the internet for any purpose other than work, study, seeking employment, or for non-sexual recreational purposes. Clause 6 of the prevention order provided that if the defendant wished to use the internet, it was on the basis that the police could enter his home without permission to check his internet usage between 8am and 8pm. The applicant challenged this part of his prevention order as contrary to his Convention rights.

The Court of Appeal accepted that the 2003 Act empowered the sentencing court to make such a conditional order. The question facing the Court of Appeal was whether the conditions imposed by the order were compliant with the applicant's Article 8 right to respect for his private and family life. The court said the "essential question is whether a restriction on use of the internet, subject to the power of monitoring in clause 6 is necessary for the purpose of protecting the public … from serious sexual harm from the applicant and, if so, whether it is a proportionate

response". It was accepted that the restrictions placed on the applicant's use of the internet were necessary.

The first instance judge, who had the benefit of conducting the sentencing process, felt that the conditions were justified and without them, the order would become "valueless".

There was further evidence put before the Court of Appeal that suggested the applicant posed a continuing risk of serious harm to children. While the applicant was assessed as being "genuinely motivated' to address his offending behaviour, he was nonetheless described as presenting a "medium risk of…re-offending in a similar way given the fact that some high-level images had been downloaded and his minimisation of his culpability".[28] At another point the court accepted that the applicant represented a "danger of serious sexual harm to the public".[29]

Despite the views of the sentencing judge, and the fact that no particular error in his reasoning was identified, the Court of Appeal considered the issue of proportionality afresh. After applying the proportionality test, the Court concluded that the challenged provision in the prevention order could not be justified. The Court considered that the way the prevention order regulated the applicant's Article 8 privacy rights was disproportionate when measured against the public good that would be achieved in aiding the police to enforce restrictions on the applicant's internet usage. The Court said the power granted to the police to enter the applicant's home to search his internet usage was "truly a Draconian measure". Even though such powers would be clearly conducive to helping the police enforce prevention orders and prohibitions on certain forms of internet usage the Court, without much elaboration, did "not consider that any provision for monitoring the applicant's use of computers and the internet could be justified" and said there was "no good reason to confer on the police … wider powers of search" through the prevention order than are vested in them under the "generally applicable law".[30]

10. *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45, [2010] 1 AC 345, 30 July 2009

In *Purdy*, the House of Lords ordered the Director of Public Prosecutions, Mr Keir Starmer QC as he then was, to publish a specific policy to give assurance to those who were contemplating committing a clear criminal offence.

The applicant argued that she had an Article 8 Convention right to require the Director of Public Prosecutions (DPP) to identify the facts and circumstances he would take into account in deciding how to exercise his discretion, under the Suicide Act 1961 s.2(4), to give or withhold consent to the prosecution, under s.2(1), of persons who act within this jurisdiction to assist another to commit suicide in a country where assisted suicide is lawful.

More specifically, the applicant sought to compel the DPP to promulgate an offence-specific policy to guide the applicant in determining whether her husband would be likely to face prosecution if he were to assist her

28. [2008] EWCA Crim 3258 at [8].
29. [2008] EWCA Crim 3258 at [18].
30. [2008] EWCA Crim 3258 at [25].

in committing suicide, the relevant assistance being the act of helping her to travel to Switzerland where she would then be assisted in committing suicide.

In what was to be the final judgment of the House of Lords before its reconstitution as the Supreme Court, the Law Lords held that the ban on assisted suicide constituted an interference with the applicant's private life per Article 8(1) of the Convention. This meant that the law regulating her right to private life, in order to satisfy the demands of Article 8(2), had to be "sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law".

The Law Lords went on to find that the DPP's general code for prosecuting serious offences, which provides guidance to prosecutors on the general principles to be applied when making decisions about prosecutions, formed part of the law in question. They then concluded that respect for Article 8(2) required the DPP to issue an offence-specific policy to secure a sufficient level of guidance for law-abiding persons as to the legal consequences of their actions. Without such guidance, the Law Lords held, the interference with the applicant's right to private life would fail to meet the standards imposed by the Article 8(2) requirement that any interference be "according to law".

Purdy is a troubling judgment for several reasons. Most fundamentally the Law Lords misconstrued the basic fact that there was never any lack of clarity in the law governing assisted suicide. Section 2(1) of the Suicide Act 1961 unequivocally proscribed the acts in question (assisting a person to travel to a jurisdiction to commit suicide). The legal duty was and remains categorical: do not assist another person in committing suicide. The law was clear to such an extent that "whatever the circumstances in which the applicant might invite assistance, and whatever the guidance or guidelines the DPP might have issued, she knew before these proceedings, knows now, and would know at any future time, that she would be inviting her assistant to break the law articulated in s.2(1)".[31]

However, instead of recognising the clarity of the statutory prohibition, which meant that there was never any real question about a failure to guide the law-abiding person, the Law Lords opted to order the DPP to fetter his discretion (a discretion which exists in respect of all crimes and in other major legal systems) and to promulgate an offence-specific policy that would essentially help a would-be law breaker in calculating the risk of prosecution should he or she be detected in helping assist a suicide. In siding with the applicant, the Lords leveraged Article 8 to compel the DPP to help people decide whether they could safely flout their clear legal duty. This judgment is therefore in deep tension with a commitment to the rule of law and in defiance of the will of Parliament, which was in the process of reenacting the relevant provisions of the Suicide Act 1961 – without any material modifications – in the Coroners and Justice Act 2009 (which received the Royal Assent a few months after the House of Lords decision).

31. John Finnis, "Invoking the Principle of Legality against the Rule of Law" [2010] NZLR 601.

11. *Manchester City Council v Pinnock* [2010] UKSC 45, 3 November 2010

In *Pinnock*, the Supreme Court introduced serious uncertainty into a public authority's ability to fairly allocate its limited supply of housing, requiring county courts to decide whether, on the facts of each case, a repossession order would be a proportionate interference in Convention rights.

The Housing Act 1996 provided for a swift judicial procedure for local authorities to regain possession of a council property from a tenant in breach of their tenancy. Section 143D(2) of the Act provided that a county court: "must make an order for possession unless it thinks that the procedure under sections 143E [requiring the provision of notice of an application for possession] and 143F [entitling the tenant, within 14 days of the notice, to demand the landlord review its decision to apply for possession] has not been followed".

The applicant's tenancy had been demoted (meaning rendered insecure) on account of serious antisocial conduct by Pinnock's children and his partner (but not Pinnock himself). The tenant then breached the terms of his demoted tenancy, prompting the authority to terminate the tenancy and apply to the court for possession. The Supreme Court found that under Strasbourg jurisprudence a tenant of a public authority has an Article 8 entitlement to raise the proportionality of dispossession before an independent tribunal, and that a domestic court – in this case the county court – must have the power to review the Convention compatibility of decisions made by a local authority and to decide afresh, according to its own assessment of the facts, whether it would be proportionate to evict a particular occupier. On the facts, the Supreme Court held that the eviction of the tenant was proportionate, given the severe anti-social behaviour on display and the duty of the local authority to manage its housing stock for the benefit of the public.

However, the Supreme Court's judgment involved a highly strained reading of the relevant statute. Parliament clearly did not intend to give a court the jurisdiction to engage in a case-by-case proportionality assessment of the dispossession order. Rather, the court accepted that "the purpose is to ensure that the court does nothing more than check whether the procedure has been followed".[32] Still, the court relied on s.3 HRA 1998 to confer upon county courts the task of assessing the proportionality of requiring repossession. This change is a significant alteration of Parliament's intention to restrict judicial scrutiny of the decisions of local authorities when it comes to managing scarce housing stock.

12. *In the matter of an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* [2011] UKSC 20, 18 May 2011

In *McCaughey*, the Supreme Court altered the Human Rights Act 1998 to confer a new retrospective cause of action for events occurring prior to the commencement of the 1998 Act.

Article 2 of the Convention sets out the right to life. The ECtHR has since construed this to impose procedural duties which control how the

32. *Manchester City Council v Pinnock* [2010] UKSC 45 at [75].

state is to hold inquests (see our critical commentary on *D* (2006) above). On 9 October 1990, British soldiers killed two men in Northern Ireland. Their family claimed the inquest needed to follow a procedure which satisfied the Article 2 duties. Initially they did not succeed, for in *McKerr* [2004] 1 WLR 807 the House of Lords held that these duties only apply to deaths which occurred after the HRA 1998 came into force. But then, in *McCaughey*, the Supreme Court departed from *McKerr* and retrospectively imposed those duties anyway.

This cannot be squared with the statute, nor indeed with the rule of law which deprecates the retrospective imposition of legal liabilities. There are two ways for a victim to rely on the duty in s.6 HRA. First, by bringing proceedings against the public authority: s.7(1)(a) HRA. Second, by relying on Convention rights when making arguments before any legal proceeding: s.7(1)(b). This is crucial because the HRA, with several exceptions, came into force on the day appointed by the relevant order made by the Secretary of State: s.22(3) HRA. That day for the purpose of the relevant parts of the Act was 2 October 2000. The only exception to this is s.22(4) HRA, which provides that reliance on Convention rights under s.7(1)(b) in relation to an act taking place before that day is only possible as a defence in proceedings brought by or at the instigation of a public authority.

But in this case, it was the claimants who brought proceedings under s.7(1)(a). So, s.22(4), clearly did not apply. It follows that there the Act was not intended to create a cause of action for breach of s.6 HRA if the conduct occurred before 2 October 2000. To decide for the claimants, the majority in *McCaughey* had effectively to write into the HRA a "transitional provision that never was".[33]

To do so, the majority relied on *Silih v Slovenia* (2009) 49 EHRR 996. There, the ECtHR swept away its own jurisprudence to hold, for the first time, that Article 2 applies to investigations of deaths which occurred prior to even the Convention's ratification. Even if this decision is sound on its own terms, what does it have to do with the temporal scope of the HRA? Any link is dubious.

Nobody doubts the HRA was largely intended to be prospective. As such, the HRA was bound not to apply to certain acts, even if they plainly violate the Convention as a matter of international law. The HRA operated, not to treat the Convention as always having been part of domestic law, but to give effect in future in domestic law to rights under the Convention in ways they did not apply before. After *Silih*, under international law the UK has procedural duties under Article 2 even for deaths which occurred prior to 4 November 1951 (when the UK ratified the ECHR). This has no bearing on whether the claimants have a cause of action, under s.7(1)(a) HRA, for deaths which occurred prior to 2 October 2000.

Moreover, the temporal scope of the HRA cannot depend on the "technicalities of the analysis of the various rights".[34] This is an issue about when and how the statute came into force, not about the the content of the rights which that statute protects. Failure to recognise this distinction led

33. *McCaughey* at [161], per Lord Rodger.
34. *McCaughey* at [157, per Lord Rodger.

the majority to suppose the 'mirror principle' supports the retrospective application of s.7(1)(a) HRA.[35] The mirror principle – that there should generally be correspondence between how the ECtHR and the UK courts construe the content of the Convention rights – has no application to the issue in *McCaughey*.

By creating this retrospective cause of action under the HRA, *McCaughey* threw the position on inquests, particularly in Northern Ireland, into doubt. It "struck a blow to legal certainty".[36]

13. *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, 8 February 2012

In this case, the Supreme Court imposed a novel liability for damages upon health trusts. This decision is a major change to the law of wrongful death.

The facts are tragic. Melanie Rabone suffered from depression. One day she attempted suicide. She was then hospitalised after an emergency referral. Later she was discharged and went on holiday with her family, but soon her suicidal tendencies returned. Given this, she agreed to be admitted to hospital again. The admission was informal and voluntary.

She later asked for home leave, claiming that disturbances from another patient kept her from sleeping well. Little over a week after her admission, her doctor assessed her condition and supported her staying with her parents for two nights. She went home accordingly. The next day, she told her mother she would be going out to see a friend. Instead, she went to a park where she committed suicide.

The hospital accepted that its approval of home leave was negligent. It therefore settled the negligence claim, brought by Melanie's parents on her behalf, and paid money into her estate. But her parents also brought a claim against the hospital, in their own right, for the loss of their child.

The question in *Rabone* was whether the hospital, in negligently approving the home leave, violated the Article 2 right to life. The European Court of Human Rights has construed Article 2 as imposing both negative and positive duties. So it requires, not just that the state refrain from depriving life, but also that the state take certain positive steps to protect it.

Among those positive steps is an operational duty, arising at the level of an individual case, to prevent the occurrence of death. This is potentially without limit. To control the duty, the ECtHR has said it is limited to "certain well-defined circumstances".[37] This includes the protection of prisoners from other prisoners.[38] But it also extends to protecting prisoners from themselves, given the risk of suicide.[39] A similar duty arises in respect of military conscripts.[40] The common thread is that there is a duty to take reasonable steps to protect from a real and immediate risk of prevent suicide those under the control of the State.

The ECtHR had also expanded the duty beyond this, but in circumstances when the state's conduct *triggered* a risk of suicide. For instance, in *Mammadov v Azerbaijan*,[41] it said the duty encompasses a situation when an individual threatens to commit suicide "directly induced by the state agents' actions

35. *McCaughey* at [62], per Lord Phillips.
36. *McCaughey* [2011] UKSC 20 at [151], per Lord Rodger.
37. *Osman v United Kingdom* (2000) 29 EHRR 245 at [115].
38. *Edwards v United Kingdom* (2002) 36 EHRR 387.
39. *Keenan v United Kingdom* (2001) 33 EHRR 913.
40. *Beker v Turkey*, no 27866/03, 24 March 2009.
41. No 4762/05, 17 December 2009 at [115].

or demands".

By contrast, the ECtHR made clear that the Article 2 operational duty does not encompass an "error of judgment" or "negligent coordination" on the part of healthcare workers in the course of treating a particular patient in a public hospital.[42] So a negligently botched surgery will not, in itself, trigger liability under Article 2.

Returning to the facts of *Rabone*, the alleged violation occurred when healthcare workers made the decision to approve home leave. This was a negligent error of judgment. If this error occurred in the treatment of physical illness, the law was clear that there could be no question of a liability grounded in Article 2 of the Convention.

But in *Rabone* the Supreme Court invented a novel liability under Article 2 for the treatment of mental illness. Because the healthcare workers should have seen that their patient was at risk of suicide, they should have refused to support her request for home leave. Not doing so, the court held, was in violation of the right to life.

To arrive at this conclusion, the court drew from cases on non-consensual detention. The problem is that, in *Rabone*, the patient was voluntarily admitted to hospital, not involuntarily detained under the Mental Health Act 1983. Yet Lord Dyson had "no doubt" the decision to approve home leave was more like a release from involuntary detention as the hospital had statutory powers to prevent her from leaving if she had insisted on doing so, and that it was unlike those cases where the ECtHR rejected liability for hospital deaths resulting from medical negligence.

This decision broke new ground, imposing a duty Strasbourg had not previously recognised. The liability is far-reaching and at odds with the general law on wrongful death. Under s.1A Fatal Accidents Act 1976, Parliament expressly chose to limit a claim for bereavement damages to parents of *minor* children. The effect of *Rabone* is to circumvent this restriction by crafting a parallel liability, separate from the Fatal Accidents Act, for the parents of adult psychiatric patients.

In creating a new ground of legal liability, the judgment will inevitably have unpredictable consequences for how medical professionals act and for the allocation of scarce health resources. It should be for Parliament not the courts to consider these consequences, for good and for ill, and to decide whether, on balance, an expansion of liability would be desirable and if so under what conditions it should operate.

14. *Smith v Ministry of Defence* [2013] UKSC 41, 19 June 2013

In *Smith*, the Supreme Court opened the door to a novel, sweeping wartime liability under Article 2 of the Convention in relation to the operations of the UK armed forces.

The claimants were killed on active military service overseas with UK armed forces. They fell within two groups. The first involved two occasions on which a Snatch Land Rover was destroyed by an improvised explosive device (IED). On one occasion, the vehicle lacked electronic counter measures against IEDs. On another occasion, the vehicle had

42. Powell v United Kingdom (2000) EHRR CD 362 at 364.

counter measures, but they lacked a component, Element A, which was not installed in time. The second concerned a Challenger II tank hit with friendly fire from another British tank. Just after nightfall, the firing tank mistook the Challenger II for enemy bunker movement. This led to friendly fire involving an explosive shell, which killed the men on top of the targeted tank.

These tragic losses of life led their families to bring claims against the UK government. Both groups of claimants allege that the UK armed forces violated a duty of care, owed to them as active service members, in the tort of negligence. With regard to the Snatch Land Rover claimants, they further alleged a violation of Article 2 of the Convention. The claim was that the UK violated their right to life when it failed to provide adequate training and equipment to its soldiers.

At one point, it was entirely clear that there was no liability for wartime decisions. No longer. Addressing both the common law and Article 2 claims, the majority of the Supreme Court attempted to thread the needle between two poles. It accepted that low-level decisions by active combatants in war are not subject to liability. At the same time, it thought that high-level decisions of wartime strategy and policy are non-justiciable in the courts. But in *Smith* the majority sought to identify a middle category, of mid-level decisions taken at the procurement and training stage, to which liability could in principle attach. The court therefore refused to strike out the claims.

The Supreme Court was divided about whether to strike out the claims, but all the judges agreed that the military personnel in question were within the jurisdiction of the UK within the meaning of Article 1 of the Convention. This expanded the extra-territorial reach of the Convention. In *Al-Skeini* (2011) 53 EHRR 18, the European Court of Human Rights wrongly decided that Convention rights were conferred even on those who reside outside the contracting state if the contracting state exercises 'effective control' over them. But in any event this was in the context of the exercise of force against foreign non-combatants by a contracting state's military. In *Smith*, the court extended this approach to the very different situation of the control a military wields over its own soldiers, thus elevating 'effective control' to an abstract formula to be applied irrespective of the context.

Lord Hope, for the majority, recognised that it was of "paramount importance that the work that the armed services do in the national interest should not be impeded by having to prepare for or conduct active operations against the enemy under the threat of litigation if things should go wrong".[43] But the problem, as Lord Mance recognises in dissent, is that the court's approach makes "extensive litigation almost inevitable after, as well as quite possibly during and even before, any active service operations undertaken by the British army".[44] Such judicialisation of the conduct of, and preparation for, military operations in war poses risks seriously degrading wartime capacity and confers on the courts a jurisdiction that it is ill-equipped to exercise. It curtails "senior commanders" willingness

43. *Smith v Ministry of Defence*, at [100]
44. *Smith v Ministry of Defence*, at [150]

to trust subordinates' and promotes a "centralised, defensive attitude towards risk".[45]

15. *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2014] 3 WLR 200, 25 June 2014

In *Nicklinson*, several justices of the Supreme Court second-guessed Parliament's decision-making in relation to the prohibition of assisted suicide, which is a highly fraught moral issue, by appeal to non-lawyerly and elastic standards.

Previously, in *Purdy*, the House of Lords aimed to prompt the de facto decriminalisation of at least some types of assisted suicide, not because the ECHR conferred a right to be assisted in one's suicide (Strasbourg had clearly rejected this claim) but by ruling that the ban on assisted suicide was an interference with Art 8 otherwise than in accordance with law. The point of the assertion was to force the DPP to promulgate a more specific policy, the subtext being that any prosecution that was not consistent with the policy would be stayed as an abuse of process. The DPP adopted a new policy, after consultation, which (rightly) ignored the court's nudge towards de facto decriminalisation. The new policy was the subject of further litigation in *Nicklinson*.

The ongoing challenge to the DPP's policy was joined with a more direct challenge to the Suicide Act 1961. The claimants sought a declaration that the Act's ban on assisted suicide was not compatible with the ECHR. The Supreme Court rejected this claim, but a majority of justices were plainly open to making the declaration in question. Five of the nine justices thought it open for the British courts to declare the legislation incompatible with Convention rights when, as was the case in *Nicklinson*, Strasbourg would clearly find the matter within the UK's margin of appreciation, such that the legislation would not breach the ECHR. Two justices were willing to make a declaration of incompatibility. Another two, including Lord Neuberger, did not strictly find an incompatibility but indicated they would be minded to do so and to make a declaration to that effect if Parliament did not act promptly.

In fact, as mentioned above, Parliament had already acted by reaffirming (and strengthening) the existing prohibition on assisting or encouraging suicide in the Coroners and Justice 2009.

This case is deeply problematic for several reasons. First, the judgment is a curious attempt to compel legislative action without following the discipline of the HRA itself, given that several judges sought to make a declaration without making a declaration, indeed without even finding an incompatibility. Second, *Nicklinson* is a stark demonstration that British judges have not only been willing to follow the "living instrument" principle of 'interpretations' adopted by the ECtHR, but that some are on occasion "ready to adopt an interpretation that would certainly have been rejected by the framers and has not yet been approved by the ECtHR – or even has been disapproved by it".[46] The Court's willingness to "go beyond" Strasbourg in this way was quite wrong.[47]

45. Tom Tugendhat and Laura Croft, *The Fog of Law* (Policy Exchange 2013) 32.
46. John Finnis and Simon Murray, *Immigration, Strasbourg, and Judicial Overreach* (Policy Exchange, 2021), 29.
47. As noted above, Policy Exchange has consistently argued that British courts have no authority under the HRA to interpret and apply Convention rights to denounce, disable or qualify legislation or policy that the ECtHR would not hold to be incompatible with the UK's obligations under the ECHR.

Third, and more fundamentally, *Nicklinson* is a prime example of the dangers of judges engaging in moral and political reasoning unmoored from traditional lawyerly tools. In enacting its categorical prohibition on the intentional taking of life, Parliament reasoned to a conclusion about how to affirm and protect human life in the context of the criminal law, with a view that the "intentional taking of life is to be avoided, and to have considered (alongside compassion for the would-be suicide-seeker and his or her family) the rights of other persons who, but for the criminal prohibition of this and other forms of participation in intentional killing, would be at increased risk of oppression and death".[48] For several justices of the Supreme Court, however, Parliament was insufficiently sensitive to an individual's right to make autonomous decisions. Lady Hale (with whom Lord Kerr agreed) was of the view (at [317]) that:

> *"the current universal prohibition prevents those who would qualify under such a procedure from securing the help they need. I consider that it is a disproportionate interference with their right to choose the time and manner of their deaths. It goes much further than is necessary to fulfil its stated aim of protecting the vulnerable. It fails to strike a fair balance between the rights of those who have freely chosen to commit suicide but are unable to do so without some assistance and the interests of the community as a whole."*

In other words, Lady Hale argued that striking a sound balance in this context would require Parliament to permit some people to have assistance in being killed or committing suicide. Whatever one's views on this conclusion, the matter is surely a highly controversial point of moral philosophy and one also involving highly disputed questions about the practical effects and risks of legislative change. It is not the kind of question in relation to which lawyers have any particular skill or insight.

Nicklinson is a troubling example of judges, who lack democratic legitimacy or institutional capacity, engaging in straightforwardly political decision-making in defiance of a very recent decision of Parliament to reaffirm (strengthen) the existing law. To do so, the judges took it upon themselves to balance moral concepts, like privacy and autonomy, with their own assessment of the public good. It is inconceivable the courts would have embroiled themselves in this kind of political issue absent the HRA 1998.

16. *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, 29 July 2015

In *Tigere*, the Supreme Court rewrote a regulation which settled difficult policy questions regarding the provision of student loans.

Under section 22 of the Teaching and Higher Education Act 1998, the conditions of eligibility for student loans are determined by the Secretary of State by regulation. In this case, the applicant challenged those regulations, arguing that the restrictions on eligibility for non-UK nationals are incompatible with Article 2 of the First Protocol of the Convention (the right to education), or alternatively discriminates against the enjoyment

48. Gregoire Webber, Paul Yowell, Richard Ekins, Maris Köpcke, Bradley W Miller, and Francisco J Urbina, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, 2018) 20.

of that right contrary to Article 14. Under the regulations, only those who resided in the UK for three years prior to starting university would be considered 'settled' in the UK, and therefore eligible for the loan. A person was "settled" if they were ordinarily resident in the United Kingdom without being subject under the immigration laws to any restriction on the period for which they may remain.

The policy rationale was to concentrate finite resources on those with a lawful and close personal connection with the United Kingdom, on the understanding they are more likely to remain permanently and use their qualifications to benefit the UK. To achieve these aims, the regulation enacted a standardised rule, as opposed to case-by-case discretion, in the interests of clarity, consistency, and administrative practicality. Such considerations are political questions which ought to be settled by constitutionally responsible and democratically accountable bodies.

In *Tigere* the Supreme Court, over a strong dissent by Lord Reed and Lord Sumption, went in a very different direction. Despite a lack of clear and consistent Strasbourg jurisprudence on the question, the Supreme Court took an expansive approach to the scope of the right to education, holding that it encompasses a right (an unstated right) to be given a student loan if the right of access to a relevant institution is to be practical and effective rather than theoretical and illusory. This is itself problematic, for here the court quickly arrives at a novel right to taxpayer support for tertiary education.

The court then held that a blanket exclusion of non-settled immigrants was disproportionate. On this question, the court relied on its view that there could be an alternative scheme which, within the bounds of administrative practicality, nonetheless allows for discretion to accommodate students without settled status when their circumstances are compelling. The court also thought the regulations failed to strike a fair balance between the public interest in the prudent allocation of public resources and the impact on the individual applicant. Although the court accepted that the applicant's access to funds was not foreclosed, but merely delayed, they nonetheless held the impact of the delay was excessively severe.

How best to structure and administer this kind of scheme, and how to manage the public finances to pay for it, are questions the courts lack both the ability and the democratic legitimacy to answer. More deference to the judgment of political authorities was warranted than the Supreme Court, was prepared to afford. It was not a policy for the allocation of state benefits manifestly without reasonable foundation. Practical policy-making becomes impossible if policy makers are confronted with the possibility of a judicial veto on their own decision and little useful guidance in practice on what alternative rules would be acceptable, even if they might potentially exclude a meritorious case, and which are also within the constraints imposed by the limited resources available.

17. *R (Reilly) v Work and Pensions Secretary* [2016] EWCA Civ 413, 29 April 2016

In this case, the Court of Appeal issued a declaration of incompatibility in response to an Act of Parliament intended to override the effect of a previous decision of the Court of Appeal, limiting Parliament's effective freedom to address the consequences of past judicial error.

The Jobseekers Act 1995 provides an allowance to some unemployed persons. Under s17A of that Act further regulations may require some persons who seek the allowance to undergo a "work for benefit" scheme. the Secretary of State made the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 under that section. This set up a scheme to assist jobseekers to secure employment. No jobseeker was required to participate in the scheme. But, for those selected to participate in the scheme, the regulation provided that failure to participate could lead to a 'benefits sanction'. In other words, their benefits could be reduced. Although told they must participate in the scheme, some refused. They were then assessed for a benefits sanction.

According to the Court of Appeal in *R (Reilly) v Work and Pensions Secretary* [2013] EWCA Civ 95 (*Reilly (No 1)*) this was unlawful. The court identified two core flaws. First, the Court held that the 2011 Regulations were ultra vires the Jobseekers Act 1995 because they did not detail the contours of the work-related scheme with a sufficient degree of specificity. The court held this to be outside the power in s17A of the 1995 Act, which provided that the Secretary of State could impose such work-related schemes only if they were of a 'prescribed description'. Secondly, the Court held that certain notifications of the requirement to participate in the scheme were unlawful because they lacked sufficient details as to what the scheme required.

On appeal, the Supreme Court in *R (Reilly) v Work and Pensions Secretary* [2013] UKSC 68 largely agreed. Crucially, it accepted the Court of Appeal's most sweeping conclusion: the 2011 Regulations were ultra vires since they were insufficiently detailed. But the court could not quash it, for its hands were tied. In response to *Reilly (No 1)* Parliament had enacted the Jobseekers (Back to Work Schemes) Act 2013. That Act, among other things, retrospectively validated the 2011 Regulations and had come into force before the Supreme Court judgment.

Reilly returned to the Court of Appeal in *R (Reilly) v Work and Pensions Secretary* [2016] EWCA Civ 413 (*Reilly (No 2)*). The 2013 Act provided that the sanctions were lawful, despite the flaws identified in *Reilly (No 1)*. The question in *Reilly (No 2)* was whether the operation of the retrospective validation by the Act in relation to pending appeals involved a violation of any Article 6 rights (right to a fair trial).

The leading case is *Zielinski v France* (2001) 31 EHRR 19. Noting that retrospective legislation may sometimes be legitimate, the ECtHR stated that "Article 6 preclude[s] any interference by the legislature – other than on compelling grounds of the general interest – with the administration of justice designed to influence the judicial determination of a dispute".[49]

49. *Reilly* at [57].

The government argued the 2013 Act was not 'designed' to influence the outcome of any particular judicial proceedings since it was of general application. That is, the sanctions were validated irrespective of the existence of any pending appeal. But this, as the Court of Appeal pointed out (at [85]-[86]), was rejected by the ECtHR in *Scordino v Italy* (2007) 45 EHRR 7.

The true problem with *Reilly (No 2)* is the nature of the 2013 Act and what it sought to accomplish. With its enactment, Parliament sought to reverse the effect of the Court of Appeal's decision in *Reilly (No 1)*, which had invalidated the 2011 Regulations with retrospective effect. In short, it was *Reilly (No 1)* which had unsettled the legal position as it stood before that judgment, which the 2013 Act then restored. Despite this, the court issued a declaration of incompatibility under s.4 HRA in relation to the effect of the 2013 Act on those claimants who had already appealed against their sanctions. In this way, the judgment provided a startling example of judicial interference in an essentially political matter involving economic and social policy, which helps to discredit the much-vaunted claim that when courts make decisions with which Parliament disagrees, Parliament is always free to intervene with corrective legislation.

18. *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 18 October 2017

In *Benkharbouche*, the Supreme Court passed judgement on the merits of legislation regulating the conduct of diplomatic relations and decided to declare the legislation incompatible with Article 6 of the ECHR.

Benkharbouche involved questions about provisions of the State Immunity Act 1978 which, it was accepted, expressly rendered a foreign state immune from proceedings in the UK courts as respects proceedings relating to the employment of the domestic staff of its diplomatic mission to the UK.

The questions, so far as the Human Rights Act 1998 was concerned, related to claims by the domestic staff of two foreign missions for failures to provide payslips or a contact of employment, unpaid wages, a failure to pay the national minimum wage and unfair dismissal.

The Supreme Court found that the 1978 Act was incompatible with Convention rights and made a declaration to that effect. Subsequently, the European Court of Human Rights considered whether the declaration was itself an "effective remedy" for the contravention of the rights of the claimants and held that it was not. The 1978 Act was amended to make it compatible, in terms of the judgment, by the State Immunity Act 1978 (Remedial) Order 2023 (SI 2023/112).

The claimants' case before the Supreme Court was that the provisions of the 1978 Act were incompatible with Article 6 of the ECHR (right to a fair trial) because they unjustifiably barred access to a court to determine their claims. They also claimed they were incompatible with Article 14 (non-discrimination). Accepting, in accordance with the jurisprudence of the Strasbourg Court, that Article 6 confers a right of access to a court to determine a dispute - and not just a right to have it tried fairly - the Court

decided that it made little difference whether the case was put under Article 6 or Article 14, the real question was the same: "Were the restrictions on the claimants' rights imposed by the 1978 Act 'justifiable' in the sense of "do the restrictions pursue a legitimate objective by proportionate means *and …not impair the essence of the claimant's right*".

The Supreme Court's detailed analysis of the ECHR case law arrived at the conclusion that the restrictions in the 1978 Act could only be justified in terms of the Convention if they were necessary to give effect to requirements of customary international law. For that purpose, the Court concluded that international practice did not require states to grant immunity to other states otherwise than according to a "restrictive" understanding of the basis for state immunity (viz one that recognised state immunity only in respect of acts done by a state in the exercise of "sovereign authority").

After considering the relationship between state immunity and diplomatic immunity, the Court decided that customary international law did not impose an obligation to grant immunity in respect of the employment of the domestic staff of a diplomatic mission (at least in the case of the staff in question). Accordingly, the provisions of the 1978 Act could not be analysed as justifiable or proportionate restrictions on Convention rights.

It was immaterial, so far as the Court was the concerned, that the practice of other nations differed and, in some cases, allowed for immunity to be granted in comparable situations. Only an obligation in customary international law would do. There was no margin of appreciation for the UK so far as the international practice was concerned.

A notable aspect of all this is that the 1978 Act had been passed partly to enable the UK to implement the European Convention on State Immunity (Basle). The effect of that Convention would have authorised immunity in the claimants' cases – and also, presumably, on an assumption of the need for reciprocity, also have required it as between two ratifying states. However, the UK, having signed that Convention, had not ratified it and, in fact, only eight states had. An unanswered question arises whether the judgment means the UK can no longer ratify it compatibly with the ECHR.

A similar question unanswered by the judgment is whether the UK is still free independently to come to internationally binding reciprocal arrangements with other states to confer immunity in cases like the claimants. If not, is it appropriate that the UK is constrained by the ECHR as to the concessions or demands it may make in any negotiations about the reciprocal arrangements designed to secure the safety of our diplomatic staff in countries whose legal systems may be less reliable than our own, or even hostile to our national interests? The terms on which the UK conducts its diplomatic relations with another country should be a matter for government, certainly not for the domestic courts or the Strasbourg Court.

Another notable aspect of the judgment is the way the Court denied any justification for immunity from proceedings for unfair dismissal.

The Court accepted that international law gives a state the right freely to appoint embassy staff and that the courts of the forum may not make an order which determines who is to be employed by the diplomatic mission of a sovereign state. But, the Court said, in the absence of an order for reinstatement "a claim for wrongful dismissal does not require the foreign state to employ anyone. It merely adjusts the financial consequences of dismissal."

This gives insufficient weight to the fact that the rules against unfair dismissal exist, amongst other things, to regulate the way decisions about who is or is not employed by an employer are made, and to submit the process for making those decisions to judicial scrutiny. Although the Court accepted this point existed, it rejected it on the puzzling grounds that the argument was not supported by anything amounting to an obligation under customary international law.

19. *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, 21 February 2018

In *DSD*, the Supreme Court deployed Convention rights to impose liability on the police that deeply distorts the way in which they set their operational priorities and is incompatible with long-standing principles of the common law.

DSD concerned the question whether victims of the multiple rapist, John Warboys, could bring proceedings against the Metropolitan Police under sections 7 and 8 of the HRA for the alleged failure of the police to conduct effective investigations of Warboys' crimes. It was conceded that there had been significant errors in the police's conduct of the investigations of Warboys' crimes.

The obstacle to bringing proceedings otherwise than under the 1998 Act was a long-standing principle of English common law. The principle originated in case law but also constitutes an important premise for the statutory regulation of police forces and for their resourcing - as well as providing the context for striking the right balance between the police's public and political accountability and their claim to "operational independence".

The established principle was that, while domestic law recognised a public, legal duty on the police to enforce the law (which was amenable to direction via judicial review and was supported by the police inspection and complaints systems, a fault free criminal injuries compensation scheme, a right of action against the offender and various other more general accountability mechanisms), it did not recognise a duty of care in tort owed by the police to individual citizens injured by the criminal conduct of others.

The Supreme Court accepted that the public policy rationale for this principle rested on two propositions:

> "(i) *that a private law duty of care to individuals would be calculated to distort, by encouraging defensive action, the manner in which the police would*

> *otherwise deploy their limited resources; (ii) resources would be diverted from the performance of public duties of the police in order to deal with claims advanced for alleged breaches of private law duties."*[50]

Nevertheless, in *DSD*, the Supreme Court unanimously upheld the liability of the police, although different members of the Court adopted different approaches.

All the judgments involved considering how far the jurisprudence of the Strasbourg court, in developing and extrapolating on the "unqualified" rights conferred by Articles 2 and 3 of the Convention (the right to life and the prohibition of torture), read with the provisions of the 1998 Act, required that principle and its rationale to be abrogated or qualified to allow (as the Court did) the claims for compensation against the police under sections 7 and 8 of that Act to be upheld.

The supposed developments and extrapolations of the Convention rights by the Strasbourg court that were taken to be relevant were—

- the extrapolation of the two Articles to create a duty to investigate, in this case, breaches of Article 3;
- the extrapolation of Article 2 to impose a positive duty on the police to offer protection to those whose lives they learn are in danger;
- the extrapolation of Article 3 beyond its natural meaning ("torture or …inhuman or degrading treatment or punishment") to include ordinary violent criminal conduct otherwise than by or with the direct involvement of state authorities;
- the consequential extrapolation of the inferred duty to investigate to cover the conduct of non-state actors;
- the suggestions in the jurisprudence of the Court that indicated that the Convention rights, as extrapolated, needed (notwithstanding the existence of alternative accountability mechanisms) to be vindicated by a civil law remedy for compensation enforceable directly against the police.

All this then required consideration of how far section 2(1) of the 1998 Act required the courts to follow the Strasbourg jurisprudence – an issue which had not been settled with any clarity by the courts in the 17 years since the Act had come into force, which was further complicated in DSD by reference to section 6 of the Act and which remains unclear and unstable (despite, but also partly because of, various subsequent changes of emphasis by the Supreme Court).

Lord Kerr's approach, with which Lady Hale agreed, was more extensive in its abrogation of the common law principle and more sceptical about its rationale than the judgements of other members of the Court. Lord Kerr found that the Strasbourg jurisprudence required a positive operational duty on the police to investigate breaches of Article 3 by persons other than agents of the state, but suggested, for reasons that were not clearly explained, that this had the effect that only "obvious" and "significant"

50. See *Smith v Chief Constable of Sussex Police* [2008] UKHL 225 per Lord Philips at [97].

shortcomings would give rise to liability.

Lords Neuberger and Mance more clearly wanted to make the seriousness of the breach part of the test for liability: Lord Mance indicating that a test distinguishing simple errors and isolated omissions from more serious failings had replaced any distinction between operational failure and systematic or structural failures.

On the other hand, that distinction was relied on by Lord Hughes, who thought there would be liability only for systematic or structural failures, not for purely operational mistakes.

This summary illustrates the problem with the decision in *DSD*. The distinctions that are drawn are subtle and no doubt elegant from an intellectual point of view, but – because of their lack of precision as to contents, as to how they differ and as to how any differences are to be reconciled – they are, for all practicable purposes, totally useless for providing the level of legal certainty required to enable sound on-the-ground decision-making by the police about the level of resources they are required to commit to different operational priorities.

It is unsurprising that the police reported to the Independent Human Rights Act Review[51] that *DSD* was a source of great difficulty for them when making decisions about operational priorities, and that it had a distorting effect. There is no reason to disbelieve them; and the fact that they assume their decision-making has to take account of *DSD* is enough to make their concerns valid. It is obvious that *DSD* can be and is used by the police, when setting operational priorities (especially where there is a choice between those that arguably engage Convention rights and those that do not), to justify or excuse decisions in a way that displaces their accountability for them as their own judgements made on the merits.

This practical effect of *DSD* is a complete vindication of the policy rationale identified by the Supreme Court for the common law principle restricting liability based on an individual duty of care. The unwillingness of the Supreme Court properly to engage with the likely and previously recognised adverse systems effects of their new approach is the direct consequence of the application of the jurisprudence of the Strasbourg Court.

20. *RR v Secretary of State for Work and Pensions* [2019] UKSC 52, 13 November 2019

In this case, the Supreme Court took on the legislative task of effectively rewriting subordinate legislation.

Under s.130 of the Social Security Contributions and Benefits Act 1992, a person is entitled to housing benefit if certain criteria are met. The applicable regulations determine the amount of this housing benefit. Those regulations are the Housing Benefit Regulations 2006.

In 2013, the government revised the 2006 Regulations to introduce a percentage reduction in the rent coverage for social sector housing if the number of bedrooms exceed a specified amount. Those opposed described it derisively as a 'bedroom tax'. More favourably, its supporters described

51. Response of the Metropolitan Police Service and the National Police Chiefs' Council to Independent Human Rights Act Review Call for Evidence (13 January 2021), link

it as the 'removal of the spare room subsidy'.

The reduction applied to those who, by virtue of their disability, cannot share a bedroom with their partner. In *R (Carmichael and Rourke) v Work and Pensions Secretary* [2016] UKSC 58, the Supreme Court held that this reduction in housing benefit was unlawful. It reasoned the housing benefit falls within the ambit of the right to property (under Article 1, Protocol 1), the ambit of the right to family life (under Article 8), or both. The reduction of that benefit, in turn, was unlawful discrimination on the basis of disability (under Article 14).

Then, in *RR*, the Supreme Court needed to decide on the appropriate remedy. Its answer: to rewrite the regulations to remove the percentage reduction. That means the public authority must, after *RR*, award the full housing benefit to those who cannot share a bedroom with their partner. In doing so, the court took it upon itself to determine the appropriate housing benefit for these applicants.

In *RR*, the Supreme Court recognised it could only make such an order if "possible to do so".[52] It is only possible when there is "no legislative choice to be exercised".[53] Nobody doubts that, in order to remedy discrimination in the provision of benefits, the legislature can either level up or level down. In other words, remove the disparity by granting the benefits absent the discriminatory restriction or to lower the benefits generally to match the restriction. But a decision-maker, according to *RR*, only has one choice: to level up. This reasoning is problematic. What makes something a 'legislative choice' is the substance of the matter in question. Whether to commit to public expenditure to cover additional entitlements, or to restrict claims to everyone, is precisely the sort of sweeping choice which ought to be made by a democratically accountable body. In effectively rewriting the regulations to prefer one of those options to the other, the Supreme Court in *RR* exercised a legislative choice to allocate public funds and enact a general expansion of housing benefit.

The majority of the Court of Appeal in *Work and Pensions Secretary v Carmichael* [2018] EWCA Civ 548 had taken a more principled approach, at least so far as remedies were concerned. Rather than effectively rewrite the regulations, it held that those disadvantaged by the reduction could bring an action for damages under s.8(2) HRA. This reconciles two propositions: (i) that the reduction of housing benefit for certain disabled recipients is unlawful given s.6 HRA, (ii) the court has no power to rewrite regulations under s.6 HRA. It is therefore regrettable that the Supreme Court overruled this approach in *RR*.

21. *AM (Zimbabwe) v Secretary of State for Home Department* [2020] UKSC 17, 29 April 2020

In this case, the Supreme Court substantially restricted the Home Secretary's power to deport those with no legal right to be in the country.

The applicant in *AM* was a national of Zimbabwe who was HIV positive and subject to a deportation order after being convicted of many serious criminal offences. He argued that if deported to Zimbabwe, he would

52. *RR v Secretary of State*, at [30].
53. *RR v Secretary of State*, at [30].

be unable to access the medication he was receiving in the UK which prevents his lapse into full-blown AIDS. The applicant argued this would be contrary to his Article 3 Convention right not to be subject to inhuman and degrading treatment.

The applicability and relevance of Article 3 in the context of deportation and medical treatment has a complicated history. In a series of immigration cases, the Strasbourg Court had held that Article 3 can sometimes be engaged where a member state returns an illegal migrant to a country where they might be denied access to the same kind of medical care they are receiving in the host state. That is, Article 3 might apply even absent a risk that the receiving country will not themselves subject the migrant to inhuman or degrading treatment, due to the difference in medical treatment available in the UK and that available in the receiving country.

For several years, the House of Lords restricted the scope of Article 3 in this domain by taking Strasbourg to mean that it only applied in truly exceptional situations, such as when the return of a person to their home country and the discontinuation of medical treatment that entailed would lead to an "imminent, lonely and distressing end".[54] On this view, it would not suffice for the applicant to show that the discontinuing of UK medical treatment would considerably or swiftly shorten their lifespan.

However, in *Paposhvili v Belgium* [2017] Imm AR 867 the ECtHR significantly expanded the scope of Article 3 beyond these limits. It also created a novel procedural obligation on the returning state to gather evidence about the standard of healthcare in the receiving country. This leads to the key question in *Zimbabwe* which is the proper scope of Article 3 and whether the Supreme Court would embrace this new line of jurisprudence from Strasbourg. It did, brusquely rejecting the idea that it should keep to the previous limits of Article 3 when faced with a highly unsatisfactory departure by the ECtHR from a long line of its own jurisprudence.

The judgment in *Zimbabwe* has serious practical consequences. The first is that the category of cases Article 3 now covers in the context of deportation and the incidental withdrawal of medical treatment are not really exceptional. It covers all those whose life will be significantly shortened without access to the UK's NHS. Another practical consequence is that the onerous procedural burden now falls on the political authority wishing to remove someone with no legal right to be in the country to gather evidence to eliminate any real doubt as to the risk of a significantly shortened lifespan and "prove that the medical facilities actually available to the deportee in his or her home country would eliminate any real risk that his or her lifespan would be significantly shortened by removal from NHS facilities to that country's." Yet another problem with the judgment is the fact, as Professor Finnis and Simon Murray have pointed out, that this broad interpretation of Article 3 "is 'unqualified' in the precise sense that its application cannot be affected by criminality or other demerits of its beneficiaries – cannot be forfeited – and is the same irrespective of the security of the state and its people".[55] This will likely prove consequential

54. *N v Home Secretary (Terrence Higgins Trust intervening)* [2005] UKHL 31, [2005] 2 AC 296.
55. John Finnis and Simon Murray, *Immigration, Strasbourg, and Judicial Overreach* (Policy Exchange, 2021) 45.

to the efficient and principled operation of the immigration system.

22. *DPP v Ziegler* [2021] UKSC 23, 25 June 2021

In *Ziegler*, the Supreme Court introduced serious uncertainty into the criminal law by requiring some convictions to be subject to an individualised proportionality assessment.

Section 137 of the Highways Act 1980 says that it is an offence 'if a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway'. In September 2017, protestors lay down on one side of an approach road leading to the Excel Centre in East London, where the Defence and Security International arms fair was being held, and locked themselves to hollow boxes. The police arrested them within five minutes, but it took 90 minutes to disassemble the boxes and remove the obstruction

A number of the protestors were arrested and charged under s.137, but acquitted at trial by the magistrates. The High Court quashed their acquittals and directed convictions. However, on appeal the Supreme Court, in *Ziegler* restored the acquittals, ruling that deliberate physical obstruction of the highway by protestors, which prevents others from passing along the highway, is lawful if criminal conviction would be a disproportionate limitation on the rights of protestors under Articles 10 and 11 of the Convention to free expression and assembly (often bundled together, not entirely accurately, as "the right to protest"). In blocking the highway, and deliberately stopping others from using it, it was held that the prosecution had failed to prove beyond reasonable doubt that the protestors were not lawfully exercising their rights under the Convention. Thus, "lawful excuse" in s.137 had to be read such that the obstruction of the highway would be lawful – not a breach of the criminal prohibition – unless the prosecution could prove that conviction would be a proportionate (and thus justified) interference in the exercise of the rights in question.

The judgment confirms how far the law has been changed since 1999, when, in *DPP v Jones* [1999] 2 AC 240, Lord Irvine could say that "any "reasonable or usual" mode of using the highway is lawful, provided it is not inconsistent with the general public's primary right to use the highway for purpose of passage and repassage". Now, after *Ziegler*, this right of the public is being routinely violated.

After the HRA 1998 it was likely that 'lawful excuse' would be read to include the exercise of Convention rights to speak and to assemble. However, the *Ziegler* judgment runs together the meaning of 'lawful excuse', which (if possible) has to be read compatibly with Convention rights, with a separate question whether conviction would be a disproportionate interference with the exercise of Convention rights. The judgment effectively assumes that convicting an offender is an act of a public body (a court) which cannot lawfully act in a way that is incompatible with Convention rights, per the terms of s.6(1) of the HRA. But while arrest and prosecution are discretionary, conviction is not. If the elements of the

offence are made out, the court must convict, in which case s.6(2) HRA applies (which provides that subsection (1) does not apply if primary legislation means that the public body could not have acted differently), and it is clear that arrest and prosecution would fall within the exception in s.6(2)(b). The Supreme Court should have asked whether the 1999 understanding of s.137 was compatible with the Convention, because it fell within the UK's margin of appreciation for controlling protests, and should have affirmed the priority of the 'general public's primary right to use the highway'. The Court should not have taken the ECHR, or the Strasbourg Court's case law, to require that protestors only be convicted of public protest offences if the prosecution establishes that a conviction would be a proportionate interference in their Convention rights. Section 137 itself may or may not be disproportionate, but it is misconceived to read into the offence a requirement to prove that a conviction would be proportionate.

After *Ziegler* everything turns on the facts of each individual case and on whether in relation to those facts a conviction is "necessary in a democratic society" (the "fact finder" in a given trial would have to make this assessment). This is an unworkable standard for trial courts to operate, which has spilled over into other public order offences, as Policy Exchange has pointed out in a number of publications.[56]

The members of the Supreme Court panel in *Ziegler* disagreed about how to classify the protest and whether to think about it as a limited obstruction of one way into the Centre or to think about it as a complete obstruction of the relevant part of the highway. For some of the judges, the limited duration of the protest was a point weighing against a conviction being a proportionate response, whereas for others the key point was that the protestors had intended to block the road for much longer and had taken steps to frustrate their removal.

The majority allowed the appeal, restoring the decision at first instance that a conviction in this context would be disproportionate. It would seem to follow, even if the Court did not spell this out, that it was probably unlawful (because a disproportionate interference in Convention rights) for the police to arrest the protestors in this case after only five minutes. For the police to have been on safe ground, they would have needed to have waited until the protestors were reasonably thought to be committing an offence, which would only occur when it was reasonable to assume that no 'lawful excuse' was open to them. The judgment has rendered the criminal law about protest in practice unworkable.[57]

23. *Bloomberg LP v ZXC* [2022] UKSC 5, 16 February 2022

This case, in which the Supreme Court made further inroads on freedom of the press, illustrates the continuing influence of Convention rights over the common law.

ZXC was a senior employee of a multinational company. The company, and he alongside it, came under criminal investigation by the UK authorities. This led the UK authorities to send a confidential letter requesting a foreign

56. See, for example, Paul Stott, Richard Ekins and David Spencer, *The "Just Stop Oil" protests* (Policy Exchange, 2022) and Richard Ekins and Sir Stephen Laws, *Amending the Public Order Bill* (Policy Exchange, 2023).
57. See further Anthony Speaight KC and Oliver Sells KC, *How to Reform the Law on Disruptive Protest* (Society of Conservative Lawyers, April 2023).

state to provide information relating to ZXC. Bloomberg obtained a copy of that letter. So they published an article reporting that ZXC was currently under criminal investigation. ZXC then sued Bloomberg, seeking damages and an injunction preventing further publication.

Prior to the Human Rights Act, this would never have been actionable. Publishing this information was surely embarrassing for ZXC. It may indeed have harmed his privacy. But English law had historically refused to recognise a general, freestanding right of privacy. The position, rather, was that privacy was protected through a set of narrower ancillary doctrines, like the equitable action for breach of confidence. This approach allowed the courts to approach, the difficult balance between privacy and free expression cautiously and in an incremental fashion.

Then everything changed. Supercharged by the HRA, the previous guardrails were abandoned. Embarrassed by the omission of a separate tort for invasion of privacy, the courts made sweeping changes to the common law. In this way, the courts used s.6 HRA to alter, not just how individuals relate to the state as a matter of public law, but also our interpersonal interactions in private law. Soon, a suite of Convention rights, most pressingly the Article 8 right to privacy, came to bear in remarkable ways on the horizontal question of how we relate to one another.

A prominent early example is *Campbell v MGN* [2004] 2 AC 457. There, the court allowed Naomi Campbell, a high-profile model, to claim damages from the publisher of the *Daily Mirror* for distributing pictures of her leaving a rehabilitation clinic. This was difficult to explain under traditional principles. Ms Campbell was in public. There was no breach of contract. And, absent that, the relevant cause of action was the equitable doctrine of breach of confidence. But traditionally this required a prior relationship of trust and confidence before a cause of action could arise. No such arrangement existed between Ms Campbell and MGN. Yet Campbell succeeded in her claim. For the House of Lords, emboldened by the HRA, felt free to abandon the traditional limits of the claim and transpose it onto the common law. This has since been taken to herald the start of a new, separate tort of misuse of private information, as confirmed by the Court of Appeal in *Vidal-Hall v Google* [2015] EWCA Civ 311. That tort has evolved so far from the law of confidence that in *PJS v NGN* [2016] AC 1081 the UKSC held that not only was a prior confidential relationship unnecessary, the information in question did not even have to be confidential for it to be protected by injunction.

There was no incremental development of the outer bounds of this tort. In one fell swoop the scope of liability for publishing embarrassing information exploded. The HRA includes provisions relating to free expression in s.12, which are often relied upon by the media. But they were principally drafted with defamation, and not privacy in mind, as the radical changes to come were not anticipated in 1998. Absent any statutory framework, the courts are now forced to engage in a delicate balancing exercise whenever it adjudicates a claim for misuse of private information. Every claim for misuse of private information implicates both the Article

8 right to privacy on the part of the claimant, and equally the Article 10 right of free expression on the part of the defendant. As the Supreme Court puts it, "liability for misuse of private information… involves a balancing exercise between the claimant's article 8 right to privacy and the publisher's article 10 right to freedom of expression".[58]

To that we may add the potential public interest in the publication of this information. All of these interests are important; none are susceptible to easy comparison, or indeed any comparison if one is limited to recognisably legal techniques. Such an issue is the domain of Parliament, which can legislate to strike a balance. But because this area of law is entirely of recent judicial invention, it is the courts which are forced to navigate this confluence of cross-cutting interests to determine, on any given occasion, whether the imposition of liability strikes a fair balance between them.

In ZXC, this assessment led the Supreme Court to a startling conclusion: that those under criminal investigation can hold the media liable, indeed silence them by injunction, if they report on its existence.

24. *AAA v. Secretary of State for Home Department* [2023] UKSC 42, 15 November 2023

In *AAA*, the Supreme Court, in a judgment which disrupted a key government policy, became entangled with questions of high political complexity and diplomatic sensitivity.

The case concerned a challenge to the first iteration of the UK Government's Rwanda asylum plan. The plan was centrally based on an agreement between the UK and Rwandan governments, known as the Migration and Economic Development Partnership. The UK agreed to treat Rwanda as a safe third country, removing asylum claimants to its territory, allowing Rwandan officials to process their claims and, where appropriate, offer Refugee protection to those with a well-founded fear of persecution in their place of origin. The Rwandan government, in turn, provided assurances that asylum seekers transferred to Rwanda would not be subject to refoulement.

The Rwanda asylum plan was challenged on several grounds, among which was that the Secretary of State would, in implementing the agreement, breach s.6 HRA by acting incompatibly with Article 3 of the ECHR. The core claim, upheld by the Supreme Court, was that Rwanda could not credibly be a safe country, despite its assurances, because there was a real risk Rwandan officials would mishandle asylum claims and send genuine refugees back to their country of origin to face mistreatment. This risk assessment has been widely misrepresented as an ordinary "finding of fact", which it obviously is not given that it involves making predictions about the future operation of a complex new administrative system and the efficacy of diplomatic arrangements and processes.

The Supreme Court said that, in relation to the removal of persons from the United Kingdom to other countries, it would apply the HRA in accordance with the principles set down in Strasbourg's treatment of

58. *Bloomberg LP* at [26].

Article 3. This led the court to say that it would give limited deference to the government's assessment of whether there are substantial grounds for believing that there is a real risk of refoulement. The court rejected the Divisional Court's approach that a judge is required to accept the government's evaluation of assurances unless there is "compelling evidence to the contrary".[59] The court's understanding of Strasbourg's Article 3 jurisprudence was that a judge would have to make their own assessment of the risk of refoulement in light of the evidence as a whole, including what weight to give the diplomatic assurances of another sovereign state. In doing so, the court said it would bring to "bear its own expertise and experience" as "weighing competing bodies of evidence, and assessing whether there are grounds for apprehending a risk are familiar judicial functions".[60]

Turning its attention to the evidence, the court was sceptical about the accuracy and integrity of the Rwandan asylum system; it also called into doubt whether Rwanda would honour the assurances that it had made to the UK[61] and whether the Rwandan judiciary were independent of its government.[62] The court relied heavily on the evidence of the United Nation High Commissioner for Refugees (UNHCR) in concluding that there was a real risk that the Rwandan asylum system would misfire.

The contestable nature of this conclusion is partly illustrated by the fact that three judges—the two judges of the Divisional Court and the Lord Chief Justice, sitting in the Court of Appeal—reached the opposite conclusion on the same evidence. In contrast to the Supreme Court, the Divisional Court was sceptical about affording special weight to the UNHCR's evidence about the deficiencies Rwandan asylum system. The judges of that court, Lewis LJ and Swift J, pointed to the UNHCR's own description of Rwanda's asylum system, on July 2020, as being "fully compliant with international standards" without any suggestion of a "protection gap".[63]

Even if this were incorrect, the courts would then need to confront an additional question: What effect will the incentives provided by the UK to Rwanda have for the safe handling of asylum claims? In *AAA* the Supreme Court gave one answer; the government another. The problem is that the courts are not well-positioned to assess either the future operation of a new administrative system or the efficacy of diplomatic arrangements and processes.

This judgment illustrates some of the ways in which Article 3, as interpreted by Strasbourg and followed by the UK courts, leads judges to attempt to answer questions that that they should not be able to address. It does no injustice to our courts to note that they lack the institutional competence and political accountability that is necessary for responsible decision-making in this context.

59. *AAA* [2023] UKSC 42 at [51]
60. *AAA* [2023] UKSC 42 at [55]
61. *AAA* [2023] UKSC 42, at [55].
62. *AAA* [2023] UKSC 42, at [82] and [83].
63. [2022] EWHC 3230 at [55].

25. *In Re Dillon* [2024] NIKB 11, 28 February 2024

In this case, the Northern Ireland High Court (a) rejected Parliament's decision about the best way to respond to the controversial legal legacy of the Northern Ireland Troubles and (b) denounced legislation correcting a clearly erroneous Supreme Court judgment.

The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 received Royal Assent on 18 September 2023. The point of the Act is to:

> *"address the legacy of the Northern Ireland Troubles and promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery, limiting criminal investigations, legal proceedings, inquests and police complaints, extending the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and providing for experiences to be recorded and preserved and for events to be studied and memorialised, and to provide for the validity of interim custody orders."*

The main provisions of the Act were challenged in proceedings before the Northern Ireland High Court, with the claimants arguing they were incompatible with Convention rights. The challenge was by way of the Human Rights Act 1998 *and* the Windsor Framework, which has force in domestic law by virtue of section 7A of the European Union (Withdrawal) Act 2018.

The first ground of challenge was that the 2023 Act breached Articles 2 and 3 in making provision for the Independent Commission for Reconciliation and Information Recovery (ICRIR) to grant immunity from prosecution to persons who met certain conditions. The High Court read the jurisprudence of the ECtHR to fall just shy of a categorical ban on amnesties, while saying that "the scope and limits of any... exceptions have not been defined in the case law".

The judge ruled, however, that the relevant provisions of the 2023 Act are incompatible with Articles 2 and 3, because they were not necessary to bring a violent dictatorship to an end or more swiftly bring a long-running conflict to an end. The Troubles ended, the Court says, in 1998, which seemed to count against legislation in 2023. The judge asserted that there was no evidence that the Act would contribute to reconciliation and indeed that the evidence was to the contrary.

The obvious counterpoint is that enacting legislation in 2023 may be justified precisely to draw a line under the past, to prevent numerous hopeless cases and claims from proceeding, which are very unlikely to result in prosecutions or convictions, and in order to help the people of Northern Ireland address the legacy of the Troubles in a healthier way. The quarter century between the Belfast Agreement and the legislation confirms that this is not an amnesty enacted in order to secure state impunity from human rights abuses – which otherwise would surely have been enacted much sooner – but rather to help detoxify the legacy of the Troubles and to ensure fairness to the persons who remain subject to investigation so many years later. Whether an amnesty would contribute to reconciliation was not a simple factual question for a judge to determine

on such evidence as may be provided to him. It is an evaluative prediction of a complex social, political and moral nature that Parliament is far better placed, and should be entitled, to make. No court is well-placed to evaluate the moral or political merits of this legislation, including its prospects for improving the lives of those in Northern Ireland, including victims, but also the wider public.

These are all political judgements on which opinions may, and indeed do, legitimately differ but which should ultimately be made by elected politicians who can be held accountable for them.

The 2023 Act limits civil proceedings arising out of the Troubles. The claimants argued that this was incompatible with their Article 6 rights. The High Court agreed that the Act's limitation on civil proceedings pursued a legitimate aim, namely reducing the burden on the courts and making it possible for families to secure the answers they seek by way of the work of the ICRIR. The High Court accepted that a clear rule was proportionate, but ruled that the Act's limited retrospective effect (applying to claims brought after 17 May 2022, when the Bill was introduced) was disproportionate and thus breached Article 6.

Given his conclusions about Articles 2, 3, 6, the High Court judge reasoned, by way of his reading of the Windsor Framework, that he was required to disapply the relevant provisions of the 2023 Act.

The High Court also considered a challenge to provisions of the 2023 Act which were enacted in response to the Supreme Court's judgment in *R v Adams* [2020] UKSC 19. The relevant provisions restore the validity of 'interim custody orders' made by the Secretary of State, but signed by Ministers of State and Undersecretaries of State, in the 1970s.

In *Adams*, the Supreme Court ruled that an interim custody order was only validly made if it was made personally by the Secretary of State. This judgment badly misinterpreted the relevant legislation, failing properly to give effect to the *Carltona* principle (which provides that civil servants and other ministers may act on behalf of the Secretary of State) in the context of the signature rules that applied to the orders.[64]

The Northern Ireland Troubles (Legacy and Reconciliation) Bill, as it then was, was amended in order to address the *Adams* judgment. There were two reasons for the amendments, as the parliamentary history makes crystal clear:[65] (1) to restore the *Carltona* principle and (2) to prevent compensation unjustly being paid in reliance on a judgment that had misunderstood the legislator's intent and misconstrued the law. The High Court judge ruled that the retrospective effect of the validation of interim custody orders, which applied to proceedings brought before the Act had come into force, was incompatible with Article 6 and A1P1 (Article 1 of Protocol 1). The judge made a s.4 HRA declaration to this effect.

The judge's reasoning proceeded on the premise that he was required to accept that the Supreme Court's judgment in *Adams* was rightly decided and goes on to reason that the point of the legislation was not to correct a mistaken judgment, and thus to restore a fundamental constitutional principle and to prevent an injustice premised on a misunderstanding

64. R Ekins and S Laws, *Mishandling the Law: Gerry Adams and the Supreme Court* (Policy Exchange, 2020).
65. R Ekins and S Laws, *Reversing the Supreme Court's Judgment in R v Adams* (Policy Exchange, 2023).

of that principle. Both points were misconceived. The legislation was premised on a rejection of the Court's reasoning in *Adams*, with the point of the legislation to restore the law as it was understood before *Adams*. This is highly relevant to the question of the compatibility of the legislation with fair trial rights and with property rights. That is, the High Court wrongly denounced Parliament's entirely justified decision to legislate in this way, a judicial intervention which is incompatible with the important principle that where the courts err, Parliament should always be free to legislate to correct their mistakes.

Postscript

On 20 September, the Northern Ireland Court of Appeal delivered its judgment on an appeal and cross-appeal from the High Court's judgment.[66] Allowing a cross-appeal, the Court of Appeal found a further incompatibility between the 2023 Act and Article 2 on the grounds that the scheme for the Independent Commission for Reconciliation and Information Recovery unduly limited the participation of next of kin and wrongly empowered the Secretary of State to block disclosure of relevant information. The Court of Appeal also went further than the High Court in holding that the Act's prospective limitation of civil actions was disproportionate and thus incompatible with Article 6. The Court of Appeal did not correct the aspects of the High Court's reasoning which we critique above, partly because on 29 July 2024, the new government formally abandoned the grounds of appeal against the High Court's section 4 declarations of incompatibility. That is, the new government conceded that the immunity provisions in the 2023 Act were incompatible with Articles 2 and 3. It also conceded that the provisions responding to *Adams* were incompatible with Article 6 and with A1P1. (While in opposition, the Labour Party had opposed the 2023 Act in principle, although it had not opposed, but rather had supported, the provisions responding to *Adams*.) The Court of Appeal's judgment makes clear that it thought the concessions were well made and that it largely agreed with the High Court's reasoning. The government's 29 July statement indicates that it will exercise its powers under section 10 of the HRA to amend the 2023 Act by remedial order.

66. [2024] NICA 59

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