



House of Lords  
House of Commons  
Joint Committee on Human  
Rights

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# Enhancing Parliament's role in relation to human rights judgments

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**Fifteenth Report of Session 2009–10**

*Report, together with formal minutes and  
written evidence*

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## Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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## Summary

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This is our fourth report of the Parliament dealing with adverse judgments by the European Court of Human Rights and declarations of incompatibility issued by the domestic courts under the Human Rights Act. As way of background we note that the European Court is in crisis, struggling to deal with 120,000 cases and with new applications having increased seven-fold over the last decade. These problems stem in large part from failures of national implementation of Court judgments: in 2008, 70% of the Court's judgments concerned cases which dealt with issues which had already been determined by the Court in earlier decisions.

Better mechanisms for implementing Court judgments must involve Parliament, particularly given the central role played by Parliament under the Human Rights Act. Although the UK's record on implementing Court judgments is generally good, it is undermined by lengthy delays in a small number of cases where the political will to make the necessary changes is lacking. This damages the UK's ability to take a lead on improving the current backlog at the Court.

We make a number of recommendations to the UK's system for monitoring and responding to Court judgments, focused in particular on guidance to Government departments on our work in this area which we have drawn up and published for the first time. We recommend that the Government should seek to prevent future violations of the Convention where they are predictable, rather than the current approach of "minimal compliance" with specific judgments. As part of this new approach, we call on the Government to give systematic consideration to whether Court judgments against other countries have implications for UK law, policy or practice and to keep Parliament informed of any such implications.

Our conclusions in relation to some of the main issues we considered are summarised below.

### **Retention of DNA profiles and samples (*S & Marper*)**

We reported at length on the Government's response to this judgment in our recent report on the Crime and Security Bill. In short, we consider the response to be inadequate both in terms of the approach to implementation and the substance of the proposals. "Pushing the envelope" of the Court judgment, to maintain as much of the previous policy on DNA retention as possible, is likely to risk further violations of the Convention.

### **Summary possession of people's homes (*McCann*)**

This case concerns procedural safeguards in summary possession proceedings and is complicated by the fact that the European Court and the House of Lords reached different views on the issue. If, as is likely, the Court comes to the same conclusion in the forthcoming case of *Kay* as it did in *McCann* then legislative change will be necessary. We question whether it would not have been more cost effective to reform the summary possession process immediately after the *McCann* judgment rather than to let further litigation on this point run its course.

### **Interception of communications (*Liberty*)**

The court found that the interception of the applicants' communications under the Interception of Communications Act 1985 breached Article 8 of the Convention. The Act was subsequently replaced by the Regulation of Investigatory Powers Act 2000. We note similarities between features of the 1985 and 2000 Acts and that the human rights compliance of the 2000 Act will soon be tested in the case of *Kennedy*. We urge the Government to give serious consideration to ways in which it could amend the system for supervising the interception of communications to provide greater safeguards for individual rights.

### **Prisoners' voting rights (*Hirst*)**

We continue to draw attention to the unacceptable delay in resolving this case.

### **Security of tenure for Gypsies and Travellers (*Connors*)**

We draw attention to the delay in bringing into force section 318 of the Housing and Regeneration Act 2008, which would remedy this incompatibility.

### **Interim measures, Rule 39 (*Al-Saadoon & Mufdhi*)**

This case concerns the decision of the Government to return two Iraqi applicants, detained by UK Armed Forces to the custody of the Iraqi authorities, despite the likelihood that they might face a risk of the imposition of the death penalty. Despite a request of the European Court that the individuals not be returned, under Rule 39 of the Court's rules of procedure, pending a decision in their case, the UK surrendered the applicants to the Iraqi authorities. We call on the Government to provide us with certain information in any case where it considers refusing to meet a Rule 39 request for interim measures. The European Court of Human Rights has recently reached a decision on the merits of this case, finding the UK in violation of the right to be free from inhuman and degrading treatment (Article 3 ECHR), the right to an effective remedy (Article 13 ECHR) and the right of individual petition (Article 34 ECHR). We call on the Government to provide a response to the Court's finding and recommend that our successor Committee keep this case under close scrutiny.

### **Suitability of care workers to work with vulnerable adults (*Wright*)**

This declaration of incompatibility concerned the Care Standards Act 2000 which has now been replaced by the Safeguarding Vulnerable Groups Act 2006. We continue to express concern that aspects of the 2006 Act, dealing with the procedure by which care workers employed to look after vulnerable adults are placed on a list of people considered unsuitable for such work, may be incompatible with the Human Rights Act. We draw attention to concerns raised by the Chair of the Administrative Justice and Tribunals Council about the scope of the right of appeal provided in the 2006 Act and its compatibility with the right to a fair hearing and the right to respect for private life. We publish our correspondence with the Chair and call on the Government to publish a full response.

### **Religious discrimination in sham marriages regime (*Baiai*)**

We draw attention to continuing delay in resolving this incompatibility.

# 1 Introduction

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## Crisis at the European Court of Human Rights

1. The European Court of Human Rights (ECtHR) is in crisis. It is a victim of its own success in establishing itself as the authoritative human rights court for 800 million citizens of 47 European countries. The number of cases currently pending before it is almost 120,000. The number of new applications in 2009 was almost 57,000, compared to 8,400 in 1999. Despite considerable improvements in the productivity of the Court, the gap between the number of decisions and judgments it delivers and the number of incoming applications remains large and continues to widen. So, not only is the backlog enormous, it is steadily getting worse: the Court simply cannot keep up with the influx of applications. Unless something radical is done, and done soon, there is a real risk that the Court will drown under the flood of applications,<sup>1</sup> and its widely recognised achievements as a champion of the values underpinning democracy and the rule of law in Europe will be undermined.

2. The crisis currently threatening to overwhelm the Court makes it more urgent than ever that the Convention be effectively implemented at national level, so that the Court is not overloaded with cases which could be dealt with adequately at national level, or with repetitive cases as a result of inadequate implementation of Court judgments. The ECHR system is based on the principle of subsidiarity. According to this principle, the Convention system plays only a subsidiary role to the national system for the protection of Convention rights: those rights are to be protected first and foremost in the national legal system. The principle of subsidiarity is reflected in Article 1 of the Convention, by which States are under an obligation to secure the Convention rights to everyone within their jurisdiction.

3. One of the signs of inadequate national implementation is the shockingly high proportion of the cases before the Court which are “repetitive applications”, that is, which concern issues on which the Court has already pronounced but where the source of the incompatibility has not been removed in the national legal system. In 2008, some 70% of the Court’s judgments concerned repetitive applications. Another sign is the large number of cases which are pending before the Committee of Ministers concerning the late or non-execution of judgments. At the end of 2009, the number of cases pending before the Committee of Ministers was about 8,600, compared to 2,300 at the end of 2000, and of these some 80% concern repetitive cases.

4. The surest way of stemming the flood of applications to the Court, including repetitive applications, is therefore to enhance the authority and effectiveness of the ECHR in the national legal system. This was the object of the package of reforms which was agreed by the member states of the Council of Europe in May 2004, to accompany Protocol 14 which made important changes to the way the Court operates to enable it to deal with the massive increase in the number of applications. As our predecessor Committee pointed out in its

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<sup>1</sup> “Simply put, the Convention system in Strasbourg is in danger of asphyxiation”: Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process* (Conclusions of the Chairperson, Mrs Herta Daubler-Gmelin, of the hearing held in Paris on 16 December 2009, AS/Jur (2010) 06, para. 9.

report on Protocol 14,<sup>2</sup> reforms to the Court and the Convention control system would not alone ensure the long-term effectiveness of the Convention. If the overload of the Court was to be overcome, it was also necessary to take a comprehensive set of interdependent measures to prevent Convention violations at national level, to improve remedies in the national legal system for Convention violations and to enhance and expedite implementation of the Court's judgments. To this end, Protocol 14 was accompanied by a number of Committee of Ministers' recommendations concerning, for example, the need for effective mechanisms for systematic verification of the Convention compatibility of draft laws, existing laws and administrative practice, and the need to improve domestic remedies for arguable violations of Convention rights.<sup>3</sup> Our predecessor Committee indicated that the JCHR intended to ensure that Parliament was properly involved in the implementation of the various Committee of Ministers recommendations.

## The Interlaken Declaration

5. In view of the deep concerns about the sustainability of the Convention system, as the number of applications continues to grow and to exceed the number of judgments and decisions, the Swiss Government, during its Chairmanship of the Committee of Ministers of the Council of Europe, recently organised a "High Level Conference on the Future of the European Court of Human Rights" at Interlaken. The conference was preceded by a number of interesting public statements by key institutions and individuals (such as the President of the Court, the Secretary General of the Council of Europe, the European Commissioner for Human Rights, and the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly),<sup>4</sup> setting out the priorities facing the Court and the Convention system as a whole. For all of these key actors, the future effectiveness of the Court depends to a large degree on better national implementation of the Convention.

6. The Interlaken conference took place on 18 and 19 February 2010 and culminated in a joint declaration by the representatives of the 47 member states of the Council of Europe.<sup>5</sup> The Interlaken Declaration reiterates the obligation of the member states to ensure that the rights and freedoms in the Convention are fully secured at the national level and calls for a strengthening of the principle of subsidiarity, which implies a shared responsibility between the States Parties to the Convention and the Court. The Declaration also stresses the need to find solutions for dealing with repetitive applications, and that full, effective and rapid execution of the final judgments of the Court is indispensable.

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2 First Report of Session 2004–05, *Protocol No. 14 to the European Convention on Human Rights*, HL 8/HC 106.

3 These recommendations are Rec (2004) 4 on the ECHR in university education and professional training; Rec (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the ECHR; Rec (2004) 6 on the improvement of domestic remedies.

4 *Memorandum of the President of the European Court of Human Rights to the States with a view to Preparing the Interlaken Conference* (3 July 2009); Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference, SG/Inf(2009)20 (18 December 2009); "Prevention of human rights violations is necessary through systematic implementation of existing standards at national level", *Memorandum of the Commissioner for Human Rights in view of the High Level Conference on the future of the European Court of Human Rights*, CommDH(2009) 38rev (7 December 2009); Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process*, above n. 1.

5 *Interlaken Declaration*, 19 February 2010:  
[http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf)



7. The Conference adopted an Action Plan, spelling out some of the actions that it calls on States to take. On implementation of the Convention at the national level, the Conference calls on states to commit themselves to taking a number of actions, including:

8. "...b) fully executing the Court's judgments, ensuring that the necessary measures are taken to prevent further similar violations;

9. c) taking into account the Court's developing case-law, also with a view to considering the conclusions to be drawn from a judgment finding a violation of the Convention by another State, where the same problem of principle exists within their own legal system;

10. d) ensuring, if necessary by introducing new legal remedies, ... that any person with an arguable claim that their rights and freedoms as set forth in the Convention have been violated has available to them an effective remedy before a national authority providing adequate redress where appropriate."

### **Increasing Parliament's involvement in national implementation of the Convention**

11. The Interlaken Declaration explicitly recognises that Parliaments, as well as governments and courts, have a fundamental role to play in guaranteeing and protecting human rights at the national level.<sup>6</sup> The role of national Parliaments has increasingly been recognised as crucial in achieving more effective national implementation of the Convention. Traditionally, it was seen principally as the responsibility of the judiciary to remedy human rights violations at the national level. Today, however, it is increasingly seen as the shared responsibility of all branches of the state (the executive and parliament as well as the courts) to ensure effective national implementation of the Convention, both by preventing human rights violations and ensuring that remedies for them exist at the national level.

12. National parliaments are therefore now encouraged to take a much more proactive role in making the Convention effective in the national legal system. As we noted above, a number of the recommendations in the package of measures accompanying Protocol 14 were aimed at enhancing the role of national parliaments in giving effect to the Convention. In addition to these 2004 recommendations encouraging parliaments to ensure that legislation is compatible with the Convention, there are now recommendations and exhortations from Council of Europe bodies which envisage a similarly proactive role for national parliaments in relation to the implementation of judgments of the European Court of Human Rights. A 2006 Resolution of the Parliamentary Assembly of the Council of Europe, for example, "invites all national parliaments to introduce specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries."<sup>7</sup>

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6 *Interlaken Declaration*, above n. 5, PP6.

7 PACE Resolution 1516 (2006), *Implementation of judgments of the European Court of Human Rights*, adopted by the Parliamentary Assembly on 2 October 2006, at para 22.1.

## Why are court judgments any of Parliament's business?

13. It may be tempting to think that how the Government responds to Court judgments about human rights is a matter for the executive and the courts rather than Parliament. Indeed, in many jurisdictions with constitutional bills of rights, courts are deemed to have a monopoly of interpretive wisdom and there is little scope for parliamentary involvement in ensuring that the executive complies with the supreme judicial will.

14. Under the UK's institutional arrangements for protecting human rights, however, Parliament, as well as the courts, has a central role to play in deciding how best to protect the rights which all are agreed are fundamental. This means that in our system, when a UK court decides that a law, policy or practice is in breach of human rights, Parliament still has an important role to play in scrutinising the adequacy of the Government's response to the judgment including, in some cases, asking itself whether a change in the law is necessary to protect human rights and, if so, what that change in the law should be.

15. Where the judgment is a judgment of the European Court of Human Rights, Parliament's role is a little more constrained because such a judgment gives rise to a number of very specific obligations of result on the UK, including the obligation to put an end to the breach and to prevent further violations in the future.<sup>8</sup> In practice, however, judgments of the European Court of Human Rights leave a considerable amount of discretion to the State concerned as to precisely how it amends its law, policy or practice to meet these obligations. The process of implementing a judgment of the European Court of Human Rights is therefore an unavoidably political process, constrained by the legal obligations (to stop the breach, provide a remedy for the individual concerned and to prevent new or similar breaches), but a political process nonetheless.

16. The increasing recognition that the implementation of judgments of the European Court of Human Rights is a complex legal and political process, involving all branches of the State and many different actors,<sup>9</sup> has in turn led to a growing recognition of the importance of the role of national Parliaments in the process of implementation. The Committee of Ministers of the Council of Europe, for example, has recognised that the implementation of Strasbourg judgments has "greatly benefited" from the increased involvement of national parliaments, and has encouraged "parliamentary oversight" of this process.<sup>10</sup> The Parliamentary Assembly of the Council of Europe in particular has recognised that the swift and full implementation of Court judgments often requires the co-ordinated action of various national authorities, and that this is most likely to be achieved if there are robust mechanisms and procedures in place to ensure regular and rigorous parliamentary supervision of the process at both national and European levels.<sup>11</sup> The need to reinforce parliamentary involvement in the implementation of Strasbourg

8 See Sixteenth Report of Session 2006–07, *Monitoring the Government's response to Court Judgments finding breaches of Human Rights*, HL 128/HC 728, at paras 4–7 for a more detailed explanation of the legal obligations which arise following a judgment of the European Court of Human Rights.

9 "The execution of a Strasbourg judgment is often a complex legal and political process, requiring cumulative and complementary measures implemented by several state organs": Progress report of the Rapporteur of the Committee on Legal Affairs and Human Rights, *Implementation of judgments of the European Court of Human Rights*, AS/Jur (2009) 36, para. 14 (Mr. Christos Pourgourides), September 2009.

10 Ministers' Deputies, *Implementation of judgments of the European Court of Human Rights*, Parliamentary Assembly Recommendation 1764 (2006), document CM/AS (2007) Rec 1764 final 30 March 2007, Reply adopted by the Committee of Ministers on 28 March 2007 at the 991<sup>st</sup> meeting of the Ministers' Deputies, para. 1.

11 See in particular Parliamentary Assembly Resolution 1516 (2006), above n.7.

Court judgments is a major theme of the recent report of the Rapporteur on the Implementation of Judgments of the European Court of Human Rights.

17. We agree with the analysis of the Parliamentary Assembly of the Council of Europe, and its Committee on Legal Affairs and Human Rights, that parliamentary involvement in the implementation of Court judgments on human rights has many advantages. It not only raises awareness of human rights issues in Parliament, but it increases the political transparency of the Government's response to Court judgments. In so doing it helps both to ensure a genuine democratic input into legal changes following Court judgments and to address the perception that changes in law or policy as a result of Court judgments lack democratic legitimacy. It facilitates the co-ordination of the various actors, raises the political visibility of the issues at stake and provides an opportunity for public scrutiny of the justifications offered by the Government for its proposed response to the judgment or for its delay in bringing such a response forward. **Parliamentary involvement is also an essential aspect of strengthening national mechanisms for ensuring compliance with the Convention and the Court's interpretation of the Convention and therefore for reducing the flood of applications to the Court.**

## National implementation of the Convention in the UK

18. The UK can generally be proud of its record on national implementation of the Convention. The Human Rights Act makes legal remedies available in UK courts for breaches of Convention rights. UK courts are required to take account of relevant Convention case-law,<sup>12</sup> and regularly do so. Our own legislative scrutiny work, independently scrutinising Government legislation for compatibility with the Convention before it is enacted, is recognised by the Council of Europe to be one of the examples of best practice on this particular aspect of national implementation throughout the Council of Europe.

19. The UK's record on implementing judgments of the European Court of Human Rights is also generally a good one. We consider in more detail in Chapter 2 below just how good the record is compared to other States in the light of the available statistics. As far as the UK's institutional arrangements are concerned, the degree of parliamentary involvement in the implementation of Strasbourg judgments, which has been largely achieved through our work monitoring the Government's responses to court judgments concerning human rights, is often held up by Council of Europe bodies as an example to be followed by other States.<sup>13</sup> We think it is important to acknowledge that in these important respects the UK's existing institutional machinery for implementing the Convention in its national legal system is advanced and, when working well, is regarded as in some respects a model of best practice for other member states.

20. There is, however, in our experience as an institution at the centre of the constitutional relationships between Parliament, the executive and the judiciary (including the European Court of Human Rights), considerable scope for improving the UK's record on national implementation of the Convention by improvements to the way in which the institutional

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<sup>12</sup> Section 2(1) Human Rights Act 1998.

<sup>13</sup> See in particular Parliamentary Assembly Resolution 1516 (2006), *Implementation of judgments of the European Court of Human Rights*.

machinery works in practice. If those improvements are made, in our view the UK can help to provide the leadership which is required in Europe in order to ensure the effective national implementation of the Convention on which the long term effectiveness of the Convention system depends. One of the most important aspects of national implementation of the Convention is the Government's response to judgments of the European Court of Human Rights. That particular aspect is the focus of this Report.

## The scope of our report

21. In this Report we provide Parliament with the results of our ongoing work monitoring the Government's response to court judgments concerning human rights since our last report on this subject in August 2008. Since this will be our last report on the implementation of judgments in the current Parliament, we have also taken the opportunity in this report to take stock of our work in this area and to ask to what extent we have succeeded in our objectives of, first, increasing Parliament's involvement following court judgments finding a breach of human rights and, second, ensuring that the systems and procedures which are in place are adequate both to facilitate parliamentary scrutiny and to ensure the full and expeditious implementation of judgments. In the light of our experience monitoring the implementation of judgments, we therefore make a number of recommendations addressing what we consider to be the main systemic obstacles to greater parliamentary involvement and to the full and swift implementation of court judgments.

22. We also take the opportunity in this report to draw together from our various reports<sup>14</sup> on this subject some guidance for departments as to how to respond to human rights judgments in a way which will facilitate effective parliamentary scrutiny of the adequacy and speed of that response.<sup>15</sup> This guidance is our response to the invitation of the Parliamentary Assembly of the Council of Europe to national parliaments to "introduce specific mechanisms and procedures for effective parliamentary oversight of the implementation of the Court's judgments on the basis of regular reports by the responsible ministries".<sup>16</sup> We hope that this guidance will assist departments when responding to a court judgment finding a law, policy or practice to be incompatible with the ECHR. We have not formally consulted the Government about this guidance and it will be kept under review in light of the Government's response and its operation in practice. We think it is beneficial, however, to distil our expectations and recommendations into formal guidance which we hope will in practice make for more effective parliamentary oversight of the Government's response to court judgments concerning human rights.

## Our evolving methodology

23. Since our last report we have continued to seek to enhance our scrutiny of the Government's responses to human rights judgments and to make it more accessible both

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14 Our previous Reports are Thirteenth Report of Session 2005-05, *Implementation of Strasbourg Judgments: First Progress Report*, HL 133/HC 954 ("First Monitoring Report"); Sixteenth Report of Session 2006-07, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, HL 128/ HC 728 ("Second Monitoring Report"); Thirty-First Report of Session 2007-08, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, HL 173/ HC 1078 ("Third Monitoring Report").

15 Annex, *Guidance for Departments on Responding to Court Judgments on Human Rights*.

16 Resolution 1516 (2006), above n.7, para 22.1.

to parliamentarians and to the public. For the first time, there has been a debate in the House of Lords on our report on human rights judgments, initiated by Lord Lester of Herne Hill, a former member of our Committee.<sup>17</sup>

We have recommended a number of amendments to Government Bills to remedy breaches of individual rights identified by the courts.<sup>18</sup> We consider these cases in Chapters 2 and 3 below. We have actively sought submissions from civil society about the issues arising from our scrutiny of the Government's response to Court judgments. We have also asked the Human Rights Minister, the Rt Hon Michael Wills MP, about various aspects of the Government's approach to implementing human rights judgments during his two appearances before us since our last report.<sup>19</sup>

24. We have written to Government departments in relation to a number of judgments and declarations of incompatibility and encouraged them to respond within the framework set out in our 2007 monitoring report. We also wrote to the Ministry of Justice in July 2009 to provide the Government with an opportunity to submit written evidence on the Government's work both on the implementation of specific judgments over the past year and on improving the systems and procedures for implementing such judgments. We specifically requested:

- Comments or information on the Government's general work on adverse human rights judgments, either from the ECtHR or the domestic courts, since June 2008;
- An outline of the steps taken by the Government to meet the Recommendation of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the ECtHR (CM (2008) 2), adopted in February 2008;
- Submissions on progress in respect of any of the cases considered in our last Report, including any updated information provided to the Committee of Ministers;
- A brief report on all adverse human rights judgments, either from the ECtHR or in respect of declarations of incompatibility made in our domestic courts, since June 2008, following the model adopted in the Netherlands and in line with our previous recommendations.<sup>20</sup>

25. We consider the Government's response to these requests in chapters 2 and 3 below.

26. We are grateful to officials in the Human Rights Division of the Ministry of Justice, the Registry staff of the European Court of Human Rights, the staff of the Department for the Execution of Judgments at the Secretariat of the Committee of Ministers and the staff of the secretariat to the Legal Affairs and Human Rights Committee of the Parliamentary

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17 HL Deb, 24 Nov 2008, col GC123.

18 See for example, Tenth Report of Session 2008–09, *Legislative Scrutiny: Policing and Crime Bill*, HL 68/HC 395, paras 1.106–1.110 (*R (Wright) v Secretary of State for Health* [2009] UKHL 3) and paras 1.111–1.119 (*Marper v UK* App. Nos. 30562/04 and 30566/04, 4 December 2008); Twelfth report of Session 2009–10, *Legislative Scrutiny: Crime and Security Bill*, HL 65/HC 400, paras 1.06–1.74 – (*Marper v UK*).

19 20 January and 2 December 2009. See evidence published in Second Report of Session 2009–10, *Work of the Committee in 2008–09*, HL 20/HC 249.

20 Ev 17 – 18

Assembly of the Council of Europe, whose co-operation greatly assisted our work in the preparation of this Report.

## 2 Judgments of the European Court of Human Rights

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### The UK's Record on the Implementation of Strasbourg Judgments

27. As we noted in chapter 1, the UK has a generally good record on the implementation of Strasbourg judgments. In our last monitoring report in 2008, however, we expressed disappointment about the number of “leading cases”<sup>21</sup> against the UK awaiting resolution by the Committee of Ministers. We noted that the United Kingdom was in the top ten States for delay in respect of that type of case. We concluded:

Delays of upwards of five years in resolving the most significant breaches of the European Convention are unacceptable unless extremely convincing justification for the delay can be provided.<sup>22</sup>

28. In its response to our report, the Government said:

The statistic that the Joint Committee has selected about the proportion of leading cases waiting for resolution is somewhat misleading. While it is statistically accurate to say that, of 15 United Kingdom cases identified by the Committee of Ministers as leading cases, eight have been subject to supervision for more than five years, it should be noted that, in the Government's understanding, six of these cases are the Northern Ireland cases [a series of six cases dealing with the investigation of allegations of state involvement in killings in Northern Ireland], that have presented particular issues and challenges. The statistic selected by the Joint Committee does not therefore disclose a particular systemic problem on the part of the United Kingdom.<sup>23</sup>

29. In April 2009, the Committee of Ministers published its second annual report on the execution of judgments, covering 2008.<sup>24</sup> We note that the figures provided in respect of the United Kingdom reinforce our earlier observation that the Government has a generally positive record of implementing judgments of the European Court of Human Rights. As the Minister pointed out to us in his letters of 21 May 2009<sup>25</sup> and 30 September 2009,<sup>26</sup> the UK has recently had a significant number of cases discharged from scrutiny by the Committee of Ministers.

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21 A “leading case” is a case which reveals a new systemic problem in a state which therefore requires the adoption of new general measures. It is to be distinguished from “repetitive cases” which raise a systemic problem which has already been raised before the Committee of Ministers.

22 Third Monitoring Report, para 28.

23 Cm 7524, *Responding to Human Rights Judgments*, Ministry of Justice, January 2009 (“The Government Response 2009”)

24 Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights: 2<sup>nd</sup> Annual Report 2008*, April 2009.

25 Ev 5

26 Ev 18



30. However, the picture painted in the 2008 statistics is not entirely positive. The UK remains in the top ten countries in respect of the time taken to implement leading cases.<sup>27</sup> In September 2009, the Council of Europe Parliamentary Assembly Rapporteur on the Implementation of Judgments, Christos Pourgourides, expressed his “serious concern” that 36 of the 47 Council of Europe Member States were failing fully to implement judgments of the ECtHR within a reasonable time. Considering judgments which had not been fully implemented within five years or which revealed major structural problems,<sup>28</sup> the rapporteur included the United Kingdom within his list of countries about which he was particularly concerned, listing 13 judgments against the UK.<sup>29</sup> He also singled out the UK along with 10 other countries for special attention, in the light of the Government’s approach to certain judgments which had taken a long time to implement (such those relating to as corporal punishment of children and the investigation of the use of lethal force by State agents in Northern Ireland).<sup>30</sup>

31. These differences of emphasis show the difficulty in interpreting the statistics which are available. The bare statistics about the implementation of judgments can be bewildering to the uninitiated. In the past, we have asked the Minister to give oral evidence at least once a year on the implementation of judgments and new judgments of the ECtHR and we have written to him in advance indicating what we would like to cover in questioning. As part of this process in future, **it would be helpful if the Government could review the annual statistics provided by both the Court and the Committee of Ministers relating to the United Kingdom and provide an overview of any developments it considers relevant or significant. We consider that such an annual review of the statistical information by the Government would help inform parliamentarians of the work of the United Kingdom to meet its obligations under the Convention and would also enhance our understanding of the Government’s position.**

32. In the meantime, we welcome the progress which has recently been made by the UK in having a number of cases discharged from scrutiny by the Committee of Ministers. We accept that the UK has a generally good record in fulfilling its obligation to respond fully and in good time to judgments of the European Court of Human Rights. However, there continues to be a small number of cases in respect of which there has been a long and inexcusable delay in implementation by the UK. Although the number of such cases is relatively small compared to the total number of judgments which the UK must implement, and compared to other member states, their significance is disproportionate because of the serious length of the delays in some cases and the importance of the issues at stake.

**33. In short, we find it unfortunate that the UK’s generally good record on implementation is undermined to a considerable extent by the very lengthy delays in implementation in those cases where the political will to make the necessary changes is lacking. In our view, whatever the challenges thrown up by a judgment of the European**

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27 Council of Europe Committee of Ministers, *Supervision of the Execution of Judgments of the European Court of Human Rights: 2<sup>nd</sup> Annual Report 2008*, April 2009, Appendix 1, Statistical Data.

28 Committee on Legal Affairs and Human Rights, *Implementation of Judgments of the European Court of Human Rights: Progress Report*, AS/JUR(2009)36, 31 August 2009, declassified 11 September 2009 (“Progress Report”).

29 Committee on Legal Affairs and Human Rights, *Implementation of Judgments of the European Court of Human Rights: Addendum to the Progress Report*, AS/JUR(2009)36 Addendum, 31 August 2009 (“Addendum”).

30 *Progress Report*, above n.27, Appendix.



**Court of Human Rights, a delay of five years or more in implementing such a judgment can never be acceptable. However good the record in the majority of cases, inexcusable delay in some cases undermines the claim that the Government respects the Court's authority and takes seriously its obligation to respond fully and in good time to its judgments. It is also damaging to the UK's ability to take a lead in improving the current backlog at the Court by encouraging other States with far worse records to take their obligations under the Convention more seriously. The UK, with its strong institutional arrangements for supervising the implementation of judgments, is in a good position to lead the way out of the current crisis facing the Court, but leaders must lead by example.**

## Recent judgments against the United Kingdom

34. During 2009, the European Court of Human Rights delivered 18 judgments in cases brought against the UK, in 14 of which it found at least one violation of the ECHR.<sup>31</sup> The majority of these cases involved the prohibition on discrimination in Article 14 ECHR (seven cases); three cases involved the right to liberty (Article 5); two cases involved the length of proceedings (Article 6); two cases involved the right to respect for private life (Article 8); and one case involved the right to freedom of expression (Article 10).<sup>32</sup>

35. We think it is important for Parliament to be properly informed about the extent to which cases against the UK contribute to the backlog of cases before the Court compared to other member states. The bulk of the almost 120,000 cases pending before the Court at the end of 2009 come from 10 States (Russia, Turkey, Ukraine, Romania, Italy, Poland, Georgia, Moldova, Serbia, and Slovenia). The number of cases pending against the UK, by comparison, was 1,690. The Court publishes statistics on the number of allocated applications by population. The figures for applications from the UK during 2006–2009, show that the number of applications from the UK by population is relatively low and fairly consistent.<sup>33</sup>

36. For the purposes of this report we have considered all judgments against the UK which became final between May 2008 and December 2009. In July 2009, we wrote to the Secretary of State for Justice and Lord Chancellor, the Rt Hon Jack Straw MP, indicating that we intended to examine a number of cases.<sup>34</sup> In each of these cases, our initial consideration indicated that some change in law, policy or practice might be needed to avoid the risk of further breaches of the Convention in future. We published a press notice which highlighted each of these issues in which we sought submissions from civil society. We consider a number of these issues in detail below.

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31 Annual Report of European Court of Human Rights (2009), January 2010. This compares with 36 judgments of the Court in 2008, in 27 of which it found a violation by the UK.

32 *Ibid*, XIII Statistical Information.

33 In 2008, the rate was 0.20 and in 2009, 0.18. This compares favourably for example, with France (0.48 in 2008 and 0.25 in 2009) and the Netherlands (0.23 in 2008 and 0.30 in 2009). Compare the rates for the main applicant States, Russia (0.71 in 2008 and 0.97 in 2009) and Ukraine (1.03 in both 2008 and 2009).

34 Ev 17

### ***Secret evidence and the detention of foreign terrorism suspects (A v UK)***

37. In *A v UK*,<sup>35</sup> the Grand Chamber unanimously held that there had been a violation of the right in Article 5(4) ECHR to have the lawfulness of detention decided by a court in the cases of four of those who were detained under Part IV of the Anti-Terrorism, Crime and Security Act 2001. The Court held that the evidence on which the state relied to support the principal allegations made against the four individuals was largely to be found in the closed material and was therefore not disclosed to the individuals or their lawyers. It said that special advocates could not perform their function, of safeguarding the detainee's interests during closed hearings, in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate. There was a violation of the right to a judicial determination of the legality of detention because the four detainees were not in a position effectively to challenge the allegations against them.<sup>36</sup>

38. The Government's view is that no further general measures are necessary to implement this judgment, because the legal regime found by the European Court of Human Rights to have violated the ECHR (Part IV of the Anti-Terrorism Crime and Security Act 2001 ("the ATCSA 2001")) has already been repealed.<sup>37</sup> **We do not accept the Government's argument that no further general measures are required. Part IV ATCSA 2001 was replaced by the control order regime in ss. 1–9 of the Prevention of Terrorism Act 2005 and that regime also involves secret evidence and special advocates, modelled closely on the regime which was the source of the violation in *A v UK*. Therefore, although *A v UK* concerned the 2001 Act not the 2005 Act, it is clear to us that the generality of its reasoning about the potential unfairness caused by secret evidence requires measures also to be taken in relation to control orders in order to prevent future violations.**

39. In the subsequent case of *AF*, the House of Lords held that the finding of a violation of Article 5(4) ECHR in *A v UK* was determinative of the similar issue which had arisen in the control order context, namely whether an individual subject to a control order was entitled to know at the very least the gist of the case against him. The reasoning in *A v UK* has therefore been applied to the control order context, at least in relation to the sorts of stringent control orders that were in issue in *AF*. As we explained in our recent report on control orders,<sup>38</sup> however, it is not yet clear whether the reasoning in *A v UK* will be applied to so-called "light touch control orders" which contain less onerous conditions on the controlee. The Government in the meantime is refusing to bring forward any changes to the legislative framework or rules which, in our view, would be the most reliable way to guard against the risk of future violations. **We repeat our recommendation, made in previous reports, that in order to give full effect to the decision of the Court in *A v UK*, the control orders legislation be amended to require the disclosure to the controlled person of the essence of the case against him.**

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35 *A and others v UK*, Application No. 3455/05 [GC], 19 February 2009, at paras 193–224.

36 *Ibid.*, at paras 218–220.

37 Letter from the Home Secretary dated 1 October 2009, see Ev 14; letter from David Hanson 13 January 2010, published in Ninth Report of Session 2009–10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395 ("Report on 2010 Control Orders Renewal"), at 49–53 (where the letter is incorrectly dated 7 January 2010).

38 Ninth Report of Session 2009–10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395.

40. We also draw attention in this context to our consideration of the growing use of secret evidence and special advocates in our report on Counter-Terrorism Policy and Human Rights: Bringing Human Rights Back In.<sup>39</sup> In that report we pointed out that there are now 21 contexts in which secret evidence and special advocates are or may be used, for at least some of which the decision of the Strasbourg Court in *A v UK* will have direct implications. **We urge the Government not to take a narrow approach to the implementation of the judgment in *A v UK* and repeat our recommendation in our report on counter-terrorism, that the Government urgently conduct a comprehensive review of the use of secret evidence and special advocates in all contexts, in light of the judgments in *A v UK* and *AF*, to ascertain whether their use is compatible with the minimum requirements of the right to a fair hearing, and report to Parliament on the outcome of that review.**

### ***Retention of DNA profiles and cellular samples (S & Marper v UK)***

41. In *S and Marper v UK*, the ECtHR concluded that the retention of fingerprint and DNA samples following discontinuation of proceedings or acquittal violated Article 8 ECHR (the right to respect for private life). In a strongly worded unanimous judgment of the Grand Chamber, the Court held that:

The blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society.<sup>40</sup>

42. Shortly after the judgment, and subsequently, we corresponded with the Home Secretary and others on the Government's approach to implementing the judgment. We published our correspondence in November 2009 before the issue was debated in Parliament during the parliamentary stages of the Policing and Crime Bill.<sup>41</sup> We have continued to monitor closely the Government's approach to this significant decision. We considered the Government's proposals in detail in our recent legislative scrutiny report on the Crime and Security Bill.<sup>42</sup>

43. The Government consulted on proposed changes to the retention of DNA and fingerprints.<sup>43</sup> It initially proposed to use secondary legislation under the then Policing and Crime Bill to implement the judgment, a position which we criticised during our scrutiny

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39 Sixteenth Report of 2009–2010, *Counter-terrorism Policy and Human Rights: Bringing Human Rights Back In*, HL Paper 86/HC 455.

40 App No 30562/04, Judgment, 4 December 2008, para 125.

41 Twenty-Seventh Report of Session 2008–09, *Retention, Use and Destruction of Biometric Data: Correspondence with the Government*, HL 182, HC 1113.

42 Twelfth Report of Session 2009–10, *Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill*, HL 67/HC 402, paras 1.5 – 1.74.

43 *Keeping the Right People on the DNA Database: Science and Public Protection*, May 2009.

of the Bill.<sup>44</sup> The Government subsequently withdrew these clauses in the House of Lords. During the debate, Lord Brett stated:

Although we remain committed to implementing the judgment of the European Court of Human Rights at the earliest opportunity, we accept the concerns raised by the Committee and other stakeholders and we accept the strength of feeling in your Lordships' House. Given that strength of feeling, we feel it is important to move forward with consensus, if possible. We therefore accept the view that this issue is more appropriately dealt with in primary legislation and have decided to invite Parliament to remove Clauses 96 to 98. As soon as parliamentary time allows, we will bring forward appropriate measures which will place the detail of the retention periods in primary legislation, allowing full debate and scrutiny of the issue in both Houses.<sup>45</sup>

44. The Home Secretary subsequently announced that the Government proposed to continue to hold the DNA profiles of all those convicted of crimes indefinitely and to retain the DNA profiles of those arrested but not charged for six years (except for children, where the retention period will generally be three years).<sup>46</sup> The Crime and Security Bill (clauses 14 to 20), introduced in the House of Commons on 19 November 2009, contains the relevant provisions. It substitutes a new section 64 and subsequent sections into the Police and Criminal Evidence Act 1984. Section 64 currently allows for samples to be retained indefinitely even after they have fulfilled their original retention purpose. The new clauses propose to impose a time limit for destroying samples once they have been loaded onto the national DNA database and have served the investigative purpose for which they were taken. They set out different retention periods depending on the age of the individual concerned, the seriousness of the offence or alleged offence, whether the individual has been convicted and, if so, whether it is a first conviction.

45. The Home Secretary recently confirmed to us that the Government has not issued guidance to the police on how to deal with DNA samples which have been collected since the Strasbourg decision and before the enactment of any new legislation.<sup>47</sup> However, during the summer, the Association of Chief Police Officers wrote to all Chief Constables stating:

... the current retention policy on fingerprints and DNA remains unchanged. Individuals who consider that they fall within the ruling in the *S & Marper* case should await the full response to the ruling by Government prior to seeking advice and/or action from the Police Service in order to address their personal issue on the matter.

ACPO strongly advise that decisions to remove records should not be based on proposed changes. It is therefore vitally important that any applications for removals

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44 Tenth Report of Session 2008–09, *Legislative Scrutiny: Policing and Crime Bill*, HL 68/ HC 395, paras 1.111–1.119.

45 HL Deb, 20 October 2009, Col. 668.

46 WMS, 11 November 2009.

47 Twenty-Seventh Report of Session 2008–09, *Retention, Use and Destruction of Biometric Data: Correspondence with the Government*, HL 182/ HC 1113, Letter from Home Secretary to Chair, November 2009.

of records should be considered against current legislation and the Retention Guidelines Exceptional Case Procedure.<sup>48</sup>

46. On 24 November 2009, the Human Genetics Commission, the Government's independent advisers on developments in human genetics, produced a report concluding:

- a) There is insufficient evidence at present to be able to say what benefits are derived from holding DNA profiles from different people.
- b) There needs to be very careful consideration of the equality impact of the database and any proposed changes to it – there are concerns about the potential for discrimination against certain groups in society, particularly young black men.
- c) There needs to be a clear and independent appeals procedure for people who have not been convicted and who want their DNA removed.
- d) All police officers should have their own DNA collected as a condition of employment
- e) The UK needs to make progress in working with the rest of Europe on exchanging DNA information and standardising procedures.<sup>49</sup>

47. When the Human Rights Minister gave evidence to us in December, we asked him about *S and Marper*. We received a letter from the Human Rights Minister on 22 January 2010, confirming that the Government considered that its proposals in the Crime and Security Bill were adequate to remove the breach identified by the Grand Chamber and providing a further explanation of the Government's approach.<sup>50</sup>

48. We have received a number of submissions from civil society expressing concern at the Government's approach to implementing *S and Marper*. Their concerns focus on the Government's decision initially to implement the decision by way of secondary legislation, the position of people who have not been convicted, children and young people, the approach to those convicted of minor offences and the over-representation of people from BME backgrounds.<sup>51</sup> We consider these concerns in our recent report on the Crime and Security Bill.

49. At its meeting December 2009, the Committee of Ministers considered the steps that the UK has taken to date to implement the ECtHR's judgment. It welcomed the steps taken by the UK to delete information on the DNA database relating to children under the age of 10 years; and that the Government proposed that all samples should be retained for a maximum of six months from the date on which they were obtained and that time limits for the retention of fingerprints and DNA profiles would be introduced, with special provisions for minors. However, it also noted:

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48 Twenty-Seventh Report of Session 2008–09, *Retention, Use and Destruction of Biometric Data: Correspondence with the Government*, HL Paper 182, HC 1113, Letter from Ian Readhead, Director of Information, ACPO, to Chief Constables, dated 28 July 2009.

49 *Nothing to hide, nothing to fear? Balancing individual rights and the public interest in the governance and use of the National DNA Database*, 24 November 2009.

50 Ev 54–56

51 See for example, Ev 43 – 45 (Liberty), Ev 29 (NICCY), Ev 33 (BIRW); Ev 39 (ILPA)

[...] that a number of important questions remain as to how the revised proposals take into account certain factors held by the European Court to be of relevance for assessing the proportionality of the interference with private life here at issue, most importantly the gravity of the offence with which the individual was originally suspected, and the interests deriving from the presumption of innocence (see paragraphs 118 – 123 of the judgment), and requested, accordingly, that the Secretariat rapidly clarify such questions bilaterally with the United Kingdom authorities.

And:

[...] that further information was also necessary as regards the institution of an independent review of the justification for retention in individual cases.<sup>52</sup>

50. It decided to consider the case again at its meeting in March 2010. On 8 March 2010, the decisions taken at this meeting were published. The Committee of Ministers welcomed the Government's efforts in relation to its bilateral consultations on the implementation of this case, but noted that despite the progress of these consultations had "not so far permitted arrival at a common understanding" as to how far the guidance of the ECtHR was reflected in the Government's current proposals. The Committee of Ministers specifically noted that disputes had arisen over the value of the research produced by the Government and the extent to which the Government's proposals met the guidance of the Grand Chamber on the need for independent review. Their decision particularly noted our report on the Crime and Security Bill and the advice of the Information Commissioner in his submission to the Public Bill Committee. The Committee has stressed the need for the Government to resolve the outstanding issues identified between the Government's proposals and the guidance of the ECtHR. They consider that particular urgency is required given the passage of the Crime and Security Bill through Parliament. They ask for the Government to convey any new developments and information to the Committee rapidly in an appropriate form, also ensuring that that information is accessible to national decision makers. They will consider this case again in June 2010, after the general election.<sup>53</sup>

51. When we considered the Government's proposals in our recent report on the Crime and Security Bill,<sup>54</sup> we concluded, in short, that the Government's approach was disproportionate and likely to lead to further breaches of Article 8 ECHR. We refer readers to our conclusions and recommendations in that report.

**52. The Government's response to this case has been inadequate both in terms of the approach it has adopted to implementation and in relation to the substance of the proposals in the Crime and Security Bill. While we welcome the Government's decision to act with haste, we are concerned that in this case, the Government's priority has not been to remove the incompatibility identified by the European Court of Human Rights, but to ensure the continued operation of the National DNA Database with as few changes as possible to its original policy. We have encouraged the Government on a**

52 CM/Del/Dec (2010) 1071, 7 December 2009. 1072nd Meeting (DH), 1 – 3 December 2009, Section 4.2.

53 CM/Del/Dec (2010) 1078, 8 March 2010. 1078th Meeting (DH), 2–4 March 2010, Section 4.2.

54 Twelfth Report of Session 2009–10, *Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill*, HL 67/HC 402, paras 1.5–1.74.



number of occasions to make greater use of the remedial order process. The HRA 1998 specifically envisaged that the Government might wish to use secondary legislation to provide a speedy response to adverse human rights judgments. In our view, the Government's original proposal in this case – that Parliament give a 'blank cheque' in secondary legislation for future reform of the taking and retention of DNA – was inappropriate. We welcome the Government acceptance that an effective Parliamentary debate on the substance of its proposals is necessary.

53. There are a number of positive aspects to the Government's proposals in the Crime and Security Bill, including the proposal to destroy all DNA samples within 6 months or as soon as a profile has been obtained. However, in our view, the proposal to continue to retain the DNA profiles of innocent people and children for up to 6 years irrespective of the seriousness of the offence concerned and without any provision for independent oversight, is disproportionate and arbitrary and likely to lead to further breaches of the ECHR.

54. It is disappointing that – except in relation to the DNA samples and profiles of children under 10 years old – little thought appears to have been given to transitional measures. We are concerned by the direction from ACPO to individual chief constables to continue their prior practice in respect of retention and destruction of samples, regardless of the decision of the Grand Chamber. It appears to have informed individual officers that, despite widespread publicity surrounding the decision, retention of DNA samples and profiles taken from innocent people should continue albeit that such retention might be in breach of the individual's rights to respect for private life. Given that retention is essentially a matter of discretion under the current legal framework, rather than a statutory obligation, we question whether the ACPO guidance to chief constables is compatible not only with Article 8 ECHR but also with the UK's obligation to abide by the judgment in *S & Marper* under Article 46 of the Convention.

55. We also remain concerned that the Government has not yet published any clear timetable for dealing with legacy samples. After the decision in *S & Marper*, it is clear that some individuals' DNA is currently retained in breach of the ECHR, as part of the National DNA Database. Without review, this continued retention is likely to lead to further litigation with associated costs to individuals and to the taxpayer.

56. In our report on the Crime and Security Bill, we noted that the Minister had openly admitted during the Commons Public Bill Committee that the Government intended to "push the boundaries" of the judgment in *S & Marper*. The Minister explained the Government's approach:

We have pushed the envelope as far as we can, but we believe that we can secure the support of the Committee of Ministers and comply with our obligations under human rights legislation.<sup>55</sup>

57. In our report, we criticised this approach:

We consider that it is unacceptable that the Government appears to have taken a very narrow approach to the judgment by purposely "pushing the boundaries" of the

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55 PBC Deb, 4 Feb 2010, Col 243.

Court's decision in order to maintain the main thrust of its original policy on the retention of DNA.<sup>56</sup>

While the Government waits for a new case where the Court can consider whether it has "pushed" the boundaries in the *Marper* judgment or whether it has broken them, further violations of individual rights will accrue and further litigation will follow with additional cost to the taxpayer.<sup>57</sup>

**58. We do not share the Minister's confidence that he will be able to persuade his Ministerial colleagues on the Committee of Ministers that the United Kingdom has effectively removed the breach identified by the Court in *S & Marper*. The responsibility under Article 46 of the Convention includes the responsibility to remove the risk of future, repeat violations. In our view, the Government's decision to purposely "push the envelope" in this case creates the risk of further violations of the Convention and fails to satisfy its obligations under Article 46. In any event, even if the Government is able to persuade its colleagues on the Committee of Ministers to accept its approach, we consider that there is a significant risk that the proposals in the Crime and Security Bill would lead to further litigation both at home and at the European Court of Human Rights and a significant risk of further violations of the right to respect for private life by the United Kingdom.**

### **Summary possession of people's homes (*McCann v UK*)**

59. On 13 May 2008, the ECtHR gave judgment in *McCann v United Kingdom*, holding that the lack of procedural safeguards in summary possession proceedings violated the right to respect for the home (Article 8 ECHR). The Court stated:

The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.<sup>58</sup>

60. Shortly after the decision, the Housing and Regeneration Bill was considered by the House of Lords. Baroness Hamwee tabled an amendment which sought to remedy the incompatibility identified in the *McCann* judgment. Baroness Andrews, for the Government, opposed the amendment on three grounds. First, domestic courts were already required to take ECtHR jurisprudence into account under Section 2(1) of the HRA. Secondly, the Strasbourg Court accepted that the proportionality defence would only be successful in exceptional cases and, according to the Government, the proposed amendment would complicate and delay the vast majority of cases. Thirdly, judgment was pending from the House of Lords in the related case of *Doherty*.<sup>59</sup> The amendment was withdrawn.

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56 Crime and Security Bill Report, above n.52, para 1.10.

57 *Ibid*, para 1.72.

58 *McCann v United Kingdom* (2008) 47 EHRR 913, App. No. 19009/04, 13 May 2008, para. 50.

59 HL Deb, 9 July 2008, cols 808–810.



61. On 30 July 2008, the House of Lords gave judgment in another case concerning a local authority's right to summary possession of a site which had been the home of a Gypsy family for 17 years, *Doherty v Birmingham City Council*.<sup>60</sup> The Secretary of State intervened in the case arguing, in the light of the ECtHR's decision in *McCann*, that the House of Lords should follow the approach of the minority of the House of Lords in *Kay v London Borough of Lambeth*<sup>61</sup>: that is, that in exceptional cases, the occupier could be permitted to argue that his individual personal circumstances made the application of the right to summary possession disproportionate in the particular circumstances of his case, and therefore in breach of Article 8 ECHR.<sup>62</sup> The House of Lords in *Doherty*, however, disagreed with the Secretary of State's argument. It held that the decision of the European Court of Human Rights in *McCann* required a slight modification of the approach taken by the majority of the House of Lords in *Kay*, which would allow the court hearing the application for summary possession to consider whether the local authority's decision to seek summary possession was reasonable (as opposed to proportionate), having regard to the length of time that the family had lived on the site.

62. The ECtHR will shortly consider its position again in the application of *Kay v United Kingdom*.<sup>63</sup> In this case, the applicants will raise very similar arguments to those in *McCann* and effectively seek to overturn the earlier judgment of the House of Lords that a summary process for possession was compatible with Article 8 ECHR.

63. In the light of the ECtHR judgment in *McCann* and its consideration by Parliament, we wrote to the Rt Hon John Healey MP, Minister for Housing, to ask for his response to a number of questions.<sup>64</sup> The Minister provided a helpfully full response.<sup>65</sup>

64. We first asked what steps the Government intended to take to give effect to the ECtHR's judgment in *McCann*. The Minister informed us that the Government's view was that the case should now be closed by the Committee of Ministers. Alternatively, the Government had suggested if it were preferable to await the ECtHR's decision in *Kay v United Kingdom*, it would take no further steps until judgment was given. The Committee of Ministers subsequently decided to await further information from the Government on any other measures taken or envisaged, pending the outcome of *Kay*. In its latest communication to the Committee of Ministers, the Government reiterated that it would take no further steps regarding implementation until judgment was given in *Kay v United Kingdom*.

65. We also asked whether the Government proposed to use primary legislation to give effect to the ECtHR's judgment and why the Government had chosen not to use the remedial order process. In response, the Minister stated that the Government did not consider that legislation was required to give effect to the judgment, as the House of Lords in the subsequent case of *Doherty* had taken *McCann* into account, by recognising that the

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60 [2008] UKHL 57, [2009] AC 367.

61 [2006] UKHL 10.

62 The House of Lords also unanimously held that where there was inconsistency between rulings of the domestic courts and the ECtHR, the domestic courts should follow the binding precedent of higher domestic courts.

63 App. No. 37341/06.

64 Ev 6

65 Ev 7–10

court in summary possession proceedings could consider whether it was reasonable to seek possession of land having regard to how long it had been someone's home, and a Convention-compatible approach was now being taken by the courts in further cases under the common law. However, he stated that if the ECtHR found against the Government in *Kay*, it would consider how best to implement the decision, including by primary legislation or remedial order.

66. We also asked the Government for the evidence on which it based its conclusion that legislative amendment in the light of *McCann* would complicate and delay the vast majority of cases.<sup>66</sup> The Minister told us:

To allow a merits review to take place in all cases would undermine that system and amount to giving protection to security of tenure to all occupiers of a property of a public authority landlord. It seems inevitable that, if arguments were to be heard on Article 8 as a matter of course, the majority of cases would take longer to be heard. Part of the rationale for the existing system, is that by creating a clear right to repossess properties in certain circumstances, housing authorities can efficiently and cost-effectively carry out their functions in allocating housing to those most in need. The House of Lords in *Kay* and *Doherty* were of that view and, for that reason sought to impose parameters and guidelines, to achieve a measure of legal certainty and to prevent Article 8 arguments being raised in every possession case.

67. Finally, we asked whether, given the House of Lords' decision in *Doherty*, the Government remained of the view that the domestic courts could take the decision in *McCann* into account. The Minister replied that the Government was satisfied that *Doherty* fully took into account the decision in *McCann*, but that if a lower court considered domestic case-law to be inconsistent with the ECtHR, it could say so and give leave to appeal to a higher court to determine the matter.

68. We are concerned about the Government's approach to the decision of the Court in this case. The decision in *McCann* is the latest in a series of decisions from the European Court of Human Rights which have considered the compatibility of summary processes for possession with the right to respect for home, private and family life guaranteed by Article 8 ECHR.<sup>67</sup> Despite these earlier decisions, the domestic courts, and in particular the House of Lords, have continued to disagree with the interpretation of Article 8 of the Convention adopted by the ECtHR.<sup>68</sup> The Government now rely on a later interpretation adopted by the domestic courts to argue that there is no need for reform of the law, despite the clear decision of the ECtHR in *McCann*.

69. We query the value of this repeat litigation on what we consider to be a relatively straightforward legal point. The European Court of Human Rights has recommended that before a person is evicted from a property, they must have the opportunity to be able to

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66 This was the argument deployed by the Government during the debates on the Housing and Regeneration Bill. See HL Deb, 9 July 2008, Cols 808–810 (Baroness Andrews).

67 Beginning with *Connors v United Kingdom* (2005) 40 EHRR 9.

68 See for example, *Doherty v Birmingham City Council* (2008) UKHL 57, (2009) 1 AC 367; *Kay v Lambeth LBC* (2006) UKHL 10, (2006) 2 AC 465. See also *Harrow LBC v Qazi* (2003) UKHL 43, (2004) 1 AC 983.

raise any arguable Article 8 ECHR claim before an independent and impartial tribunal. The Government (and domestic courts) consider that allowing an Article 8 defence to be raised in all possession cases would be administratively difficult for public authority landlords and would increase the time and costs involved in securing possession in every case. We question this assumption, since the decision in *McCann* only requires that there be an opportunity to have a hearing on the Article 8 issue in those cases where it is arguable that to grant possession would be a disproportionate interference with a person's right to respect for their home. This will be far from every case.

70. Furthermore, without action by the Government, domestic courts remain bound by the decisions of the House of Lords in *McCann* and *Doherty*, that express consideration of the proportionality of any interference with the right to respect for home in Article 8 ECHR is not required.<sup>69</sup> We think it is predictable that this position will not find favour with the European Court of Human Rights. We consider that the Minister should be required to explain why the costs of resisting further litigation in the case of *Kay v United Kingdom* on this repeat issue are justified. He should also explain why in the Government's view unmeritorious Article 8 ECHR defences to possession claims could not be adequately dealt with in the way that courts usually deal robustly with unmeritorious Convention claims, at the outset of the proceedings, and with the help of careful guidance to public authorities and to lower courts on the requirements of Article 8 ECHR in possession cases.

**71. We are concerned that the issue of respect for people's homes in summary possession cases remains unresolved, despite numerous decisions of the House of Lords and the European Court of Human Rights. We welcome the Government's acknowledgment that should the European Court of Human Rights decide again, in the pending case of *Kay v United Kingdom*, that domestic law is incompatible with Article 8 ECHR, it will have to revisit the question of whether a remedial order or legislation is necessary to remove the breach identified by the Court. Unless the European Court of Human Rights departs entirely from its reasoning in the case of *McCann*, we consider that the Government will inevitably need to revisit the breach identified in that case. We question whether it would not have been more cost effective to reform the summary possession process rather than to pursue further domestic and European litigation. It would be prudent for the Government in the meantime to consider how the process might be reformed to give effect to the decision in *McCann* in the event that the decision in *Kay* goes against it, in order to avoid any further delay following the forthcoming decision in *Kay v UK*.**

### ***Interception of communications (Liberty v UK)***

72. In *Liberty and others v United Kingdom* the ECtHR found that the interception of the applicants' communications under the Interception of Communications Act 1985 (ICA) (repealed by the Regulation of Investigatory Powers Act 2000 (RIPA)) breached the right to respect for private life and correspondence (Article 8 ECHR).<sup>70</sup> It held:

69 *Doherty v Birmingham City Council* (2008) UKHL 57, (2009) 1 AC 367; *Kay v Lambeth LBC* (2006) UKHL 10, (2006) 2 AC 465

70 *Liberty and others v United Kingdom* App. No. 58243/00, 1 July 2008.

The Court does not consider that the domestic law at the relevant time indicated with sufficient clarity so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it did not, as required by the Court's caselaw, set out in a form accessible to the public any indication of the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material. The interference with the applicant's rights under Article 8 was not, therefore, "in accordance with the law".<sup>71</sup>

73. We wrote to the Home Secretary on 11 June 2009 to ask him to respond to four questions relating to the UK's implementation of the judgment in *Liberty*. Firstly, we asked what steps, if any, the Government intends to take to give effect to the Court's decision. More specifically, we asked whether the Government is satisfied that the legal deficiencies identified by the ECtHR have been rectified by repeal of the ICA and enactment of RIPA and its Code of Practice. We also asked, in particular, whether the Government was satisfied that publicly accessible information on the current procedure for "selecting for examination, sharing, storing and destroying intercepted material" is available and where it can be located. Finally, we requested information on the extent to which work by the Government following on from its consultation on RIPA, aims to implement the ECtHR's judgment in this case.<sup>72</sup>

74. The Home Secretary replied on 14 July 2009.<sup>73</sup> He noted that the ICA had been repealed, that the main purpose of RIPA was "to ensure that the various investigatory powers encompassed within the Act are used in accordance with human rights" and that the Government is satisfied that RIPA has cured the deficiencies identified by the Court in *Liberty and others*. He stated that the Government proposed to make a small number of minor changes to the Interception Code of Practice.

75. The Committee of Ministers considered this case on 17 March 2009 and 15 September 2009. The UK Government has provided information to the Committee of Ministers which mirrors the information provided to us by the Home Secretary. The Committee of Ministers notes that whether interception of communications under RIPA is in accordance with the Convention is currently before the ECtHR in the case of *Kennedy v United Kingdom*<sup>74</sup> and that the Committee awaits information on any other measures taken or planned by the UK, pending the outcome of *Kennedy*.

76. In *Liberty's* evidence to us regarding this judgment, it states:

RIPA, enacted soon after the HRA, was intended to introduce a more human-rights friendly framework for targeted surveillance. Although it was a step forward, the Act attempted to remain faithful to those that had passed before it and the result is a Byzantine piece of legislation that is as confusing as it is insidious.<sup>75</sup>

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71 *Ibid.*, para. 69.

72 Ev 10

73 Ev 11–12

74 App. No. 26839/05.

75 Ev 46

77. Liberty said that their key concerns regarding RIPA included the lack of judicial oversight (particularly for the more intrusive forms of surveillance), the circumstances in which RIPA powers can be granted, and the fact that over 800 public bodies have access to targeted surveillance powers.<sup>76</sup>

78. The regime which has been set up under RIPA closely mirrors the ICA regime which was the subject of the Court's criticism in *Liberty*. The Court made clear that greater transparency and accountability for warrants which are issued and executed is necessary in order to comply with the Convention and that the current review by the Interception of Communications Commissioner is no substitute for a proper framework in primary legislation of checks and balances.<sup>77</sup> The Court's judgment refers to its earlier decision in *Weber v Germany*<sup>78</sup> which concerned the compatibility of the German G10 Act 2001 with Article 8 ECHR and determined that the supervisory measures in Germany met the requirements of Article 8. These include a six monthly report to Parliament on the implementation of the Act by the Federal Minister; an independent G10 Commission which the Minister must notify, and whose consent must be obtained, before commencing any planned surveillance operations, and which must inform the target of any monitoring once doing so would no longer jeopardise the operation; and provisions governing the use of search terms by the authorities.<sup>79</sup> In the UK, such a rigorous system for reporting and monitoring does not currently exist. For example, the Interception of Communications Commissioner reports to the Prime Minister, not to Parliament, and no system for individual notification exists.

**79. We note the similarities between certain features of the statutory regime which was in force at the time of the judgment in *Liberty v UK (IoCA)* and the statutory regime which is now in force (RIPA). We therefore consider this to be a case in which full implementation of the judgment of the Court requires the Government to consider general measures which go beyond the repeal of the statutory regime that was in force at the time. We note that compatibility of the RIPA regime will be the subject of a further judgment of the European Court of Human Rights in the forthcoming case of *Kennedy*. In the meantime we urge the Government to give serious consideration to ways in which it could amend the system for supervising the interception of communications to provide greater safeguards for individual rights. It should consider, for example, the powers and reporting of the Interception of Communications Commissioner and the information which the Minister routinely provides to Parliament on surveillance and monitoring; the notification of targets of monitoring and surveillance operations in the future, once those operations have ceased and their products will not be harmed by disclosure; and defining the phrase "national security" in RIPA, so as to provide greater specificity for those seeking and granting warrants as to what threats would and would not be considered sufficient to permit surveillance.**

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76 Ev 46

77 *Liberty and others v United Kingdom* App. No. 58243/00, 1 July 2008, para. 67.

78 App. No. 54934/00, decision dated 29 June 2006.

79 S. 3(2) G10 Act prohibits the use of catchwords that allow for the interception of specific communications. This means that strategic monitoring cannot be used to identify specific individuals. Instead, individualised authorisations are required.



***Prisoners' correspondence with medical practitioners (Szuluk v UK)***

80. In *Szuluk v UK*, the applicant complained that the monitoring of a prisoner's medical correspondence with his doctor was a breach of the Article 8 ECHR right to respect for correspondence. The ECtHR held:

In light of the severity of the applicant's medical condition, the Court considers that uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP.<sup>80</sup>

81. It concluded that "the monitoring of the applicant's medical correspondence, limited as it was to the prison medical officer, did not strike a fair balance with his right to respect for his correspondence in the circumstances".<sup>81</sup> Since the events which gave rise to Mr Szuluk's complaint, the relevant law has changed (Prison Service Order 4411 is relevant) and the NHS now provides medical care to prisoners.

82. On 13 October 2009, we wrote to the Secretary of State for Justice, the Rt Hon Jack Straw MP, to ask what steps the Government proposed to take to implement the decision in *Szuluk*. We also asked whether the Government proposed to revise PSO 4411, Chapter 5, to make clear that correspondence between a prisoner and a medical professional should be subject to confidential handling arrangements, similar to those applicable to legal advisors, Members of Parliament and the then Healthcare Commission, and if so how. Finally, we sought the Government's response on whether it considered that any amendments to the Prison Rules, Prison Service Instructions or other Prison Service Orders are necessary to ensure compliance with Article 8 ECHR in relation to correspondence between a prisoner and his or her medical advisor.<sup>82</sup>

83. The Secretary of State replied on 8 November 2009.<sup>83</sup> He informed us that amendments would be made to Prison Rule 35A, Young Offender Institution Rule 11 and Prison Service Orders 4411 (Prisoner Communications) and 3050 (Continuity of Healthcare for Prisoners) to make provision for correspondence between prisoners and a treating medical practitioner (in cases where there is a diagnosed life threatening illness) to be subject to confidential handling arrangements. Guidance in PSO 4411 and 3050 would support these changes but, according to the Justice Secretary, no other changes to Prison Service Orders needed to be made to give effect to the judgment.

84. In the Government's submission to the Committee of Ministers of September 2009, it points out that the judgment has been publicised in *The Times* and other legal databases and disseminated to the Prison Service. It suggested that no further general measures were necessary and that the case should be closed.

85. We note that a statutory instrument was laid before Parliament on 25 November 2009 and came into force on 1 January 2010 amending Rule 20 of the Prison Rules 1999 and Rule 27 of the Young Offender Institution Rules 2000 to provide that a prisoner may

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80 *Szuluk v United Kingdom*, App. No. 36936/05, 2 June 2009, para. 53.

81 *Ibid*, para. 54.

82 Ev 29–30

83 Ev 30–31

correspond confidentially with a registered medical practitioner who has treated the prisoner for a life threatening condition, unless the Prison Governor has “reasonable cause” to believe that the contents of the correspondence do not relate to the treatment of that condition.<sup>84</sup>

**86. We welcome the Government’s swift approach to respond to this judgment. We suggest that our successor Committee might consider the wider issue of prisoners’ correspondence with medical practitioners.**

### **Care proceedings (*RK and AK v UK*)**

87. In *RK and AK v United Kingdom*, the applicants argued that they did not have an effective remedy for their complaints following the unnecessary removal of their child from their care, after child protection issues arose concerning injuries to their child. Their child was subsequently discovered to have brittle bone disease and was returned to them. The events occurred before the coming into force of the Human Rights Act 1998 and the applicants were therefore unable to bring a claim for a breach of the right to respect for family life (Article 8 ECHR). The ECtHR held that there had been a violation of Article 13 (the right to an effective remedy) as:

The applicants should have had available to them a means of claiming that the local authority’s handling of the procedures was responsible for any damage which they suffered and obtaining compensation for that damage. Such redress was not available at the relevant time.<sup>85</sup>

88. We wrote to the Rt Hon Dawn Primarolo MP, the Minister of State for Children, Young People and Families asking for her response to a number of questions.<sup>86</sup> Firstly, we asked how many current cases the Government is aware of which involve allegations of negligence and/or breaches of the Convention which predate the coming into force of the Human Rights Act, and asked for a breakdown of those cases by level of court. In reply, the Minister told us there is no centralised database of all domestic litigation in which the Government is involved, but that the Department for Children Schools and Families is not aware of any domestic cases raising this issue. She acknowledged that there were a small number of applications raising a similar point before the ECtHR.

89. Secondly, we asked whether the Government was taking steps to settle claims where there was a high probability that the ECtHR would find the UK Government to be in breach of the right to an effective remedy. We suggested that settlements in such cases would avoid the cost and inconvenience to both parties of pursuing a case to Strasbourg. The Minister replied as follows:

The action taken by the Government in each piece of litigation in which it is involved is based on the individual circumstances of the case together with legal advice. While in principle the Government is usually prepared to consider settlement in cases of

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84 The Prison and Young Offender Institution (Amendment) Rules 2009 (2009/3082).

85 *RK and AK v United Kingdom* App. No. 38000(1)/05, 20 September 2008.

86 Ev 15–16

this type it is not appropriate for it to comment on the solutions currently being pursued in individual cases.<sup>87</sup>

90. Thirdly, we requested details of the steps that the Government has taken to ensure that the implications of the judgment for local authorities and child protection agencies are widely known. The Minister replied that the ECtHR did not find a breach of the right to respect for family life (Article 8 ECHR). Although acknowledging the Court's decision that there had been a breach of the right to an effective remedy (Article 13 ECHR), the Minister told us that the Human Rights Act now provides for a means of redress in cases like this, which satisfied the UK's obligations under Article 13. She suggested that no further general measures were required.

91. Finally, we asked the Minister whether the Government had advised local authorities and their lawyers not to seek to strike out similar claims to those made in *RK and AK* and if not, why not. She replied "it is not clear what the JCHR consider would constitute 'similar cases'", noting that every case has to be considered on its own merits. She stated:

The UK Government rarely seeks to strike out domestic cases unless they appear to be fundamentally flawed, and to have no merit. Nor would it seek to advise a local authority on whether to seek a strike out. Local authorities must form their own views in the circumstances of each case in question.<sup>88</sup>

92. **As the Minister rightly states, the enactment of the Human Rights Act makes cases like *RK and AK* less likely to need to go to the Strasbourg Court in the future, as applicants should be able to seek a remedy for their grievance in the UK. However, it appears that there are still some historic cases in the system which involve events which occurred before the coming into force of the Human Rights Act. Whilst we accept that the enactment of the Human Rights Act provides redress for cases where the events occurred after the Act came into force (2 October 2000), which is likely to be compatible with Article 13, no such mechanism exists for pre October 2000 cases. In such cases, the UK will, almost inevitably, be found to be in breach of the requirement to ensure an effective remedy under Article 13, irrespective of whether or not the Court finds a violation of a substantive Article of the Convention. In our view, where a finding of a violation is inevitable, the UK should actively pursue settlement negotiations, in order to relieve the Strasbourg Court of the burden of dealing with repetitive cases and to save both the applicant and the Government, the cost and inconvenience of pursuing the litigation in Strasbourg.**

### ***Length of criminal confiscation proceedings (Bullen and Soneji v UK)***

93. The case of *Bullen and Soneji v UK* concerned complaints by two applicants that the length of criminal proceedings against them, including confiscation proceedings, had contravened the reasonable time requirements of Article 6(1) ECHR. The Court found a breach of Article 6(1) holding:

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87 Ev 16

88 Ev 17



In light of the importance of what was at stake for the applicants in this case and without discounting the complexity of the legal issue in question, the Court finds the periods of delay attributable to the State, when taken cumulatively, to be unreasonably long and in breach of the reasonable time requirement as provided by Article 6 of the Convention.<sup>89</sup>

94. We wrote to the Home Secretary, the Rt Hon Alan Johnson MP, on 8 July 2009, seeking his response to two questions. Firstly, we asked what steps, if any, the Government intended to take to give effect to the ECtHR's decision. Secondly, we asked whether the Government proposed to revise guidance and training to relevant authorities such as prosecutors and the courts to ensure that future proceedings meet the reasonable time requirement in Article 6(1).<sup>90</sup>

95. The Home Secretary replied that the Crown Prosecution Service and the Revenue and Customs Prosecution Office have disseminated the judgment to prosecutors and have issued guidance reminding prosecutors of "the need to make progress in confiscation proceedings, to comply with court directions on timing and to have regard to the reasonable time requirement in Article 6 of the ECHR". He also noted that the National Policing Improvement Agency has issued guidance to Accredited Financial Investigators in the police service and other agencies reminding them of the need to be ready to proceed with confiscation hearings as soon as possible. The Home Secretary also told us that the Government and the judiciary were discussing the most appropriate way to implement the judgment, which included issuing a practice direction or circulars to court staff.<sup>91</sup>

96. The first and only discussion of this case by the Committee of Ministers was on 15 September 2009. In addition to the above information, the Committee of Ministers noted that the case had been publicised in *The Times* and other journals.

**97. The breach of the Convention found in the case of *Bullen and Soneji* appears to have resulted from a failure of practice rather than law. It is therefore right that the Government should seek to ensure that all those responsible for prosecuting or adjudicating upon criminal trials and confiscation proceedings are aware of their duties under Article 6 ECHR to ensure a fair trial within a reasonable time. We are satisfied that the UK is on the right track in respect of its implementation of this judgment, provided that it acts on the commitments for further action that it has made to the Committee of Ministers. We also recommend that the Ministry of Justice, Her Majesty's Courts Service and the relevant prosecuting authorities closely monitor practice in this area to ensure that similar delays do not occur in the future.**

## Delays in implementation

98. In this section, we follow up progress made in dealing with the issues raised by the judgments considered in our last Report. We do not propose to set out the facts in each of these cases at any length; this section should be read together with our previous Report.

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89 *Bullen and Soneji v United Kingdom* App. No. 3383/096, 8 January 2009, para. 71.

90 Ev 12

91 Ev 12–13.

### *Prisoners' voting rights (Hirst v UK)*

99. We have reported on the issue of prisoners voting rights on numerous occasions over the course of this Parliament. In October 2005, the Grand Chamber ruled that the current ban on prisoners' voting in the UK is disproportionate and incompatible with the Convention right to participate in free and fair elections (guaranteed by Article 3 of Protocol 1 ECHR).<sup>92</sup> The Grand Chamber were particularly concerned that the relevant statutory provision – Section 3, Representation of the People Act 1983 – has never been subject to a full parliamentary debate. The statutory ban on prisoner voting has subsequently been declared incompatible with Convention rights under Section 4 of the Human Rights Act 1998 by the Court of Session in Scotland.<sup>93</sup>

100. We last reported on this case in our report on the Political Parties and Elections Bill, where we revisited our two previous reports on human rights judgments, regretting the delay in the Government's response to this judgment.<sup>94</sup> We concluded:

It is unacceptable that the Government continues to delay on this issue. The judgment of the Grand Chamber was clear that the blanket ban on prisoners voting in our current electoral law is incompatible with the right to participate in free elections.<sup>95</sup>

101. Since our last report, the High Court has considered a further challenge by a prisoner to the blanket ban on prisoner voting.<sup>96</sup> Three further applications are pending before the European Court of Human Rights.<sup>97</sup>

102. The Government published its second stage consultation on the issue of prisoners' voting on 8 April 2009. The Government wrote to the Committee of Ministers in April 2009, summarising the Government's position and introducing the second stage of consultation.<sup>98</sup>

103. The Government's consultation puts forward four options, each based on the duration of sentence being served by a prisoner. This would mean all prisoners crossing a specific custodial threshold would automatically be deprived of the right to vote. Only four respondents to the first stage consultation argued in favour of a system of enfranchisement based on duration of sentence.

104. In their evidence, Liberty told us they had concerns about the Government's approach to its second stage consultation:

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92 *Hirst v United Kingdom*, App No 74025/01, 6 October 2005 (Grand Chamber).

93 *William Smith v Electoral Registration Officer* [2007] CSIH XA 33/04 (24 January 2007).

94 Fourth Report of Session 2008–09, *Legislative Scrutiny: Political Parties and Elections Bill*, HL 23/HC 204.

95 *Ibid*, para 1.19.

96 *R (Chester) v (1) Secretary of State for Justice (2) Wakefield Metropolitan Prison* [2009] EWHC 2923 (Admin). In this decision, the Court noted the existing declaration of incompatibility and reiterated that it was for Parliament to make any necessary changes to the law.

97 These include *Toner v United Kingdom*, App. No. 8195/08 (communicated to the UK on 27 August 2009); *Greens v United Kingdom*, App No 60041/08 (communicated to the UK on 27 August 2009); and App No 60054/08. See also Ev 27.

98 Ministry of Justice, Information Note to Committee of Ministers, 8 April 2009.

It has now been more than four years since the ECtHR ruled that UK law was unlawful yet no changes have yet been made. The first consultation paper rejected outright before receiving any responses the enfranchisement of all prisoners. It only proposed more minor reforms, saying explicitly that full enfranchisement was not an option. This position has been maintained in the second stage consultation which merely proposes allowing prisoners sentenced to between one and four years to continue to hold the right to vote. Liberty believes that all prisoners should retain the right to vote and the Government's failure to implement the ECtHR's decision reflects a lack of political will manifested in a series of delaying tactics, including a flawed and protracted consultation exercise.<sup>99</sup>

105. We wrote to the Minister to ask for further information on the Government's view that the proposals in the second stage consultation were proportionate.<sup>100</sup> We referred to the guidance of the Grand Chamber:

[The standard of tolerance required by the Convention] does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol 1, which enshrines the individual's capacity to influence the composition of the lawmaking power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations [...] The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

106. The Minister referred us back to the second consultation paper and reiterated:

Therefore: "The Government has reached the preliminary conclusion that to meet the terms of the judgment a limited enfranchisement of convicted prisoners in custody must take place, with eligibility determined on the basis of sentence length."

Regarding the decision not to enfranchise prisoners sentenced to four years and over, the consultation paper states (pages 25–26) "In line with its view that the more serious the offence that has been committed, the less right an individual should have to retain the right to vote when sentenced to a period of imprisonment, the Government does not intend to permit the enfranchisement of prisoners who are sentenced to 4 years' imprisonment or more in any circumstances. The Government believes that this is compatible with the ECtHR ruling in *Hirst (No 2)*."<sup>101</sup>

**107. We are concerned that, despite the time taken to publish the second consultation, the Government's proposals appear to take a very limited approach to the judgment in *Hirst*. As we noted earlier in this report, this type of approach can lead to further unnecessary litigation with the associated burden on the European Court of Human Rights and the taxpayer. We accept that the Grand Chamber left a broad discretion to**

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99 Ev 47

100 Ev 23–27

101 Ev 24

the United Kingdom to determine how to remove the blanket ban. However, the Court stressed that withdrawal of the franchise is a very serious step and gave guidance on the types of offences which might rationally be connected with such a step. We are not persuaded that automatic disenfranchisement based upon a set period of custodial sentence can provide the “discernible link between the conduct and circumstances of the individual” and necessity for the removal of the right to vote required by the Grand Chamber. In our view, this approach will lead to a significant risk of further litigation.

108. Despite our concerns about the narrow nature of the Government's approach, our overriding disappointment is at the lack of progress in this case. We regret that the Government has not yet published the outcome of its second consultation, which closed almost 6 months ago, in September 2009. This appears to show a lack of commitment on the part of the Government to proposing a solution for Parliament to consider.

109. In December 2009, the Council of Europe's Committee of Ministers issued an interim resolution in respect of the delay in this case. The interim resolution is a significant and serious step and is couched in unambiguous terms. The Committee of Ministers “expresses serious concern that the substantial delay in implementing the judgment has given rise to a significant risk that the next United Kingdom general election...will be performed in a way that fails to comply with the Convention”.<sup>102</sup>

110. On 15 December 2009, the Minister for Human Rights responded to a written question by Mark Oaten MP, “noting” the interim resolution and again confirming that the Government was considering the outcome of its second consultation on this issue.<sup>103</sup> On the same day, Lord Bach gave a similar response to an oral question by Lord Ramsbottom. He explained that the Government would “respond when we are ready to respond” and that it was the Government's view that the legality of the election would not be affected by the ongoing incompatibility with the ECHR caused by the blanket ban on prisoner voting.<sup>104</sup>

111. We wrote to the Human Rights Minister in December 2009 to ask for further information in the light of these developments.<sup>105</sup> Despite the conclusion of the second consultation, the Government told us that it would be some time before it introduces any legislative solution to address the breach identified by the Grand Chamber.<sup>106</sup> We asked the Government whether reform could be achieved by amendment to the Constitutional Reform and Governance Bill, which is currently before Parliament. The Minister for Human Rights told us it would be inappropriate to turn this Bill into a “Christmas tree”.<sup>107</sup> Similarly, the Government has rejected using the Remedial Order process to ensure that reform is considered before the general election:

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102 Interim Resolution CM/ResDH(2009)160 *Execution of the judgment of the European Court of Human Rights Hirst against the United Kingdom No. 2, (Application No. 74025/01, Grand Chamber judgment of 06/10/2005)*, Adopted by the Committee of Ministers on 3 December 2009 at the 1072nd meeting of the Ministers' Deputies.

103 HC Deb, 15 Dec 2009, Col 1043 W

104 HC Deb, 15 Dec 2009, Col 1393 – 1394. This repeats a view expressed in the Minister's letter dated 8 October 2009, see Ev 23–27.

105 Ev 27–28

106 Ev 28

107 Ev 28

We do not think that this is an appropriate issue for a remedial order; it is an appropriate issue for both Houses to decide whether and how this particular ruling of the European Court of Human Rights should be brought into force.<sup>108</sup>

112. In February 2010, the Prison Reform Trust and UNLOCK launched a campaign to encourage the Government to remove the blanket ban before the general election. Launching their campaign, they said:

The blanket ban remains in place despite the European Court of Human Rights ruling it unlawful in March 2004. In April 2009 the Government acknowledged for the first time that some sentenced prisoners will eventually be allowed to vote but, without urgent action, the general election in 2010 will not be compliant with the European Convention on Human Rights.

The Government must now put aside delaying tactics, respect and obey the judgment of the court and overturn the outdated ban on prisoners voting. People in custody should be able to exercise their democratic rights and responsibilities in the forthcoming election.<sup>109</sup>

113. The only possible way to introduce a solution before the next election would be as emergency legislation, fast-tracked through the Parliamentary process or through use of the Urgent Remedial Order process provided for in the HRA 1998. Given the lack of opportunity for debate or amendment, neither of these options would provide the degree of opportunity for parliamentary debate which the Court considered desirable and upon which the Government insists.

114. In March 2010, the Committee of Ministers confirmed its interim resolution. It reiterated its serious concern that:

A failure to implement the Court's judgment before the general election and the increasing number of persons potentially affected by the restriction could result in similar violations affecting a significant category of persons, giving rise to a substantial risk of repetitive applications to the European Court.

115. The Committee "strongly urged" the UK Government to rapidly adopt measures "of even an interim nature", in order to ensure the incompatibility is removed before the general election. The Committee decided to review progress at its next meeting in June, which is likely to take place after the election.<sup>110</sup>

**116. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK*. The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable.**

117. The delay in implementing the judgment inevitably leads to the Strasbourg Court being burdened by repetitive applications. Since the decision in *Hirst* another three

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108 HL Deb, 15 Jul 2009, Col 1212 (Lord Bach).

109 PRT and UNLOCK, *Barred from Voting*, February 2010.

110 CM/Del/Dec (2010) 1078, 8 March 2010. 1078th Meeting (DH), 2–4 March 2010, Section 4.2.

applications challenging the blanket ban on prisoners voting have been lodged against the UK in Strasbourg. Another two cases challenging similar bans in Russia and the Czech Republic are pending.<sup>111</sup> We understand that the Government intends to defend the cases against the UK, with the associated costs to the taxpayer. If the Government continues to neglect its duty under Article 46 ECHR to remove the blanket ban on prisoners voting, further cases will arise. We consider that the longer the ban remains in place the greater the incentive will be for existing prisoners – and in particular, if the ban remains in place at the general election, those prisoners denied the right to vote in the election – to bring further applications to the European Court of Human Rights challenging the blanket ban. The Court in *Hirst* made clear that it was making no judgment on the decision to remove the right to vote in respect of Mr Hirst, but only that the blanket ban was disproportionate. It did not award Mr Hirst any “just satisfaction” or compensation. The Convention is a living instrument and the Court’s position on prisoner voting rights will continue to evolve. Where a breach of the Convention is identified, individuals are entitled to an effective remedy by Article 13 ECHR. **So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation.**

118. In our 2006 report on this case, we regretted the fact that further delay could lead to the general election taking place in a way which would mean that some prisoners were “unlawfully disenfranchised”.<sup>112</sup> This conclusion referred to the regrettable circumstance that appears to have come to pass, that a United Kingdom general election would proceed despite the knowledge that it would take place in a way which breached the European Convention on Human Rights. The Government, in its recent correspondence with us and the Committee of Ministers has been keen to emphasise that the ongoing breach of the Convention cannot affect the legality of the forthcoming election. In his recent letter, the Human Rights Minister said:

Whilst the Government is bound under Article 46 of the ECHR to implement decisions of the European Court of Human Rights, such decisions do not have the effect of striking down the national law to which they relate. The UK is a dualist legal system in which international law obligations must be translated into domestic law via Parliament. Therefore, whilst the Government accepts that the Court in *Hirst v UK (No 2)* found that section 3 of the Representation of the People Act 1983 is not compliant with its international law obligations under the Convention, the domestic law continues in force. Similarly, this decision does not have any impact on the continuing validity of our current body of domestic election law.<sup>113</sup>

**119. The Government’s analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government’s international obligation**

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<sup>111</sup> See *Gladkov v Russia*, App. No. 15162/05 and *Anchugov v Russia*, App. No. 11157/04. See also *JV v Czech Republic*, App. No. 17613/07.

<sup>112</sup> Third Monitoring Report, para 63.

<sup>113</sup> Ev 28



to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations.

### ***Security of Tenure for Gypsies and Travellers (Connors v UK)***

120. In our last report, we welcomed the remedy proposed by the Government in Section 318, Housing and Regeneration Act 2008, designed to remove the incompatibility identified in the case of *Connors v UK* by extending the application of the Mobile Homes Act 1984 to Gypsy and Traveller sites, so introducing security of tenure for Gypsies and Travellers.<sup>114</sup> The remedy eventually adopted by the Government was essentially the same as that recommended by our predecessor Committee more than four years previously and therefore while we welcomed the necessary amendment of the mobile homes legislation to remove the incompatibility we expressed our disappointment at the significant and unnecessary delay in doing so.

121. It has now been brought to our attention that Section 318 of the Housing and Regeneration Act 2008 has not yet been brought into force and the Government has decided not to lay the necessary statutory instrument to bring it into force before the general election, because there is insufficient parliamentary time and other statutory instruments are regarded as more of a priority.

122. In the light of our consecutive reports regretting the significant delay in implementing the *Connors* decision, we are concerned to hear that the delay continues in bringing that remedy into effect. In our Third Monitoring Report we described the delay in implementing the judgment in *Connors* as unacceptable and recommended that the Government reconsider using a remedial order to provide a remedy. The Government responded in August 2007 that it agreed that the issues raised by the *Connors* judgment "should be resolved at the earliest opportunity" and it was the Government's intention to implement the judgment in the forthcoming Housing and Regeneration Bill.<sup>115</sup> The Housing and Regeneration Act 2008 received Royal Assent on 22 July 2008. In his letter to us dated 30 September 2009 the Human Rights Minister informed us that s. 318 of the Act will "complete the implementation of this judgment" and that "the order bringing this provision into force in England is expected to be laid before Parliament in the autumn."<sup>116</sup>

**123. In view of this apparent yet further delay in remedying the incompatibility in this case, we have written to the Minister to ask whether the Government intends to introduce the statutory instrument necessary to bring Section 318 into force before the end of this Parliament; if not, why not; and to ask for a full explanation of why a statutory instrument which would bring into force a piece of legislation which prevents**

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<sup>114</sup> Third Monitoring Report, para. 71. We considered the Government's proposal in detail in our legislative scrutiny report on the Housing and Regeneration Bill: Seventeenth Report of Session 2007–08, *Legislative Scrutiny: 1) Employment Bill, 2) Housing and Regeneration Bill, 3) Other Bills*, HL 95/HC 501, paras 2.29–2.33.

<sup>115</sup> Third Monitoring Report, Ev 62.

<sup>116</sup> Ev 20–21

**future breaches of the Convention is not regarded as a priority claim on parliamentary time by the Government.<sup>117</sup>**

### Interim measures (Rule 39 Cases)

#### *Iraqi civilians under threat of the death penalty (Al-Saadoon & Mufdhi v UK)*

124. On 13 January 2009 we wrote to the Secretary of State for Defence to raise our concerns that two Iraqi civilians had been transferred to the custody of the Iraqi High Tribunal, despite a decision of the European Court of Human Rights indicating that “the applicants should not be removed or transferred from the custody of the United Kingdom until further notice” and a finding by the UK courts that there was a substantial risk that the men would face the death penalty.<sup>118</sup> The detailed facts and chronology of this case, were at that time unclear, but had received a significant degree of attention in the UK press.<sup>119</sup> In short:

- The applicants were two Iraqi civilians accused of the murder of two members of the UK armed forces.
- They were held by the UK armed forces in Basra until sometime during the afternoon of 31 December 2008, when they were transferred to the custody of the Iraqi High Tribunal.<sup>120</sup> Those forces formed part of the multinational forces in Iraq pursuant to UN Security Council Resolutions. Their UN mandate expired at midnight on 31 December 2008.
- The applicants argued that their return to the Iraqi High Tribunal for trial, which has the power to impose the death penalty, will lead to a breach of their rights under the European Convention on Human Rights (ECHR), including the right to life (Article 2) and the right to be free from torture, inhuman and degrading treatment or punishment (Article 3) as well as other Convention rights.
- Their case was heard and dismissed by the Court of Appeal on 30 December 2008, which refused to extend an injunction preventing the UK from ordering the transfer of the applicants to Iraqi custody.
- On the same day, the European Court of Human Rights took an interim measures decision, which indicated to the United Kingdom that the applicants should not be removed from the custody of the United Kingdom until further notice.<sup>121</sup>
- Despite the decision of the European Court of Human Rights, the applicants were delivered to the Iraqi High Tribunal on the afternoon of 31 December 2008.

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<sup>117</sup> Ev 57

<sup>118</sup> Ev 1

<sup>119</sup> See *Al-Saadoon & Mufdhi v Secretary of State for Defence* [2008] EWHC 3098 (Admin); Transcript; Court of Appeal Hearing, 29–30 December 2008.

<sup>120</sup> The applicants were each taken into the custody of UK Armed Forces in April and November 2003, respectively. On 27 December 2007, after a criminal investigation, the Iraqi High Tribunal requested that the applicants be transferred to their custody.

<sup>121</sup> Pursuant to Rule 39 of the Rules of Court of the European Court of Human Rights.



- The High Court granted a further emergency injunction on the afternoon of 31 December 2008 to prevent the transfer of the applicants to Iraqi custody, in line with the decision of the European Court of Human Rights. This order was later rescinded as the applicants had already been transferred.
- The Government wrote to the European Court of Human Rights on 31 December 2008, to explain its decision. It said that, in the light of the decision of the Court of Appeal, and its analysis of the application of the European Convention of Human Rights and the broader requirements of international law, it was the view of the United Kingdom Government that it had “no lawful option other than transfer to the Iraqi authorities”.<sup>122</sup> In addition, it explained that:

The European Court of Human Rights at Strasbourg has asked the UK to retain custody in Iraq of Mr Al Saadoon and Mr Mufdhi when we have no legal power to do so. Compliance with Strasbourg requests would normally be a matter of course but these are exceptional circumstances.<sup>123</sup>

125. We asked the Secretary of State for Justice and the Minister for Human Rights for more information on this case, during our annual evidence session on 20 January 2009. The Secretary of State maintained the Government's position that the Iraqi men were not legally in UK custody and that the UK would be in breach of international law if they had failed to transfer them to the Iraqi court. When asked about the conflicting obligation to comply with Rule 39 decisions, the Minister for Human Rights said that the Government had responded to legal advice that failure to hand over both men would have led to a breach of international law.<sup>124</sup>

126. The Rt Hon Bob Ainsworth MP, Minister for State for Armed Forces, responded to our request for further information on 26 January 2009, enclosing a full copy of the Government's correspondence with the ECtHR.<sup>125</sup> The Minister provided us with a fuller chronology that clarified that the decision of the ECtHR was received on the afternoon of 30 December 2009 and that the men were transferred at quarter past one the following afternoon, less than 24 hours later. Later that day, after the prisoners were transferred, the Government informed the ECtHR and the applicants' solicitors. The Secretary of State told us that he understood our concern about the Government decision to transfer, despite the interim measures request, and reiterated that the Government “take very seriously our responsibilities in relation to such measures”. He explained that, in this case, the Government considered that transfer was the “only lawful option”. He added:

It is the Government's policy to comply with Rule 39 measures indicated by the court as a matter of course where it is able to do so. However, in the wholly exceptional circumstances of this case, and in particular given that continued detention of the applicants would have been unlawful...The Government therefore took the view that, exceptionally, it could not comply with the measure indicated by the Court; and that

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122 Letter dated 31 December 2008 from Derek Walton, Agent of the Government of the United Kingdom to Mr T L Early, Section Registrar, European Court of Human Rights.

123 *Independent, Pair accused of murder handed over to Iraqi authorities*, 31 December 2008. See also Ev 3–4.

124 Second Report of Session 2008–09, *Work of the Committee in 2008–09*, HL 20/HC 185, Ev 14–16.

125 Ev 2–3

this action should not be regarded as a breach of Article 34 of the convention in this case.<sup>126</sup>

127. The Minister confirmed that the Government accepted that, ultimately, the jurisdiction of the ECHR is a matter for the ECtHR to determine.<sup>127</sup> Failure to comply with interim measures may breach the right of an individual to petition the European Court of Human Rights for a decision on the application of the European Convention on Human Rights. Liberty also intervened in this case. They told us that they had:

grave concerns about the Government's failure to comply with the ECtHR's interim measure, notwithstanding its stated reasons for doing so. Interim measures are binding on contracting states and failure to comply with them dangerously undermines the whole system of protection of Convention rights.<sup>128</sup>

128. The ECtHR declared this decision admissible on 30 June 2009. A number of parties were granted leave to intervene, including the Equality and Human Rights Commission. The Government continued to argue that the applicants were not within the jurisdiction of the United Kingdom for the purposes of Article 1 of the ECHR, and so, the Convention did not apply. The Court held that the applicants remained within the United Kingdom's jurisdiction until their physical transfer to the custody of the Iraqi authorities on 31 December 2008. It concluded: "given the total and exclusive *de facto*, and subsequently *de jure* control exercised by the United Kingdom authorities over the premises in question, the individuals detained there, including the applicants, were within the United Kingdom's jurisdiction". The Court reserved the question of whether the United Kingdom was bound by international law to hand over the applicants to the Iraqi authorities, and whether any such obligation could override the requirements of the Convention, until the hearing on the merits of the case. The Court also reserved the question of whether the decision not to comply with the Rule 39 request was in breach of Article 34 and the right of individual petition.<sup>129</sup>

**129. Although there was not a final judgment in this case, because of the seriousness of what was at stake for the individuals concerned we exceptionally decided to write to the Government to raise our concern over its decision not to comply with the Rule 39 request of the court, that the Iraqi applicants be retained by the UK, in order to allow their case to be considered by the European Court of Human Rights. We welcome the Government's acceptance that the decision of the European Court of Human Rights on the scope and jurisdiction of the ECHR is final, and question why the analysis of the Court of Appeal on this question was allowed to form the basis for the decision to ignore the Rule 39 request from Strasbourg. We remain concerned about the Government's conduct in this case.**

**130. We are concerned that despite the extremely grave issues at stake in this case, we had to write to the Secretary of State for Defence in order to secure a more detailed chronology and account of and the decisions taken by the Government. A full response**

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126 Ev 3

127 *Ibid.*

128 Ev 46. See also Ev 33 (British Irish Rights Watch).

129 *Al-Saadoon & Mufdhi v United Kingdom*, App. No. 61498/08, Decision, 30 June 2009.

**took over two weeks. We recommend that in any case where the Government considers refusing a Rule 39 request, information about that request and the Government's decision should be provided to us routinely and without delay.**

131. The ECtHR handed down its judgment on the merits in this case on 2 March 2010, shortly before we agreed this report. In a Chamber judgment, the ECtHR decided that there had been a violation of the right to be free from inhuman and degrading treatment (Article 3), the right to access an effective remedy (Article 13) and the right of individual petition (Article 34). The UK judge, Sir Nicolas Bratza, entered a partly dissenting judgment and would not have found a violation of either Article 13 or Article 34.<sup>130</sup>

132. The Court examined the facts of this case in the round and concluded that the UK had not taken adequate steps to remove the risk that the Iraqis would be subjected to the death penalty. The Court rejected the Government's argument that it was obliged by international law, and the terms of agreement between the Iraqi Government and the UK governing the presence of UK Armed Forces in Iraq:

It is not open to a Contracting State to enter into an agreement with another State which conflicts with its obligations under the convention. The principle carries all the more force in the present case given the absolute and fundamental nature of the right not to be subjected to the death penalty.<sup>131</sup>

133. The ECtHR considered the analogy drawn by the Government and domestic courts between the circumstances in this case and earlier domestic decisions involving individuals at diplomatic embassies. The court stressed that earlier Convention case-law appeared to reach the opposite conclusion and that the facts in this case were very different: "the applicants did not choose to seek refuge with the authorities of the United Kingdom; instead the respondent State's armed forces, having entered Iraq, took active steps to bring the applicants within the United Kingdom's jurisdiction, by arresting them and holding them in British-run detention facilities. In the absence of an assurance by the Iraqi authorities that the death penalty would not be applied, transfer was in violation of the prohibition on inhuman and degrading treatment.<sup>132</sup> The ECtHR concluded that this treatment was ongoing and, unusually, gave an indication that the effective implementation of this judgment would require the UK to now seek reassurances from the Iraqi government that the death penalty would not apply.<sup>133</sup> This was particularly important given that the applicants' cases were currently being reinvestigated with a view to a retrial.

134. In respect of their decisions on the right to an effective remedy and the right to individual petition, the ECtHR focused on the UK decision not to comply with Rule 39. It held that:

The Government have not satisfied the Court that they took all reasonable steps, or indeed any steps, to seek to comply with the Rule 39 indication. They have not informed the Court, for example, of any attempt to explain the situation to the Iraqi

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130 App No 61498/08, 2 March 2010

131 *Ibid*, para 138.

132 *Ibid*, paras 134 – 143.

133 *Ibid*, para 171.

authorities and to reach a temporary solution which would have safeguarded the applicants' rights until the Court had completed its examination.<sup>134</sup>

**135. The judgment in this case is not yet final. We have not had the opportunity to consider the Government's views on its findings and we have no information on whether the Government intends to request that the case is considered by the Grand Chamber. We reiterate our view that the issues raised in this case are serious ones. We note that a number of additional applications against the UK about the scope of the jurisdiction of the ECHR and its application to the activities of UK forces in Iraq are due to be heard by the ECtHR during 2010. We particularly draw the Government's attention to the ECtHR guidance in this case that a violation of the rights of the applicants to be free from inhuman and degrading treatment is ongoing, and that the Government remains under an obligation to seek diplomatic reassurances from the Iraqi Government that the death penalty will not be applied in this case. We recommend that the Government provide a full response to the conclusions of the ECtHR in this case, including whether a request for a hearing by the Grand Chamber is planned. We recommend that our successor Committee consider any Government response and keep this case under close scrutiny in the next Parliament.**

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134 *Ibid*, para 163

## 3 Declarations of Incompatibility

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### Introduction

136. There has been one new final declaration of incompatibility made during the past year.<sup>135</sup> There have been a number of new declarations, however, which have been overturned on appeal or which are currently subject to appeal.<sup>136</sup>

137. In our previous Reports, we praised the Ministry of Justice database on declarations of incompatibility, noting that, if regularly updated, the database can significantly increase the transparency of the Government's response to these important judgments.<sup>137</sup> In our last Report, we expressed disappointment that the database did not appear to have been updated for a significant period of time; nor was it easily accessible on the new, redesigned, Ministry of Justice website.

**138. Through officials at the Ministry of Justice, we have been provided with an updated version of this database, which adopts a different narrative format, which in our view is difficult to follow and less accessible. We are disappointed that the database is no longer available on the Ministry of Justice website. We recommend that the Ministry of Justice takes steps to resolve this problem to enable widespread public access to its database on declarations of incompatibility in order to enhance transparency in the implementation process. We also repeat our recommendation that the database should be reviewed and updated on at least a quarterly basis.**

### Recent declarations of incompatibility

#### *Suitability of care workers to work with vulnerable adults (Wright v Secretary of State for Health)*

139. On 21 January 2009, in *Wright v Secretary of State for Health*, the House of Lords made a declaration of incompatibility in relation to the scheme for placing care workers employed to look after vulnerable adults on a list of people considered unsuitable to work with such adults. It declared section 82(4)(b) of the Care Standards Act 2000 to be incompatible with the right to a fair trial (Article 6 ECHR) and to respect for private life (Article 8 ECHR).

140. We considered and reported on this declaration of incompatibility when scrutinising the then Policing and Crime Bill, as it amended the Safeguarding Vulnerable Groups Act 2006 which replaced the Care Standards Act.<sup>138</sup> We wrote to the Minister to ask whether, in the light of the House of Lords judgment in *Wright*, the 2006 Act is compatible with human rights and whether it meets the problems identified by the House of Lords in

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<sup>135</sup> *R (Wright) v Secretary of State for Health* [2009] UKHL 3.

<sup>136</sup> *R (Black) v Secretary of State for Justice* [2009] UKHL 1 (House of Lords overturned the declaration of incompatibility made by the Court of Appeal); *Nasseri v Secretary of State for the Home Department* [2009] UKHL 23 (House of Lords' upheld Court of Appeal's decision overturning declaration of incompatibility made by the High Court); *R (F) v Secretary of State for Justice* [2009] EWCA Civ 792 (subject to appeal).

<sup>137</sup> Second Monitoring Report, para. 27; Third Monitoring Report, para. 82.

<sup>138</sup> Tenth Report of Session 2008–09, *Legislative Scrutiny: Policing and Crime Bill*, HL 68/ HC 395, paras 1.106–1.110.

relation to Articles 6 and 8 ECHR. In reply, the Minister told us that the Government remained satisfied that the 2006 Act was compatible with human rights, as the new scheme does not involve any provisional listing and the Independent Safeguarding Authority (ISA) must invite representations before placing someone on the list. However, the Minister also noted that individuals would not be able to make representations where it was considered that they posed an immediate risk of harm. In our Report, we concluded that aspects of the new scheme under the Safeguarding Vulnerable Groups Act remained troubling from a human rights perspective. We concluded:

The fact that the individual will not be invited to make representations where it is deemed that she poses an immediate risk of harm before she is placed on the barred list appears, on its face, to be analogous to the Secretary of State's discretion to offer some care workers, but not others, the opportunity to make representations, which was part of the House of Lords' reasoning in *Wright*.<sup>139</sup>

141. We noted the House of Lords' decision that there needed to be a swift method for hearing both sides of the story and before irreparable harm was done. We concluded that it was unclear how quickly a hearing involving the barred person, at which he or she could make representations, would take place under the new scheme. We recommended that the Government consider whether the procedure needs to be amended to give effect to the judgment by ensuring that an individual who is placed on the barred list without the possibility of making representations is able to make representations at a full hearing as a matter of urgency and, as the House of Lords held, "before irreparable damage [is] done".<sup>140</sup> **We reiterate these concerns and encourage the Government to clarify the issue.**

142. We have recently received a submission from Richard Thomas, Administrative Justice and Tribunals Council Chairman, expressing serious concerns about the compatibility of Section 4 of the Safeguarding Vulnerable Groups Act 2006 with the right to a fair hearing, as guaranteed by Article 6 ECHR and the right to respect for private and family life, guaranteed by Article 8 ECHR. His particular concern focuses on the limited right of appeal open to individuals who are to be listed. The existing route of appeal is limited to appeal on grounds of error of fact or error of law. Mr Thomas points out, that in decisions which involve the determination of whether it is appropriate for an individual to be included on a safeguarding list, this involves the exercise of discretion. Without a full appeal in respect of this discretionary power, the right to appeal is not adequate to meet the need for a hearing by an independent and impartial tribunal for the purposes of Article 6 ECHR. This reasoning has recently been confirmed by Lord Justice Laws in the Court of Appeal:

Though it may entertain appeals on law or fact from the ISA for the purposes of its jurisdiction "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact (s 4(3) of the 2006 Act). The issue most likely to be critical in a case like the present, namely whether on the proved or admitted facts the quality of an individual's act should be judged severe

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<sup>139</sup> *Ibid.*, para. 1.110.

<sup>140</sup> *Ibid.*, para. 1.110.



enough to put him on the barred list, appears to lie beyond the Upper Tribunal's decision.<sup>141</sup>

143. We have not had an opportunity to enter into correspondence with the Government on the scope of concerns raised by the Chairman of the Administrative Justice and Tribunals Council (AJTC) about the right to a fair hearing in relation to barring decisions made under the Safeguarding Vulnerable Groups Act 2006. We publish the recent letter of the Chairman of the AJTC with this report. We consider that the concerns which he has raised about the scope of the right to appeal in respect of barring decisions are serious ones. We recommend that the Government should respond directly to the Chairman of the AJTC, including its analysis of the compatibility of Section 4 of the Safeguarding Vulnerable Groups Act 2006 with Articles 6 and 8 ECHR. We call on the Government to publish that response as soon as possible.

### Unremedied declarations of incompatibility

144. In this section, we consider declarations of incompatibility which remain outstanding because they have still not been remedied by the Government. We do not propose to set out the facts of these cases; this section should be read together with our previous Reports.

#### *Religious discrimination in sham marriages regime (Baiai v Secretary of State for the Home Department)*

145. This case determined that the requirement that any marriage outside the Church of England involving a person subject to immigration control must be subject to a Certificate of Approval issued by the Secretary of State was incompatible with the right to enjoy respect for religion and belief without discrimination (as guaranteed by Article 9 and 14 ECHR). The Government accepts that the exemption of the Church of England from the Certificate of Approval regime is in breach of the Convention. In our last report, we criticised the Government's approach to this case. We called on the Government to explain its plan to create a distinct scheme for Church of England marriages and to bring forward its proposals for the removal of the discriminatory exemption without delay.<sup>142</sup>

146. In its response to our last report, in January 2009, the Government told us:

The Government is committed to remedying the declared incompatibility with Article 14...The UK Border Agency is liaising with relevant stakeholders and is considering the most appropriate way to remedy the incompatibility. We are conscious of the House of Lords find that the scheme could represent a disproportionate interference with Article 12 for those applicants who are needy and not able to afford the fee for a Certificate of Approval application, and are considering very carefully the implications of the House of Lords judgment in this respect. This aspect relates to the secondary legislation, and is separate from the declaration of incompatibility which of course concern the primary legislation.<sup>143</sup>

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141 *Governors of X School v R (on the application of G & Others)* [2010] EWCA Civ 1

142 Third Monitoring Report, paras 96–106.

143 The Government Response (2009), page 28.



147. We wrote to the Government in May 2009, asking for further information on progress in relation to this case.<sup>144</sup> We also noted that the compatibility of the Certificate of Approval scheme with the right to marry and the right to respect for belief or religion without discrimination (Articles 12, 9 and 14) is being challenged at the European Court of Human Rights.<sup>145</sup>

148. The Immigration Law Practitioners Association (ILPA) told us:

- The Government delay in relation to its response to the declaration of incompatibility in this case; and its response to the findings of the House of Lords was extensive;
- It was surprised by the Government's statement that the UK Border Agency had been liaising with stakeholders on this case. ILPA is part of the Agency's Corporate Stakeholder Group and had tried, unsuccessfully, to raise the need for a response to this case. It understood that both interveners in the case, AIRE Centre and the Joint Council for the Welfare of Immigrants, had not been consulted;
- An opportunity for reform had been missed in the Borders, Citizenship and Immigration Act 2009; and
- This scheme continued to operate: "The blanket prohibition on the right to marry without such a certificate and the exemption for the Anglican church remain."<sup>146</sup>

149. On 12 November 2009, six months after our original letter, the Minister responded to our request for further information. He told us that the Government considered that, in its view, it had taken adequate steps to meet the criticism of the House of Lords that the fees associated with the Certificate of Approval scheme could interfere with the right of needy applicants to marry (Article 12 ECHR). In any event, the Government had decided to remove the entire Certificate of Approval scheme rather than reform it to extend to Church of England marriages:

The UK Border Agency has sought for some time to bring marriages after Anglican preliminaries in England and Wales within the CoA scheme but has been unable to find a workable solution. The imperative need to respond to the declaration of incompatibility, together with other changes to the CoA scheme since 2005 which we believe have weakened its effectiveness, have led us to conclude that we should deal with the incompatibility by removing the scheme. We propose to bring forward a Remedial Order under Section 10 of the Human Rights Act to achieve this.<sup>147</sup>

150. The Minister explained that the Government envisaged using the non-urgent procedure and planned to lay a proposal before Parliament as "early as possible in the New Year". The Government intended to reform the rules on gaining immigration status through marriage in order to achieve the policy intentions it had intended to pursue through the Certificate of Approval scheme.<sup>148</sup> The Government hoped that these

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144 Ev 4

145 *O'Donoghue v United Kingdom*, App. No. 34848/07.

146 Ev 34–35

147 Ev 5

148 Cm 7730, Home Office, *Simplifying Immigration Law*, November 2009.

proposals would be in place before the Remedial Order came into force. The Minister promised to write to us in due course with further details about its approach. In January 2010, the Government re-affirmed its intention to bring forward these proposals “as soon as possible” but explained that it did not intend the Order to come into force until at least the end of 2010.<sup>149</sup>

**151. We welcome the Government’s decision to bring forward a Remedial Order in this case. Unfortunately, as we have no information about the substance of the Order or its likely timetable, we are unable to consider the substance of the Government’s approach. We are concerned that it is now almost a year since we asked for further information on this case. The relevant declaration of incompatibility is over three years old and yet we still have no clear proposals to scrutinise or any timetable for action.**

**152. If the Government intends to remove the entire Certificate of Approval Scheme, this would be a relatively simple legislative change, which could have been achieved during this parliamentary session with relative ease. However, we regret that the Government has moved so slowly towards the production of a draft Order that it cannot be considered before the end of this Parliament. In the meantime, this scheme continues to operate in a discriminatory way, in breach of the right to marry without discrimination. In the light of the earlier prolonged delay in this case, further procrastination is unacceptable. We call on the Government to publish its draft Order and its timetable for reform as soon as possible. While delay may be inevitable, because of the forthcoming election, any work done by the Government so far to meet this incompatibility should be published in order to inform the next Parliament, and to encourage prompt action to remove the ongoing incompatibility in section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.**

153. In its submission ILPA argued that this type of delay was usually inherent in the actions of UK Border Agency.<sup>150</sup> In our last report, we expressed our view that where the Government was involved in a case like this – where it accepted one declaration of incompatibility, but sought to appeal another – there would be a number of factors which would determine whether action was necessary before the final appeal in the case. These factors included the seriousness of the interference concerned, the time until the appeal, any interim measures and the administrative costs involved in an interim change to meet the relevant declaration of incompatibility.<sup>151</sup> ILPA expressed its concern that our comments had encouraged the UK Border Agency to see administrative inconvenience as an acceptable reason to stall its response to human rights arguments in other cases:

ILPA is concerned that the [Committee’s] reference to striking a balance between cost and administrative convenience and the detriment suffered by those whose human rights have been breached may give comfort where none is intended. The cases above are examples of breaches of human rights where the Government has determined that there is not only “no rush” but no need to do anything until forced to act as a result of subsequent litigation. ILPA considers that in all cases a remedy

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149 Ev 57

150 Ev 40 – 41

151 Third Monitoring Report, paras 104 – 106.

should be brought forward “without delay” and that delay, rather than time taken to implement the judgment is what has been experienced in the cases described.<sup>152</sup>

154. **In our last report, we set out a number of factors to be considered by Government in their response to accepted declarations of incompatibility in cases which were still subject to appeal. One of those factors was administrative cost. Our comments were limited to a very narrow set of circumstances, and even in those small number of cases, our view remains that any declaration of incompatibility should be removed without unnecessary delay. We repeat that the Government's response to cases finding incompatibilities with Convention rights should be proactive, in order to ensure that future breaches are avoided and that public funds are not wasted pursuing repetitive cases.**

155. We asked the Minister for Human Rights whether the Government intended to seek a friendly settlement in the Strasbourg challenge in the light of its decision to remove the Certificate of Approval scheme. The Minister told us that the Government could not discuss pending cases.<sup>153</sup> **We would be grateful if the Government would keep us informed of progress in the case of *O'Donoghue v United Kingdom* and provide us with the judgment in the case and any Government response in due course.**

### ***Discrimination in access to social housing (Morris v Westminster City Council)***

156. This case concerned discrimination on the grounds of nationality in respect of access to housing assistance offered by local authorities. We commented on this case in our last two reports, expressing concern over the time taken by the Government to respond to the declaration of incompatibility.<sup>154</sup> In its response to our request for further information, the Government confirmed its view that Schedule 15 of the Housing and Regeneration Act 2008 resolves the declaration of incompatibility in this case.<sup>155</sup>

157. We have previously reported our view that although this measure may remove the direct cause of the incompatibility identified in these cases, the solution in Schedule 15 of the 2008 Act gives rise to a similar risk of incompatibility.<sup>156</sup> Schedule 15 continues to make a distinction between those entitled to the full range of housing assistance in relation to priority need, and a lesser set of obligations which will be open to those whose priority need is based upon their relationship with a dependant who is subject to certain immigration controls. We note that a similar kind of distinction, albeit based on facts which arose prior to the enactment of Schedule 15, is currently being challenged at the European Court of Human Rights.<sup>157</sup>

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152 Ev 43

153 Second Report of Session 2009–10, *Work of the Committee in 2008–09*, HL Paper 20/HC 185, Q 92.

154 Third Monitoring Report, para 95; Second Monitoring Report, para 134.

155 Ev 20.

156 Third Monitoring Report, para 95.

157 *Bah v United Kingdom*, App. No. 56328/07.

***Prisoners' voting rights (Smith v Electoral Registration Officer)***

158. Section 3 of the Representation of the People Act 1983 is subject to a declaration of incompatibility, in so far as it imposes a complete ban on prisoners' voting.<sup>158</sup> We considered this issue above, in Chapter 2.

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158 *William Smith v Electoral Registration Officer* [2007] CSIH XA33/04 (24 January 2007)

## 4 Systemic issues

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### Introduction

159. In previous reports we have reported on systemic obstacles both to effective parliamentary scrutiny of the Government's response to Court judgments concerning human rights and to effective implementation of those judgments. In this chapter we return to a number of those issues and make some recommendations about how these systemic obstacles can be overcome.

### The Government system for responding to judgments

160. In its response to our last Report,<sup>159</sup> the Government rejected our recommendation that the Ministry of Justice should adopt a co-ordinating role in relation to the Government's response to adverse judgments,<sup>160</sup> arguing that it was not persuaded that there would be any significant benefit in doing so, but that it was considering how the Ministry of Justice "might work more effectively with other Government departments"<sup>161</sup> and how and whether to develop further and formalise the guidance that is given to departments. In practice, however, it appears that the department has effectively assumed such a co-ordinating role.

161. In oral evidence Edward Adams said this about the Ministry of Justice's co-ordinating role:

When an adverse judgment is issued against the Government it does actually impact upon the Department and the Minister responsible for that Department in that particular area; and because these decisions are not purely administrative there can be big political choices to be made, and those have to be in the hands of the Minister responsible for that.<sup>162</sup>

162. Giving the example of the case of *S and Marper v UK*, which involves the retention of DNA samples by the police and which we consider in more detail below, Mr Adams stated:

It really is not actually for Ministry of Justice Ministers to be deciding what the policy is about because that is the fundamental responsibility of the Home Secretary. It is our job to make sure that we keep the pressure on, to keep asking them "What are you doing? How far have you got? What is the next stage? Anything we can do to help?" And to keep supporting them and also to an extent holding them to account to make sure that they do respond in a timely way to adverse judgments both in Strasbourg and in the domestic courts.... I would pitch it just slightly below a co-ordinating role.<sup>163</sup>

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159 The Government Response (2009), January 2009.

160 *Ibid*, para. 18.

161 *Ibid*, pp. 31–32.

162 Second Report of 2009–2010, *Work of the Committee in 2008–09*, HL 20/HC 185.

163 Second Report of 2009–2010, *Work of the Committee in 2008–09*, HL 20/HC 185, Qq 69 & 70.

163. We welcome the *de facto* assumption by the Human Rights Division of the Ministry of Justice of the role of co-ordinator, both of the national implementation of judgments of the European Court of Human Rights and of the Government's response to declarations of incompatibility. We look forward to working closely with the Ministry of Justice to develop that co-ordination role in future.

## Guidance for Departments

164. In our second monitoring report we recommended that the Government should update its guidance for Whitehall departments, and stated that we looked forward to being consulted on a draft.<sup>164</sup> In our last monitoring report, our overall conclusion was that the Government should take a more consistent and transparent approach across departments to the way in which it responds to declarations of incompatibility and judgments from the ECtHR. The Government indicated in its response that it is considering updating its guidance as suggested but, as far as we are aware, this has not happened.

165. Our experience this year whilst conducting our scrutiny of Government responses to judgments has been very similar: while some departments have been very forthcoming with information and good at keeping us informed of relevant developments and progress,<sup>165</sup> others have been less informative and required chasing for responses.<sup>166</sup> The general picture remains one of considerable inconsistency of practice across departments and full transparency about the Government's thinking in response to court judgments remains the exception rather than the norm.

166. We are not at all clear as to what guidance exists for departments on how to respond to court judgments on human rights, or, if it exists, how up to date it is. There is certainly no publicly available guidance for departments on responding to human rights judgments. **We believe it to be useful, at the end of this Parliament, to distil our current practice into some guidance for departments, to assist those advising Government departments and also our successor Committee. For the reasons we have explained in chapter 1 above, we believe that the future effectiveness of the ECHR system depends on more effective national implementation of the Convention, in order to stem the flood of applications to Strasbourg, and we therefore publish in the Annex to this Report this guidance which we believe will help to underpin Parliament's important role in monitoring the Government's response to human rights judgments.**

167. The guidance contained in the Annex to this Report is based largely on current practice, but also on recommendations previously made by us and our predecessor Committee, on Government responses to those recommendations, and in some cases on recommendations made in this Report.

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164 Second Monitoring Report, para. 163.

165 See e.g. the very full letter of explanation received from the Department for Communities and Local Government in relation to the *McCann* case, Ev 7–10.

166 See for example, the Government response to our letter dated 12 May 2009, requesting further information in relation to the Government response to the declaration of incompatibility in the case of *Baiai*. The Government response is dated 12 November 2009, almost 6 months later. See Ev 4–5.



## Minimal compliance or full implementation?

168. One of the recurring criticisms we have made in this and previous reports on the implementation of human rights judgments has been that the Government generally adopts an approach of “minimal compliance” with Court judgments. This is currently evident, for example, in the Government’s response to the decision of the Court concerning the retention of DNA samples.<sup>167</sup> As we saw above, the same can be said of the Government’s response to the decision about the unfairness caused by the use of special advocates in the context of the legislation which authorised the detention of foreign nationals suspected of terrorism. We have made similar criticisms of the Government’s approach following Court judgments concerning control orders.<sup>168</sup> The Government’s approach of minimal compliance exacerbates the problem of repetitive cases because it leads to future litigation which can culminate in predictable findings of violation.

169. The Government does not always adopt an approach of minimal compliance rather than full implementation. The Marriage Act 1949 (Remedial Order) 2006, for example, went wider than removing the incompatibility found by the European Court of Human Rights in the particular case, and removed a restriction on the right to marry which, though not in issue in the case itself, would in the Government’s view inevitably be found to be incompatible with the right to marry as a result of the reasoning of the Court in the particular case. We scrutinised the Government’s reasoning and agreed with it that the other restriction would be likely to be found incompatible as a result of the Court’s decision.<sup>169</sup> The Government’s welcome approach to full implementation in that case required it also to take an expansive view of the power to take remedial action under s. 10(1)(b) of the Human Rights Act (if it appears to the Minister that, having regard to a finding of the European Court of Human Rights, a provision of legislation is incompatible with an obligation of the UK arising from the Convention). We also agreed with this broad interpretation of the scope of the power to take remedial action in s.10 HRA 1998.<sup>170</sup>

170. We recommend that, instead of the current approach of minimal compliance, the Government make a commitment to full implementation of Strasbourg judgments following an adverse Court judgment: the Government should make sure that it takes the opportunity to prevent future violations which are predictable.

## Provision of information to Parliament

### *Prompt notification of Parliament*

171. An example of a slightly more proactive co-ordinating role for the Ministry of Justice, which in our view would lead to greater consistency of practice and much earlier identification of the remedial measures required, would be for the Ministry of Justice to assume responsibility for notifying us promptly of judgments of the European Court of

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167 *S and Marper v UK*, above. See Twelfth Report of Session 2009–10, *Legislative Scrutiny: Crime and Security Bill, Personal Care at Home Bill, Children, Schools and Families Bill*, HL 67/HC 402.

168 Ninth Report of Session 2009–10, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, HL 64/HC 395.

169 Twenty-ninth Report of Session 2005–06, *Draft Marriage Act (1949) Remedial Order 2006*, HL 248/HC 1627, para. 8.

170 *Ibid.* at para. 9.

Human Rights and of declarations of incompatibility. According to the Ministry of Justice's understanding of the present arrangements,<sup>171</sup> we receive "a regular update" from the Foreign and Commonwealth Office on new adverse decisions of the European Court of Human Rights against the UK, and declarations of incompatibility are drawn to our attention by the department with responsibility for the subject matter of the declaration. We do receive a six monthly update from the Foreign Office of judgments against the UK,<sup>172</sup> but some judgments are often quite old by the time we receive this, and the last update we received was nine months after the previous one. There is no facility on the Court's website for subscribing to alerts about judgments by country and we therefore depend on the Government, which is after all a party to the litigation in Strasbourg, to notify us when the Court hands down a judgment in a case against the UK. In relation to declarations of incompatibility by UK courts, in practice we find that notification of relevant judgments is fairly haphazard and where it does occur it is not within any particular time frame.

**172. We recommend that the Ministry of Justice should notify the Committee of any judgment of the European Court of Human Rights in an application against the UK and of any declaration of incompatibility made by a UK court under s. 4 of the Human Rights Act 1998 as soon as reasonably practicable and in any event within 14 days of the date of the judgment.**

### **Action Plans**

173. As in previous years when conducting this monitoring work we have had occasion to complain about the Government's failure to keep us, and Parliament, fully informed about the steps being taken towards implementation. We have had to chase the Government for late replies to letters and remind it of previous undertakings to keep Parliament informed.

174. The Government is now expected to submit an Action Plan to the Committee of Ministers setting out the measures it intends to take to implement a judgment, including an indicative timetable.<sup>173</sup> In its response to our last human rights judgment report, the Government indicated that it intends to make these action plans available to us in future.<sup>174</sup> This intended practice has yet, however, to establish itself. In relation to *S and Marper*, for example, the Home Secretary indicated that she would be willing to send us the Government's plans for implementation at the same time as it sent them to the Committee of Ministers.<sup>175</sup> In the event we had to chase for the Action Plan twice<sup>176</sup> before finally receiving it some months after it had been submitted to Strasbourg, and we also had to chase the Government to be sent a copy of updating information sent to Strasbourg.<sup>177</sup> In other cases, no Action Plan has been sent to us.

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171 The Government Response (2009) pp. 35–36.

172 See for example, Written Evidence, below, pp78-80.

173 See CM/Inf/DH (2009) 29 Rev, 3 June 2009, *Action Plans – Action Reports, Definitions and Objectives, Memorandum prepared by the Department for the Execution of Judgments of the European Court of Human Rights*.

174 The Government Response (2009), p. 36.

175 Letter from Home Secretary, 5 January 2009: *Retention, use and destruction of biometric material: correspondence with Government*, HL 182/HC 1113, p. 7.

176 Letters to Home Secretary, 21 May 2009 and 8 July 2009, *ibid*, p. 10.

177 Letter to the Home Secretary, 29 October 2009, *ibid*, p. 17.

175. We welcome the Government's intention to make available to us the Action Plan which it is required to submit to the Committee of Ministers. We recommend that the Government always send us, as a matter of course, a copy of the Action Plan, at the same time as it sends it to the Committee of Ministers, and that we be copied in to all subsequent significant communications with the Committee of Ministers about the case.

### *Information on systemic issues*

176. The Interlaken Declaration calls on States to ensure that they review their implementation of the Committee of Ministers' various recommendations concerning national implementation.<sup>178</sup> The Government has kept the Council of Europe informed about progress in implementing those recommendations but that assessment has not been made available to Parliament.

177. We have continued to hold regular oral evidence sessions with the Human Rights Minister on the subject of the Government's response to human rights judgments. This is an opportunity for the Government to inform Parliament about how the Government's systems for implementing and responding to Court judgment are working in practice and for parliamentarians to ask the Government questions about that subject.

178. **Following our previous practice, described in Chapter 1, we recommend that, prior to our annual evidence session with the Minister responsible for human rights, the Government provide the Committee with a written memorandum covering the following:**

- i) **all judgments against the UK, or declarations of incompatibility, since the last evidence session;**
- ii) **all measures taken to implement such judgments;**
- iii) **the progress made towards the implementation of all other outstanding judgments;**
- iv) **the UK's record on implementation according to the latest available statistics from the Council of Europe;**
- v) **the progress made towards the implementation of Committee of Ministers' recommendations on national implementation;**
- vi) **the implications of Strasbourg judgments against other States for the UK's legal system (see further below).**

### *Other ways of improving parliamentary scrutiny*

179. During the House of Lords debate on our earlier report a number of members of the House of Lords who are not members of our Committee participated in the debate and called for further information from the Minister. We consider that it is important that Parliament is given a wider opportunity to scrutinise the Government's activities in respect

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<sup>178</sup> Interlaken Declaration, Action Plan, para. 4(f).

of the implementation of the European Convention on Human Rights and in particular the Government's response to adverse human rights judgments. **We recommend that there should be an annual debate in Parliament on the JCHR's report scrutinising the Government's memorandum.**

180. In recent years the UK has increasingly intervened in cases against other States. Some of these interventions have been highly controversial, and involved the UK Government arguing for an interpretation of the Convention with which we, and Parliament, might disagree. For example, the UK Government intervened in a torture case against Italy,<sup>179</sup> arguing that the Grand Chamber should overturn its decision in *Chahal v UK*, and in a case against Austria concerning the rights of same-sex couples.<sup>180</sup> At present there is no mechanism for ensuring the transparency of the UK Government's position in such interventions, and there is therefore no opportunity to hold the Government accountable for the arguments it makes. **We recommend that the Government commit to informing us at the earliest opportunity whenever it intervenes on behalf of the UK in a case against another State, and to making available to Parliament the reasons for its intervention and the substance of its argument.**

181. In Chapter 2, above, we consider the case of *Al-Saadoon* and recommend that the Government keep us informed in any case where it considers refusing a Rule 39 request of the Court. In our last report, we considered the significant number of Rule 39 requests which arise in respect of the United Kingdom, particularly in asylum cases.<sup>181</sup> **We recommend that the Government inform us on a quarterly basis of the number of Rule 39 requests that have been made by the Court and provide a detailed breakdown of the sorts of cases in which those requests have been made.**

182. **We repeat our recommendation, first made in 2005, that the Ministry of Justice should provide an accessible database of information, perhaps on its website, listing recent judgements, implementation measures taken or proposed, and cases where implementation measures had yet to be decided on.** This database need be no more detailed than the database on declarations of incompatibility already maintained by the department, which greatly increases the transparency of the process of responding to such judgments.

## Target Timetables

183. In our previous recommendations about responding to human rights judgments, we have sought to establish a clear timetable for each of the steps in the process. The Government, however, has been reluctant to agree to such a timetable. We understand the reasons for its reluctance. We accept that a rigid, one-size-fits-all timetable for implementation of European Court of Human Rights judgments, or responding to declarations of incompatibility, is neither realistic nor desirable. The identification of the appropriate remedial measures is likely to involve a process, involving the consultation of relevant stakeholders and, in the case of judgments of the European Court of Human Rights, discussions between national authorities and the Committee of Ministers.

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179 *Saadi v Italy* (GC) App. No. 37201/06, Judgment dated 28 February 2008.

180 *Schalk and Kopf v Austria*, App. No. 30141/04.

181 Third Monitoring Report, paras 111–112.

184. However, the remedying of an incompatibility with the Convention should be swift as well as full. **We think it is reasonable to expect the Government's remedial action following Court judgments to follow a target timetable, and to expect the Government to provide reasoned justifications for any departures from that timetable. Good explanations for not keeping to the target timetable will not lightly be dismissed. We believe that the discipline of a target timetable is necessary in order to facilitate effective parliamentary scrutiny of the Government's response. Our guidance for departments therefore spells out a target timetable, requiring notification of judgments within 14 days, detailed plans as to what the Government's response will be within four months, and a final decision as to how the incompatibility will be remedied within six months.**

## Recognising the interpretative authority of the Strasbourg Court

### *Effect of judgments against the UK*

185. The need for greater acceptance of the interpretative authority of the European Court of Human Rights has been identified as one of the keys to achieving better national implementation of the Convention at national level.<sup>182</sup> The record of the UK courts in this respect is generally good: we welcome the approach taken by our courts to the requirement in s. 2(1) of the Human Rights Act that they must take ECHR case-law into account.<sup>183</sup> The approach of the House of Lords in *AF*, for example, giving effect to the judgment of the Strasbourg Court in *A v UK*, exemplifies this acceptance of the interpretative authority of the European Court of Human Rights.

186. We have criticised in previous reports, however, the approach of the House of Lords that lower courts should not depart from the interpretation of higher courts even where there is clear Strasbourg authority to the contrary.<sup>184</sup> We regret the House of Lords' maintenance of this approach,<sup>185</sup> which we consider to be a serious limitation on the extent to which UK courts recognize the interpretative authority of the Strasbourg Court. **In our view UK courts should reconsider the approach in *Price* that lower courts must follow the interpretation of higher courts even where that is clearly contrary to subsequent Strasbourg authority.**

### *Effect of judgments against other States*

187. The Interlaken Declaration calls on states to take into account, not only judgments of the Court against the state itself, but also the Court's developing case-law in judgments finding a violation of the Convention by other States. It urges states to consider the

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182 *Interlaken Declaration*, 19 February 2010

183 See for example, *AF v Secretary of State for the Home Department* [2009] UKHL 28

184 See for example, Second Monitoring Report, at paras 10 – 13. See *Doherty v Birmingham City Council* (2008) UKHL 57, (2009) 1 AC 367; *Kay v Lambeth LBC* (2006) UKHL 10, (2006) 2 AC 465.

185 *Doherty v Birmingham City Council* (2008) UKHL 57. See also *R v Horncastle and Others* [2009] UKSC 14. In this last decision, the Supreme Court refused to follow the jurisprudence of the ECtHR in *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR, where a Chamber of the ECtHR held that the admissibility of certain evidence without the opportunity for challenge was incompatible with the right to a fair hearing guaranteed by Article 6 ECHR. The Supreme Court argued that the ECtHR had failed to appreciate fully the nature of domestic law on hearsay. The case of *Al-Khawaja* is pending before the Grand Chamber.

conclusions to be drawn from such judgments against other states where the same problem of principle exists within their own legal system.

188. This reflects a growing concern that the binding effect of the judgments of the European Court of Human Rights interpreting the Convention is limited in practice by states taking an essentially passive approach to compliance with the Convention, waiting until the Court has found a violation before considering whether its law, policy or practice requires changing in order to make it compatible with the Convention. The President of the European Court of Human Rights, for example, in his Memorandum to the States with a view to preparing the Interlaken Conference, says that “it is no longer acceptable that States fail to draw the consequences as early as possible of a judgment finding a violation by another State when the same problem exists in their own legal system.”<sup>186</sup>

189. As far as we are aware the Government does not have in place any arrangements for systematically monitoring judgments of the European Court of Human Rights against other States and considering, as soon as practicable following the judgment, whether they have any implications for UK law, policy or practice. In the Netherlands, by comparison, the Government's annual report to Parliament on human rights judgments has, since 2006, covered not only judgments of the European Court of Human Rights against the Netherlands, but any judgment which could have a direct or indirect effect on the Dutch legal system.<sup>187</sup> In Switzerland too, since the beginning of 2009 regular reports by the Government to Parliament now cover all Strasbourg Court judgments which may have a bearing on the Swiss legal system, and not just those against Switzerland.

190. In our view, the Government should institute a mechanism for systematically considering the implications for the UK of Court judgments against other States and should provide to Parliament the relevant information indicating exactly what consideration it has given to such other judgments and their possible implications for the UK. We note with interest that this is already done by the Governments of the Netherlands and Switzerland, which include the information in the annual reports to their parliaments. We do not consider that this would be an unduly onerous task. We know that the Government already monitors the cases coming before the European Court of Human Rights with a view to intervening in those which may have implications for UK law, and indeed increasingly does so.

**191. We recommend that the Human Rights Division of the Ministry of Justice, working with the Foreign Office, make the necessary arrangements to ensure that systematic consideration is given to whether judgments of the European Court of Human Rights finding a violation by another State have any implications for UK law, policy or practice and that this consideration take place as soon as reasonably practicable after the judgment.**

**192. We also recommend that the Minister for Human Rights provide a detailed description of the arrangements which are made for this purpose in his memorandum**

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<sup>186</sup> Judge Costa, *Memorandum of the President of the European Court of Human Rights to the States with a view to preparing the Interlaken Conference* (3 July 2009).

<sup>187</sup> *Parliamentary Scrutiny of the standards of the European Convention on Human Rights*, PACE Committee on Legal Affairs and Human Rights Background Document, AS/Jur/Inf (2009) 02 p. 2. The Dutch Senate requested in 2006 that the scope of the Government's report to Parliament be broadened to include an overview of implementation issues raised by Strasbourg judgments generally.



to be provided to the Committee before he next gives oral evidence in relation to human rights judgments. The Minister's memorandum should also include a summary report of the outcome of this consideration of the implications for the UK of Court judgments finding violations by other States.

193. We suggest that our successor committee consider developing this line of monitoring work by regularly asking the Government what steps it is taking to give effect in UK law to a judgment of the European Court of Human Rights against another State but which clearly has implications for UK law, policy or practice.

### Greater co-ordination with Council of Europe bodies

194. We aim to achieve closer co-ordination of our work monitoring the implementation of Strasbourg judgments with the work of Council of Europe bodies on the same subject. We believe that such co-ordination will lead both to more information being available to Parliament and to more effective implementation. To this end, our staff are in close contact with officials in the Registry of the European Court of Human Rights and in the Department for Execution of Judgments in the Secretariat of the Committee of Ministers. As an example of this greater co-ordination in action, in the recent Decision of the Committee of Ministers on *S and Marper v UK*, on 3 March 2010, the Committee of Ministers noted the recent position taken by the JCHR (in its legislative scrutiny report on the Crime and Security Bill) and stressed the importance of the UK rapidly conveying the results of its consultation to the Committee of Ministers in an appropriate form, "accessible also for the national decision-making process."<sup>188</sup>

195. One of the recommendations of our sister Committee in the Parliamentary Assembly of the Council of Europe is that there should be a role for the national PACE delegation in the national process for supervising implementation in the national Parliament. Indeed, the Rapporteur on the Implementation of Judgments, Mr. Pourgourides, regards it as "an implicit responsibility upon the Assembly's national delegates to ensure that they contribute to this process [the implementation of Strasbourg Court judgments] in their capacity as national parliamentarians."<sup>189</sup>

196. In the past, some members of the JCHR have also been members of the Parliamentary Assembly, but no member of the JCHR has also been a member of the equivalent Committee of the Parliamentary Assembly. In practice it may be hard for a member to be an active member of both Committees, but **we see considerable merit in members of the national delegation of PACE being involved in the work of both Parliament and the Assembly monitoring the implementation of judgments, and in closer links at official level between the two parliamentary committees which take the lead on this work in both parliaments. In our view this would help to provide more co-ordination between the efforts of these two parliamentary bodies in relation to the implementation of judgments.**

<sup>188</sup> CM/Del/Dec (2010) 1078, 8 March 2010. 1078<sup>th</sup> Meeting (DH), 2 – 4 March 2010, Section 4.5.

<sup>189</sup> Pourgourides Report, above, September 2009 at para. 16.

## Conclusions and recommendations

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### Why are court judgments any of Parliament's business?

1. Parliamentary involvement is also an essential aspect of strengthening national mechanisms for ensuring compliance with the Convention and the Court's interpretation of the Convention and therefore for reducing the flood of applications to the Court. (Paragraph 17)

### The UK's record on the implementation of Strasbourg judgments

2. it would be helpful if the Government could review the annual statistics provided by both the Court and the Committee of Ministers relating to the United Kingdom and provide an overview of any developments it considers relevant or significant. We consider that such an annual review of the statistical information by the Government would help inform parliamentarians of the work of the United Kingdom to meet its obligations under the Convention and would also enhance our understanding of the Government's position. (Paragraph 31)
3. In short, we find it unfortunate that the UK's generally good record on implementation is undermined to a considerable extent by the very lengthy delays in implementation in those cases where the political will to make the necessary changes is lacking. In our view, whatever the challenges thrown up by a judgment of the European Court of Human Rights, a delay of five years or more in implementing such a judgment can never be acceptable. However good the record in the majority of cases, inexcusable delay in some cases undermines the claim that the Government respects the Court's authority and takes seriously its obligation to respond fully and in good time to its judgments. It is also damaging to the UK's ability to take a lead in improving the current backlog at the Court by encouraging other States with far worse records to take their obligations under the Convention more seriously. The UK, with its strong institutional arrangements for supervising the implementation of judgments, is in a good position to lead the way out of the current crisis facing the Court, but leaders must lead **by example**. (Paragraph 33)

### Secret evidence and detention of foreign terrorism suspects (*A v UK*)

4. We do not accept the Government's argument that no further general measures are required. Part IV ATCSA 2001 was replaced by the *control* order regime in ss. 1–9 of the Prevention of Terrorism Act 2005 and that regime also involves secret evidence and special advocates, modelled closely on the regime which was the source of the violation in *A v UK*. Therefore, although *A v UK* concerned *the 2001 Act* not the *2005 Act*, it is clear to us that the generality of its reasoning about the potential unfairness caused by secret evidence requires measures also to be taken in relation to control orders in order to prevent future violations. (Paragraph 38)
5. We repeat our recommendation, made in previous reports, that in order to give full effect to the decision of the Court in *A v UK*, the control orders legislation be

amended to require the disclosure to the controlled person of the essence of the case against him. (Paragraph 39)

6. We urge the Government not to take a narrow approach to the implementation of the judgment in *A v UK* and repeat our recommendation in our report on counter-terrorism, that the Government urgently conduct a comprehensive review of the use of secret evidence and special advocates in all contexts, in light of the judgments in *A v UK* and *AF*, to ascertain whether their use is compatible with the minimum requirements of the right to a fair hearing, and report to Parliament on the outcome of that review. (Paragraph 40)

### Retention of DNA profiles and cellular samples (*S & Marper v UK*)

7. The Government's response to this case has been inadequate both in terms of the approach it has adopted to implementation and in relation to the substance of the proposals in the Crime and Security Bill. While we welcome the Government's decision to act with haste, we are concerned that in this case, the Government's priority has not been to remove the incompatibility identified by the European Court of Human Rights, but to ensure the continued operation of the National DNA Database with as few changes as possible to its original policy. We have encouraged the Government on a number of occasions to make greater use of the remedial order process. The HRA 1998 specifically envisaged that the Government might wish to use secondary legislation to provide a speedy response to adverse human rights judgments. In our view, the Government's original proposal in this case – that Parliament give a 'blank cheque' in secondary legislation for future reform of the taking and retention of DNA – was inappropriate. We welcome the Government acceptance that an effective Parliamentary debate on the substance of its proposals is necessary. (Paragraph 52)
8. There are a number of positive aspects to the Government's proposals in the Crime and Security Bill, including the proposal to destroy all DNA samples within 6 months or as soon as a profile has been obtained. However, in our view, the proposal to continue to retain the DNA profiles of innocent people and children for up to 6 years irrespective of the seriousness of the offence concerned and without any provision for independent oversight, is disproportionate and arbitrary and likely to lead to further breaches of the ECHR. (Paragraph 53)
9. We also remain concerned that the Government has not yet published any clear timetable for dealing with legacy samples. After the decision in *S & Marper*, it is clear that some individuals' DNA is currently retained in breach of the ECHR, as part of the National DNA Database. Without review, this continued retention is likely to lead to further litigation with associated costs to individuals and to the taxpayer. (Paragraph 55)
10. We do not share the Minister's confidence that he will be able to persuade his Ministerial colleagues on the Committee of Ministers that the United Kingdom has effectively removed the breach identified by the Court in *S & Marper*. The responsibility under Article 46 of the Convention includes the responsibility to remove the risk of future, repeat violations. In our view, the Government's decision

to purposely “push the envelope” in this case creates the risk of further violations of the Convention and fails to satisfy its obligations under Article 46. In any event, even if the Government is able to persuade its colleagues on the Committee of Ministers to accept its approach, we consider that there is a significant risk that the proposals in the Crime and Security Bill would lead to further litigation both at home and at the European Court of Human Rights and a significant risk of further violations of the right to respect for private life by the United Kingdom. (Paragraph 58)

### Summary possession of people's homes (*McCann v UK*)

11. We are concerned that the issue of respect for people's homes in summary possession cases remains unresolved, despite numerous decisions of the House of Lords and the European Court of Human Rights. We welcome the Government's acknowledgment that should the European Court of Human Rights decide again, in the pending case of *Kay v United Kingdom*, that domestic law is incompatible with Article 8 ECHR, it will have to revisit the question of whether a remedial order or legislation is necessary to remove the breach identified by the Court. Unless the European Court of Human Rights departs entirely from its reasoning in the case of *McCann*, we consider that the Government will inevitably need to revisit the breach identified in that case. We question whether it would not have been more cost effective to reform the summary possession process rather than to pursue further domestic and European litigation. It would be prudent for the Government in the meantime to consider how the process might be reformed to give effect to the decision in *McCann* in the event that the decision in *Kay* goes against it, in order to avoid any further delay following the forthcoming decision in *Kay v UK*. (Paragraph 71)

### Interception of communications (*Liberty v UK*)

12. We note the similarities between certain features of the statutory regime which was in force at the time of the judgment in *Liberty v UK* (IoCA) and the statutory regime which is now in force (RIPA). We therefore consider this to be a case in which full implementation of the judgment of the Court requires the Government to consider general measures which go beyond the repeal of the statutory regime that was in force at the time. We note that compatibility of the RIPA regime will be the subject of a further judgment of the European Court of Human Rights in the forthcoming case of *Kennedy*. In the meantime we urge the Government to give serious consideration to ways in which it could amend the system for supervising the interception of communications to provide greater safeguards for individual rights. It should consider, for example, the powers and reporting of the Interception of Communications Commissioner and the information which the Minister routinely provides to Parliament on surveillance and monitoring; the notification of targets of monitoring and surveillance operations in the future, once those operations have ceased and their products will not be harmed by disclosure; and defining the phrase “national security” in RIPA, so as to provide greater specificity for those seeking and granting warrants as to what threats would and would not be considered sufficient to permit surveillance. (Paragraph 79)

### **Prisoners' correspondence with medical practitioners (*Szuluk v UK*)**

13. We welcome the Government's swift approach to respond to this judgment. We suggest that our successor Committee might consider the wider issue of prisoners' correspondence with medical practitioners. (Paragraph 86)

### **Care proceedings (*RK and AK v UK*)**

14. As the Minister rightly states, the enactment of the Human Rights Act makes cases like RK and AK less likely to need to go to the Strasbourg Court in the future, as applicants should be able to seek a remedy for their grievance in the UK. However, it appears that there are still some historic cases in the system which involve events which occurred before the coming into force of the Human Rights Act. Whilst we accept that the enactment of the Human Rights Act provides redress for cases where the events occurred after the Act came into force (2 October 2000), which is likely to be compatible with Article 13, no such mechanism exists for pre October 2000 cases. In such cases, the UK will, almost inevitably, be found to be in breach of the requirement to ensure an effective remedy under Article 13, irrespective of whether or not the Court finds a violation of a substantive Article of the Convention. In our view, where a finding of a violation is inevitable, the UK should actively pursue settlement negotiations, in order to relieve the Strasbourg Court of the burden of dealing with repetitive cases and to save both the applicant and the Government, the cost and inconvenience of pursuing the litigation in Strasbourg. (Paragraph 92)

### **Length of criminal confiscation proceedings (*Bullen and Soneji v UK*)**

15. The breach of the Convention found in the case of Bullen and Soneji appears to have resulted from a failure of practice rather than law. It is therefore right that the Government should seek to ensure that all those responsible for prosecuting or adjudicating upon criminal trials and confiscation proceedings are aware of their duties under Article 6 ECHR to ensure a fair trial within a reasonable time. We are satisfied that the UK is on the right track in respect of its implementation of this judgment, provided that it acts on the commitments for further action that it has made to the Committee of Ministers. We also recommend that the Ministry of Justice, Her Majesty's Courts Service and the relevant prosecuting authorities closely monitor practice in this area to ensure that similar delays do not occur in the future. (Paragraph 97)

### **Prisoners' voting rights (*Hirst v UK*)**

16. We are concerned that, despite the time taken to publish the second consultation, the Government's proposals appear to take a very limited approach to the judgment in Hirst. As we noted earlier in this report, this type of approach can lead to further unnecessary litigation with the associated burden on the European Court of Human Rights and the taxpayer. We accept that the Grand Chamber left a broad discretion to the United Kingdom to determine how to remove the blanket ban. However, the Court stressed that withdrawal of the franchise is a very serious step and gave guidance on the types of offences which might rationally be connected with such a

step. We are not persuaded that automatic disenfranchisement based upon a set period of custodial sentence can provide the “discernible link between the conduct and circumstances of the individual” and necessity for the removal of the right to vote required by the Grand Chamber. In our view, this approach will lead to a significant risk of further litigation. (Paragraph 107)

17. Despite our concerns about the narrow nature of the Government's approach, our overriding disappointment is at the lack of progress in this case. We regret that the Government has not yet published the outcome of its second consultation, which closed almost 6 months ago, in September 2009. This appears to show a lack of commitment on the part of the Government to proposing a solution for Parliament to consider. (Paragraph 108)
18. It is now almost 5 years since the judgment of the Grand Chamber in *Hirst v UK*. The Government consultation was finally completed in September 2009. Since then, despite the imminent general election, the Government has not brought forward proposals for consideration by Parliament. We reiterate our view, often repeated, that the delay in this case has been unacceptable. (Paragraph 116)
19. So long as the Government continues to delay removal of the blanket ban on prisoner voting, it risks not only political embarrassment at the Council of Europe, but also the potentially significant cost of repeat litigation and any associated compensation. (Paragraph 117)
20. The Government's analysis is legally accurate. The continuing breach of international law identified in *Hirst* will not affect the legality of the forthcoming election for the purposes of domestic law. However, without reform the election will happen in a way which will inevitably breach the Convention rights of at least part of the prison population. This is in breach of the Government's international obligation to secure for everyone within its jurisdiction the full enjoyment of those rights. We consider that the Government's determination to draw clear distinctions between domestic legality and the ongoing breach of Convention rights shows a disappointing disregard for our international law obligations. (Paragraph 119)

### Security of tenure for Gypsies and Travellers (*Connors v UK*)

21. In view of [...] apparent yet further delay in remedying the incompatibility in this case, we have written to the Minister to ask whether the Government intends to introduce the statutory instrument necessary to bring Section 318 [Housing and Regeneration Act 2008] into force before the end of this Parliament; if not, why not; and to ask for a full explanation of why a statutory instrument which would bring into force a piece of legislation which prevents future breaches of the Convention is not regarded as a priority claim on parliamentary time by the Government. (Paragraph 123)

### Interim measures (Rule 39 cases)

22. Although there was not a final judgment in this case, *because of the seriousness of* what was at stake for the individuals concerned we exceptionally decided to write to



the Government to raise our concern over its decision not to comply with the Rule 39 request of the court, that the Iraqi applicants be retained by the UK, in order to allow their case to be considered by the European Court of Human Rights. We welcome the Government's acceptance that the decision of the European Court of Human Rights on the scope and jurisdiction of the ECHR is final, and question why the analysis of the Court of Appeal on this question was allowed to form the basis for the decision to ignore the Rule 39 request from Strasbourg. We remain concerned about the Government's conduct in this case. (Paragraph 129)

23. We are concerned that despite the extremely grave issues at stake in this case, we had to write to the Secretary of State for Defence in order to secure a more detailed chronology and account of and the decisions taken by the Government. A full response took over two weeks. We recommend that in any case where the Government considers refusing a Rule 39 request, information about that request and the Government's decision should be provided to us routinely and without delay. (Paragraph 130)
24. The judgment in this case is not yet final. We have not had the opportunity to consider the Government's views on its findings and we have no information on whether the Government intends to request that the case is considered by the Grand Chamber. We reiterate our view that the issues raised in this case are serious ones. We note that a number of additional applications against the UK about the scope of the jurisdiction of the ECHR and its application to the activities of UK forces in Iraq are due to be heard by the ECtHR during 2010. We particularly draw the Government's attention to the ECtHR guidance in this case that a violation of the rights of the applicants to be free from inhuman and degrading treatment is ongoing, and that the Government remains under an obligation to seek diplomatic reassurances from the Iraqi Government that the death penalty will not be applied in this case. We recommend that the Government provide a full response to the conclusions of the ECtHR in this case, including whether a request for a hearing by the Grand Chamber is planned. We recommend that our successor Committee consider any Government response and keep this case under close scrutiny in the next Parliament. (Paragraph 135)

### **Declarations of Incompatibility**

25. Through officials at the Ministry of Justice, we have been provided with an updated version of this database, which adopts a different narrative format, which in our view is difficult to follow and less accessible. We are disappointed that the database is no longer available on the Ministry of Justice website. We recommend that the Ministry of Justice takes steps to resolve this problem to enable widespread public access to its database on declarations of incompatibility in order to enhance transparency in the implementation process. We also repeat our recommendation that the database should be reviewed and updated on at least a quarterly basis. (Paragraph 138)

### **Suitability of care workers to work with vulnerable adults (*Wright v Secretary of State for Health*)**

26. We reiterate these concerns and encourage the Government to clarify the issue. (Paragraph 141)
27. We have not had an opportunity to enter into correspondence with the Government on the scope of concerns raised by the Chairman of the Administrative Justice and Tribunals Council (AJTC) about the right to a fair hearing in relation to barring decisions made under the Safeguarding Vulnerable Groups Act 2006. We publish the recent letter of the Chairman of the AJTC with this report. We consider that the concerns which he has raised about the scope of the right to appeal in respect of barring decisions are serious ones. We recommend that the Government should respond directly to the Chairman of the AJTC, including its analysis of the compatibility of Section 4 of the Safeguarding Vulnerable Groups Act 2006 with Articles 6 and 8 ECHR. We call on the Government to publish that response as soon as possible. (Paragraph 143)

### **Religious discrimination in sham marriages regime (*Baiai v Secretary of State for the Home Department*)**

28. We welcome the Government's decision to bring forward a Remedial Order in this case. Unfortunately, as we have no information about the substance of the Order or its likely timetable, we are unable to consider the substance of the Government's approach. We are concerned that it is now almost a year since we asked for further information on this case. The relevant declaration of incompatibility is over three years old and yet we still have no clear proposals to scrutinise or any timetable for action. (Paragraph 151)
29. If the Government intends to remove the entire Certificate of Approval Scheme, this would be a relatively simple legislative change, which could have been achieved during this parliamentary session with relative ease. However, we regret that the Government has moved so slowly towards the production of a draft Order that it cannot be considered before the end of this Parliament. In the meantime, this scheme continues to operate in a discriminatory way, in breach of the right to marry without discrimination. In the light of the earlier prolonged delay in this case, further procrastination is unacceptable. We call on the Government to publish its draft Order and its timetable for reform as soon as possible. While delay may be inevitable, because of the forthcoming election, any work done by the Government so far to meet this incompatibility should be published in order to inform the next Parliament, and to encourage prompt action to remove the ongoing incompatibility in section 19 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004. (Paragraph 152)
30. In our last report, we set out a number of factors to be considered by Government in their response to accepted declarations of incompatibility in cases which were still subject to appeal. One of those factors was administrative cost. Our comments were limited to a very narrow set of circumstances, and even in those small number of cases, our view remains that any declaration of incompatibility should be removed

without unnecessary delay. We repeat that the Government's response to cases finding incompatibilities with Convention rights should be proactive, in order to ensure that future breaches are avoided and that public funds are not wasted pursuing repetitive cases. (Paragraph 154)

31. We would be grateful if the Government would keep us informed of progress in the case of *O'Donoghue v United Kingdom* and provide us with the judgment in the case and any Government response in due course. (Paragraph 155)

## Systemic issues

### *The Government system for responding to judgments*

32. We welcome the de facto assumption by the Human Rights Division of the Ministry of Justice of the role of co-ordinator, both of the national implementation of judgments of the European Court of Human Rights and of the Government's response to declarations of incompatibility. We look forward to working closely with the Ministry of Justice to develop that co-ordination role in future. (Paragraph 163)

### *Guidance for Departments*

33. We believe it to be useful, at the end of this Parliament, to distil our current practice into some guidance for departments, to assist those advising Government departments and also our successor Committee. For the reasons we have explained in chapter 1 above, we believe that the future effectiveness of the ECHR system depends on more effective national implementation of the Convention, in order to stem the flood of applications to Strasbourg, and we therefore publish in the Annex to this Report this guidance which we believe will help to underpin Parliament's important **role in monitoring the Government's response to human rights judgments**. (Paragraph 166)

### *Provision of information to Parliament*

34. We recommend that the Ministry of Justice should notify the Committee of any judgment of the European Court of Human Rights in an application against the UK and of any declaration of incompatibility made by a UK court under s. 4 of the Human Rights Act 1998 as soon as reasonably practicable and in any event within 14 days of the date of the judgment. (Paragraph 172)

### *Action Plans*

35. We welcome the Government's intention to make available to us the Action Plan which it is required to submit to the Committee of Ministers. We recommend that the Government always send us, as a matter of course, a copy of the Action Plan, at the same time as it sends it to the Committee of Ministers, and that we be copied in to all subsequent significant communications with the Committee of Ministers about the case. (Paragraph 175)

### ***Information on systemic issues***

36. Following our previous practice, described in Chapter 1, we recommend that, prior to our annual evidence session with the Minister responsible for human rights, the Government provide the Committee with a written memorandum covering the following:
- all judgments against the UK, or declarations of incompatibility, since the last evidence session;
  - all measures taken to implement such judgments;
  - the progress made towards the implementation of all other outstanding judgments;
  - the UK's record on implementation according to the latest available statistics from the Council of Europe;
  - the progress made towards the implementation of Committee of Ministers' recommendations on national implementation;
  - the implications of Strasbourg judgments against other States for the UK's legal system (see further below). (Paragraph 178.vi)

### ***Other ways of improving parliamentary scrutiny***

37. We recommend that there should be an annual debate in Parliament on the JCHR's report scrutinising the Government's memorandum. (Paragraph 179)
38. We recommend that the Government commit to informing us at the earliest opportunity whenever it intervenes on behalf of the UK in a case against another State, and to making available to Parliament the reasons for its intervention and the substance of its argument. (Paragraph 180)
39. We recommend that the Government inform us on a quarterly basis of the number of Rule 39 requests that have been made by the Court and provide a detailed breakdown of the sorts of cases in which those requests have been made. (Paragraph 181)
40. We repeat our recommendation, first made in 2005, that the Ministry of Justice should provide an accessible database of information, perhaps on its website, listing recent judgements, implementation measures taken or proposed, and cases where implementation measures had yet to be decided on. (Paragraph 182)

### ***Target timetables***

41. We think it is reasonable to expect the Government's remedial action following Court judgments to follow a target timetable, and to expect the Government to provide reasoned justifications for any departures from that timetable. Good explanations for not keeping to the target timetable will not lightly be dismissed. We believe that the discipline of a target timetable is necessary in order to facilitate effective parliamentary scrutiny of the Government's response. Our guidance for

departments therefore spells out a target timetable, requiring notification of judgments within 14 days, detailed plans as to what the Government's response will be within four months, and a final decision as to how the incompatibility will be remedied within six months. (Paragraph 184)

## Recognising the interpretative authority of the Strasbourg Court

42. In our view UK courts should reconsider the approach in *Price* that lower courts must follow the interpretation of higher courts even where that is clearly contrary to subsequent Strasbourg authority. (Paragraph 186)
43. We recommend that the Human Rights Division of the Ministry of Justice, working with the Foreign Office, make the necessary arrangements to ensure that systematic consideration is given to whether judgments of the European Court of Human Rights finding a violation by another State have any implications for UK law, policy or practice and that this consideration take place as soon as reasonably practicable after the judgment. (Paragraph 191)
44. We also recommend that the Minister for Human Rights provide a detailed description of the arrangements which are made for this purpose in his memorandum to be provided to the Committee before he next gives oral evidence in relation to human rights judgments. The Minister's memorandum should also include a summary report of the outcome of this consideration of the implications for the UK of Court judgments finding violations by other States. (Paragraph 192)
45. We suggest that our successor committee consider developing this line of monitoring work by regularly asking the Government what steps it is taking to give effect in UK law to a judgment of the European Court of Human Rights against another State but which clearly has implications for UK law, policy or practice. (Paragraph 193)

## Great coordination with Council of Europe bodies

46. we see considerable merit in members of the national delegation of PACE being involved in the work of both Parliament and the Assembly monitoring the implementation of judgments, and in closer links at official level between the two parliamentary committees which take the lead on this work in both parliaments. In our view this would help to provide more co-ordination between the efforts of these two parliamentary bodies in relation to the implementation of judgments.

## Annex: Guidance for Departments on Responding to Court Judgments on Human Rights

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1. The Government takes seriously its obligation to respond fully and in good time to judgments of the European Court of Human Rights. It is also committed to responding effectively and rapidly to declarations of incompatibility once they are no longer subject to appeal. The Government has agreed to keep the Joint Committee on Human Rights (JCHR) informed of its plans for the implementation of each judgment of the European Court of Human Rights finding a breach of human rights by the UK.<sup>190</sup> The Government has also agreed to keep the JCHR closely informed following a declaration of incompatibility by a UK court.

2. This Guidance is intended to assist Government departments by explaining the Committee's method of scrutinising the Government's response to human rights judgments and by setting out the Committee's expectations in relation to both the timing and content of the information provided by the Government. It seeks to draw together and rationalise previous recommendations made by the Committee, so that a comprehensive account of the Committee's expectations is available in one place.

### ***When does the Committee's scrutiny of the Government response to Court judgments begin?***

3. The Committee will begin to consider any compatibility issues raised by judgments of the European Court of Human Rights or declarations of incompatibility even before the judgment or declaration is final. The Committee's scrutiny of the Government's response will include consideration of the likelihood of success of any appeal against a declaration of incompatibility, or of any request for a reference to the Grand Chamber, or subsequent reference. Where the Committee considers that such an appeal, or reference to the Grand Chamber, has little prospect of success, it may make recommendations about the general measures necessary if there is an opportunity to remedy the incompatibility even before the judgment becomes final.<sup>191</sup> However, the Committee only reports in its implementation of judgments reports on the Government's response to judgments which have become final.

4. In the case of judgments of the European Court of Human Rights this is defined by Article 44 of the European Convention itself:

- A judgment of the Grand Chamber is final.<sup>192</sup>

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<sup>190</sup> The Government Response (2009), p. 6.

<sup>191</sup> See e.g. Ninth Report of Session 2009–10, *Legislative scrutiny: Crime and Security Bill; Personal Care at Home Bill; Children, Schools and Families Bill*, HL 67/HC 402, paras 1.82 – 1.97, recommending amendments to the stop and search provisions in the Crime and Security Bill to give effect to the Chamber judgment in *Gillan and Quinton v UK* where, in the Committee's view, the prospects of the Government succeeding before the Grand Chamber were remote.

<sup>192</sup> Article 44(1) ECHR.



A judgment of a Chamber becomes final:<sup>193</sup>

- when the parties declare that they will not request that the case be referred to the Grand Chamber; or
- three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
- when the request to refer is rejected by the Grand Chamber.

5. In the case of declarations of incompatibility by UK courts, the declaration becomes final when the period for appealing against the judgment has expired and no appeal has been lodged.

### ***With whom will the Committee correspond?***

6. The Committee regards the Human Rights Division in the Ministry of Justice as its central point of contact with the Government concerning the implementation of judgments of the European Court of Human Rights and Government responses to declarations of incompatibility.

7. The Committee may also correspond directly with the department or departments responsible for the particular area of law or policy affected by the court judgment.

### ***Timetable for implementation***

8. The Committee accepts that a rigid, one-size-fits-all timetable for implementation of European Court of Human Rights judgments, or responding to declarations of incompatibility, is neither realistic nor desirable. The identification of the appropriate remedial measures is likely to involve a process, involving the consultation of relevant stakeholders and, in the case of judgments of the European Court of Human Rights, discussions between national authorities and the Committee of Ministers.

9. However, the remedying of an incompatibility with the Convention should be swift as well as full. The Committee therefore expects the Government's remedial action following Court judgments to follow a target timetable, and will expect the Government to provide reasoned justifications for any departures from that timetable.

### ***When should the Committee be notified of Court judgments and what information should be provided?***

10. The Ministry of Justice, working with the Foreign Office, should notify the Committee of any judgment of the European Court of Human Rights in an application against the UK and of any declaration of incompatibility made by a UK court under s. 4 of the Human Rights Act 1998 as soon as reasonably practicable and in any event within 14 days of the date of the judgment.

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193 Article 44(2) ECHR.

11. In the case of declarations of incompatibility, it would be helpful to the Committee if the Ministry of Justice could at the same time provide a copy of the judgment of the court if it is not readily available, and the full text of the declaration in question if it is not set out in full in the judgment.

12. Where the judgment is a judgment of a Chamber of the European Court of Human Rights, the Government should indicate whether it is considering requesting that the case be referred to the Grand Chamber. Where the judgment is a judgment making a declaration of incompatibility, the Government should indicate whether it is considering appealing against the judgment.

13. Where the Government has decided not to request a referral of the case to the Grand Chamber, or to appeal against the making of the declaration of incompatibility, the Ministry of Justice or the relevant Minister should inform the Committee of the reasons for that decision.

14. The letter of notification should identify the lead department and identify the official to be treated as the official with lead responsibility for the matter in the department, along with their contact details.

***When should the Committee be informed of how the Government plans to respond and what information should be provided?***

15. The Committee normally expects the Government to have reached a detailed decision about how to implement a judgment of the European Court of Human Rights, or respond to a declaration of incompatibility, within four months of the date of the judgment. The Ministry of Justice, or the relevant department, should write to the Committee, setting out the Government's detailed plans for responding to the judgment, including the following:

- Whether the Government considers that any general measures are required in order to remedy the incompatibility;
- If the Government does not consider any remedial action necessary, its reasons for this view;
- Whether the Government intends to use the remedial order process to remedy the incompatibility;
- The measures the Government is intending to take to respond to the judgment; and
- An indicative timetable for taking the necessary measures.

16. Where it is still not possible to state what measures will be taken, the letter should set out the steps to be taken to decide what the measures will be (e.g. a proposed consultation) with an indicative timetable for such steps.

17. The Government should keep the Committee updated about any changes or relevant developments in its plans.

18. In the case of judgments of the European Court of Human Rights, the Government should provide the Committee with a copy of its Action Plan provided to the Committee of Ministers at the same time as it is submitted to the Committee of Ministers. The Government should also provide the Committee with copies of all subsequent significant submissions to the Committee of Ministers, at the same time as they are sent to the Committee of Ministers.

19. Final decisions about how to remedy incompatibilities identified in Court judgments should normally be made no later than six months after the date of the final judgment.

20. If the Government is not able to meet the target timetable it should write to the Committee explaining the reasons why it is unable to meet the target. The Committee will scrutinise the reasons given by the Government for not being able to meet the target timetable in a particular case. If the Committee is not satisfied that there is a good reason for the delay in meeting the target timetable, it will report to both Houses that the delay in remedying the incompatibility is unjustifiable.

21. The Committee will continue to monitor progress towards the implementation of judgments on which it has previously reported.

### ***When should a Remedial Order be used?***

22. The relevant Minister may proceed by way of Remedial Order only if he or she considers that there are “compelling reasons” for doing so.<sup>194</sup> When deciding whether there are compelling reasons for proceeding by way of Remedial Order, the Minister should take into account the impact of the incompatibility on particular individuals and the need to remedy incompatibilities with Convention rights as speedily as possible. The Committee has urged the Government to make greater use of Remedial Orders in appropriate cases in order to remedy incompatibilities more swiftly.

### ***When should the urgent procedure be used?***

23. If the Minister decides to proceed by way of Remedial Order, he or she may proceed by the urgent or the non-urgent procedure, taking into account:

- The significance of the rights which are, or might be, affected by the incompatibility;
- The seriousness of the consequences of identifiable individuals or groups from allowing the continuance of an incompatibility with any right;
- The number of people affected;
- The adequacy of compensation arrangements as a way of mitigating the effects of the incompatibility; and
- Alternative ways of mitigating the effect of the incompatibility pending amendment to primary legislation.

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<sup>194</sup> Section 10(2) and (3)(b) Human Rights Act 1998.

24. The decisive factor in deciding whether to adopt the urgent or non-urgent procedure for a Remedial Order should be the current and foreseeable impact of the incompatibility it remedies on anyone who might be affected by it.<sup>195</sup>

### ***What general information about systems for implementation does the Committee expect?***

25. In addition to the information sought above in relation to the general measures necessary to remedy incompatibilities with the Convention, the Committee also expects to be provided with more general information about how the Government's systems for responding fully and swiftly to court judgments concerning human rights are working in practice.

26. Two months before the Minister with responsibility for human rights gives oral evidence to the Committee, it will ask the Government for a memorandum covering:

- i) all judgments in leading cases against the UK, or declarations of incompatibility, since the last evidence session;
- ii) a summary of the measures taken to implement such judgments, and any other outstanding judgments;
- iii) the UK's record on implementation according to the latest available statistics from the Council of Europe;
- iv) the progress made towards the implementation of Committee of Ministers' recommendations on national implementation; and
- v) the implications of Strasbourg judgments against other States for the UK's legal system.

### ***Full implementation***

27. When deciding what remedial action is required the Committee expects the Government to demonstrate a commitment to full implementation rather than minimal compliance with court judgments. The Committee therefore expects the remedial action proposed by the Government not only to prevent a repeat of identical violations in the future but also to prevent future violations which are predictable as a result of the judgment in question.<sup>196</sup>

28. The Committee considers that the powers to make remedial orders in the Human Rights Act 1998<sup>197</sup> are wide enough to permit the use of Remedial Orders for this purpose.<sup>198</sup>

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195 Seventh Report of Session 2001–02, *Making of Remedial Orders*, HL Paper 58/HC 473

196 See e.g. Sixteenth Report of Session 2005–06, *Proposal for a Draft Marriage Act (1949) Remedial Order 2006*, HL 154/HC 1022 paras 8–9.

197 Section 10(1)(b) and Schedule 2 HRA 1998.

198 Twenty Ninth Report of Session 2005–06, *The Draft Marriage Act 1949 (Remedial) Order*, paras 6 – 10.

### ***When does the Committee's scrutiny of the Government's response to Court judgments stop?***

29. The Committee's formal monitoring of the Government's response to judgments of the European Court of Human Rights will stop when the Committee of Ministers has made a decision to close its supervision of the case.

30. The Committee's formal monitoring of the Government's response to a declaration of incompatibility will stop when the Committee is satisfied that the incompatibility which is the subject of the declaration has been removed.

31. Where the remedying of the incompatibility requires legislation, the Committee will not regard the incompatibility as having been remedied until the legislation is in force.<sup>199</sup>

### ***Correspondence***

32. The Committee may write to the Ministry of Justice or the relevant department shortly after the judgment, and before receiving the letter referred to above, if it considers that the need for remedial action is urgent in view of the impact on those affected, or if there are additional specific questions it wishes to ask arising out of the judgment. The Ministry of Justice will be copied in to any correspondence with the Department

### ***Further information***

33. The Committee may seek further information from the department at any point during its scrutiny of the Government's response. Information may be sought by informal contact at official level. However, anything which may be contentious will be dealt with in a letter from the Chair to the Minister which will be published with the Committee's report.

### ***Involvement of civil society***

34. The Committee actively seeks the involvement of civil society in its scrutiny of the Government's response to court judgments concerning human rights. It publishes all correspondence with the Government on its website shortly after it has been sent or received. It may from time to time publish a press notice identifying the issues which it is scrutinising and inviting submissions in relation to those issues.<sup>200</sup>

### ***Co-ordination with Council of Europe bodies***

35. The Committee intends to achieve closer co-ordination of its work monitoring the implementation of Strasbourg judgments with the work of Council of Europe bodies on the same subject. The Committee's staff are in close contact with officials at the Department for the Execution of Judgments at the Secretariat of the Committee of

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<sup>199</sup> See, for example, the concern expressed above, paras 115–118, about the failure to bring into force the amendment to the Mobile Homes Act which is necessary to remedy the incompatibility identified by the European Court of Human Rights in *Connors v UK*.

<sup>200</sup> See e.g. JCHR Press Notice No. 58 of Session 2008–09, *Call for Evidence: Implementation of Strasbourg Judgments and Declarations of incompatibility* (30 July 2009) [http://www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights/declarations\\_of\\_incompatibility.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights/declarations_of_incompatibility.cfm)

Ministers and with officials in the secretariat to the Legal Affairs and Human Rights Committee of the Parliamentary Assembly of the Council of Europe.

### ***When will the Committee report?***

36. The Committee aims to report annually.

### ***The Committee's report***

37. The Committee will consider both the adequacy and expeditiousness of the Government's response to Court judgments since its last report on the subject and will report thereon to Parliament. The Committee may comment on the Government's justification for any delay in implementation and may itself recommend general measures to remedy the incompatibility if it is not satisfied that the Government's response is adequate.<sup>201</sup> The Committee's report will cover progress made in responding to judgments which are outstanding.

38. The Committee's report will also consider the adequacy of the Government's systems and procedures for responding to Court judgments on human rights and may make recommendations for improving those arrangements, in particular with a view to enhancing Parliament's role.

39. Correspondence with the Department concerned or the Ministry of Justice will normally be published with the Committee's Report.

### ***Government response***

40. The Committee expects a response to its Report by the Government, in accordance with the normal convention for replying to select committee reports.<sup>202</sup>

### ***Annual debate in Parliament***

41. The Committee will seek to ensure that there is an annual parliamentary debate on its Report on the Government's Response to Human Rights Judgments and the Government's Response to the Committee's report.

### ***Amendments to Bills to give effect to the Committee's recommendations***

42. Where appropriate the Committee may, in its legislative scrutiny work, propose amendments to Bills to give effect to its recommendations in its work on human rights judgments, for example by amending the law to remove an incompatibility.<sup>203</sup>

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201 See for example, the Committee's report on the implementation of the decision in *S & Marper v UK*, considered above in paras 38 – 55.

202 The Committee was very critical of the Government for taking more than a year and a half to respond to its recommendations about the Government's systems for implementing judgments in its 2006–07 monitoring report: see e.g. Third Monitoring Report at paras 8–9. The Committee's Second Report was published in June 2007 and the Government's Response to the "systemic issues" part of the report was published in January 2009.

203 See e.g. Scrutiny reports on Employment Bill (Seventeenth Report of Session 2007–08, *Legislative Scrutiny*, HL 95/HC 501 paras 1.1–1.31) (amendment proposed to give effect to Committee's recommendation in relation to *ASLEF v UK*); Housing and Regeneration Bill (Seventeenth Report of Session 2007–08, *Legislative Scrutiny*, HL 95/HC 501, paras 2.29–2.37) (earlier amendments proposed to give effect to Committee's recommendation in relation to *Connors v*



### ***Follow up***

43. The Committee may follow up its work on implementation of judgments by inquiring into whether the measures adopted to remedy the incompatibility have in practice prevented more violations from arising.

### ***Review***

44. The Committee will keep this guidance under review in light of its experience of monitoring the Government's responses to court judgments in practice.

# Formal Minutes

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Tuesday 9 March 2010

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness Lord Dubs Baroness Falkner of Margravine Lord Morris of Handsworth The Earl of Onslow	Dr Evan Harris MP Mr Virendra Sharma MP
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Draft Report (*Enhancing Parliament's role in relation to human rights judgments*), proposed by the Chairman, brought up and read.

*Ordered*, That the draft Report be read a second time, paragraph by paragraph. Paragraphs 1 to 196 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

*Resolved*, That the Report be the Fifteenth Report of the Committee to each House.

*Ordered*, That the Chairman make the Report to the House of Commons and that Lord Dubs make the Report to the House of Lords.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 9 and 12 December, 13 January, 3 February, 19 May, 2 June, 14 and 21 July, and 13 and 20 October, in the last session of Parliament, and on 24 November, 15 December, 12 January and 3 February.

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[The Committee adjourned.]

## List of written evidence

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4	Letter from the Chair of the Committee to Rt Hon John Hutton MP, Secretary of State for Defence, dated 13 January 2009	Ev 1
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19	Letter from the Chair to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, dated 21 July 2009	Ev 17
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27	Letter to the Clerk of the Committee from Caroline Parkes, Researcher, British Irish Rights Watch, dated 24 November 2008	Ev 30
28	Letter to the Clerk of the Committee from Christopher Stanley, Research and Casework Manager, British Irish Rights Watch, dated 27 October 2009	Ev 31
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31	Letter to the Chair of the Committee from Andrew Alexander, Head, Police Powers Team, Policing Powers and Protection Unit, Home Office, dated 3 December 2009	Ev 48
32	Letter to the Chair of the Committee from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 22 January 2010	Ev 53
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## Written evidence

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### **Letter to the Committee from Derek Walton, Legal Counsellor, Foreign and Commonwealth Office, dated 24 July 2009**

I write to inform you that since I last wrote on 29 January, the following judgments against the United Kingdom have been given by the European Court of Human Rights:

- Booth v United Kingdom (Application No. 27961/02 Judgment of 3 February 2009). Lead Department: Department of Work and Pensions.
- Turner v United Kingdom (Application No. 42709/02 Judgment of 3 February 2009). Lead Department: Department of Work and Pensions.
- Mitchard v United Kingdom (Application No. 42711/02 Judgment of 3 February 2009). Lead Department: Department of Work and Pensions.
- Robert Murray v United Kingdom (Application No. 28045/02 Judgment of 3 February 2009). Lead Department: Department of Work and Pensions.
- Twomey v United Kingdom (Application No. 28095/02 Judgment of 3 February 2009). Lead Department: Department of Work and Pensions.
- A & Others v United Kingdom (Application No. 3455/05 Judgments of the Grand Chamber of 19 February 2009). Lead Department: Home Office.
- Blackgrove v United Kingdom (Application No. 2895/07 Judgment of 28 April 2009). Lead Department: Department of Work and Pensions.
- Szuluk v United Kingdom (Application No. 3693/05 Judgment of 2 June 2009). Lead Department: Ministry of Justice.

### **Letter to the Committee from Derek Walton, Legal Counsellor, Foreign and Commonwealth Office, dated 1 March 2010**

I write to inform you that since I last wrote on 24 July 2009, the following judgments against the United Kingdom have been given by the European Court of Human Rights:

- Richard Anderson v United Kingdom (Application No. 19859/04 Judgment of 9 February 2010). Lead Department: Scottish Executive.
- Financial Times Ltd & Others v United Kingdom (Application No. 821/03 Judgment of 15 December 2009). Lead Department: Ministry of Justice.
- Omojudi v United Kingdom (Application No. 1820/08 Judgment 24 November 2009). Lead Department: Home Office.
- A.W. Khan v United Kingdom (Application No. 47486/06 Judgment 12 January 2010). Lead Department: Home Office.

- *Crompton v United Kingdom* (Application No. 42509/05 Judgment 27 October 2009). Lead Department: Ministry of Defence.
- *Gillan & Quinton v United Kingdom* (Application No. 4158/05 Judgment 12 January 2010). Lead Department: Home Office.

I apologise for the delay since my last letter.

## **Letter to the Chair of the Committee from Richard Thomas CBE, Chairman, Administrative Justice & Tribunals Council**

### ***Judgment of the Court of Appeal in *Governors of X School v R (on the application of G) & Ors [2010] EWCA Civ 1****

The Administrative Justice and Tribunals Council (AJTC) was established by the Tribunals Courts and Enforcement Act 2007 as the successor body to the Council on Tribunals, with a remit to keep under review the administrative justice system and the constitution and working of tribunals and statutory inquiries within its oversight.

During 2006, the JCHR gave detailed consideration to the provisions of the Safeguarding Vulnerable Groups Bill. At that time, the Council on Tribunals raised concerns with the then Department for Education and Skills about the provisions in the Bill affecting the right of appeal of people barred from working with children or vulnerable adults by the Independent Barring Board (now called the Independent Safeguarding Authority (ISA)). In particular, the Council questioned whether limiting the right of appeal to a mistake of law or fact would comply with the European Convention on Human Rights. We were concerned that the lack of any right to challenge the merits of the ISA's decision, or of the exercise of discretion by the ISA, appears to be contrary to ECHR Articles 6 and 8. Subsequent changes following implementation of the Tribunals, Courts and Enforcement Act 2007 further limit the right of appeal from a decision of the ISA to the Upper Tribunal, effectively leap-frogging the First-tier Tribunal (Care Standards), which dealt with appeals against barring decisions under the earlier schemes.

The AJTC was therefore interested in your correspondence early last year with Vernon Coaker MP, Minister of State at the Home Office, inquiring whether, in the light of the House of Lords' judgment in *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, the Government remain satisfied that the Safeguarding Vulnerable Groups Act (SVGA) 2006 is compatible with human rights. Mr Coaker's response was limited to the specific issues raised in that case concerning the previous practice of provisional listing without the right to make representations. Since the ISA now invites representations from people it is minded to place on a barred list before making a final decision, the Government considers that the SVGA scheme is compatible with human rights, and in particular with Articles 6 and 8 of the ECHR.

Our attention has recently been drawn to the above recent judgment of the Court of Appeal. The question in this case was whether a teaching assistant accused of inappropriate conduct should be allowed to have legal representation at an internal disciplinary hearing. The following extracts from the judgment of Laws LJ raise significant human rights issues:



"48. Accordingly it is clear in my judgment that the outcome of the disciplinary proceedings, if (after the extant appeal) it remains unfavourable to the claimant, will have a substantial effect on the outcome of the barred list procedures which will then be applied to him. His right to practise his profession, which will be directly at stake in the barred list procedure, may (in the language of the *Ocalan* case) be irretrievably prejudiced by the disciplinary proceedings. I conclude that the answer to the first question which I posed is in the affirmative: the disciplinary proceedings are a determinant of the claimant's right to practise his profession. Article 6 is accordingly engaged on the footing that that is the civil right in issue.

49. This result cannot, I think, be dislodged by the existence of the Upper Tribunal's appellate jurisdiction. Though it may entertain appeals on law or fact from the ISA, for the purposes of its jurisdiction "the decision whether or not it is appropriate for an individual to be included in a barred list is not a question of law or fact" (s.4(3) of the 2006 Act). The issue most likely to be critical in a case like the present, namely whether on the proved or admitted facts the quality of the individual's act should be judged severe enough to put him on the barred list, appears to lie beyond the Upper Tribunal's jurisdiction. "

I would therefore be grateful if your Committee would consider the implications of this judgment and again seek the Government's views on whether, in the light of its findings, section 4 of the SVGA 2006 is in fact compliant with Articles 6 and 8 of the ECHR.

# List of Reports from the Committee since 2007–08

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## Session 2009–10

First Report	Any of our business? Human rights and the UK private sector	HL Paper 5/HC 64
Second Report	Work of the Committee in 2008–09	HL Paper 20/HC 185
Third Report	Legislative Scrutiny: Financial Services Bill and the Pre-Budget Report	HL Paper 184/HC 184
Fourth Report	Legislative Scrutiny: Constitutional Reform and Governance Bill; Video Recordings Bill	HL Paper 33/HC 249
Fifth Report	Legislative Scrutiny: Digital Economy Bill	HL Paper 44/HC 327
Sixth Report	Demonstrating Respect for Rights? Follow Up: Government Response to the Committee's Twenty-second Report of Session 2008–09	HL Paper 45/ HC 328
Seventh Report	Allegation of Contempt: Mr Trevor Phillips	HL Paper 56/HC 371
Eighth Report	Legislative Scrutiny: Children, Schools and Families Bill; Other Bills	HL Paper 57/HC 369
Ninth Report	Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010	HL Paper 64/HC 395
Tenth Report	Children's Rights: Government Response to the Committee's Twenty-fifth Report of Session 2008–09	HL Paper 65/HC 400
Eleventh Report	Any of our business? Human rights and the UK private sector: Government Response to the Committee's First Report of Session 2009–10	HL Paper 66/HC 401
Twelfth Report	Legislative Scrutiny: Crime and Security Bill; Personal Care at Home Bill; Other Bills	HL Paper 67/HC 402
Thirteenth Report	Equality and Human Rights Commission	HL Paper 72/HC 183
Fourteenth Report	Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill	HL Paper 73/HC 425
Fifteenth Report	Enhancing Parliament's role in relation to human rights judgments	HL Paper 85/HC 455

## Session 2008–09

First Report	The UN Convention on the Rights of Persons with Disabilities	HL Paper 9/HC 93
Second Report	The Work of the Committee in 2007–08	HL Paper 10/HC 92
Third Report	A Bill of Rights for the UK? Government Response to the Committee's Twenty-ninth Report of Session 2007–08	HL Paper 15/ HC 145
Fourth Report	Legislative Scrutiny: Political Parties and Elections Bill	HL Paper 23/ HC 204

Fifth Report	Counter-Terrorism Policy and Human Rights: Annual Renewal of Control Orders Legislation 2009	HL Paper 37/HC 282
Sixth Report	UN Convention on the Rights of Persons with Disabilities: Government Response to the Committee's First Report of Session 2008–09	HL Paper 46/HC 315
Seventh Report	Demonstrating respect for rights? A human rights approach to policing protest	HL Paper 47/HC 320
Eighth Report	Legislative Scrutiny: Coroners and Justice Bill	HL Paper 57/HC 362
Ninth Report	Legislative Scrutiny: Borders, Citizenship and Immigration	HL Paper 62/HC 375
Tenth Report	Legislative Scrutiny: Policing and Crime Bill	HL Paper 68/HC 395
Eleventh Report	Legislative Scrutiny: 1) Health Bill and 2) Marine and Coastal Access Bill	HL Paper 69/HC 396
Twelfth Report	Disability Rights Convention	HL Paper 70/HC 397
Thirteenth Report	Prisoner Transfer Treaty with Libya	HL Paper 71/HC 398
Fourteenth Report	Legislative Scrutiny: Welfare Reform Bill; Apprenticeships, Skills, Children and Learning Bill; Health Bill	HL Paper 78/HC 414
Fifteenth Report	Legislative Scrutiny: Policing and Crime Bill (gangs injunctions)	HL Paper 81/HC 441
Sixteenth Report	Legislative Scrutiny: Coroners and Justice Bill (certified inquests)	HL Paper 94/HC 524
Seventeenth Report	Government Replies to the 2 <sup>nd</sup> , 4 <sup>th</sup> , 8 <sup>th</sup> , 9 <sup>th</sup> and 12 <sup>th</sup> reports of Session 2008–09	HL Paper 104/HC 592
Eighteenth Report	Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days 2009	HL Paper 119/HC 726
Nineteenth Report	Legislative Scrutiny: Parliamentary Standards Bill	HL Paper 124/HC 844
Twentieth Report	Legislative Scrutiny: Finance Bill; Government Responses to the Committee's Sixteenth Report of Session 2008–09, Coroners and Justice Bill (certified inquests)	HL Paper 133/ HC 882
Twenty First Report	Legislative Scrutiny: Marine and Coastal Access Bill; Government response to the Committee's Thirteenth Report of Session 2008–09	HL Paper 142/ HC 918
Twenty-second Report	Demonstrating respect for rights? Follow-up	HL Paper 141/ HC 522
Twenty-third Report	Allegations of UK Complicity in Torture	HL Paper 152/HC 230
Twenty-fourth Report	Closing the Impunity Gap: UK law on genocide (and related crimes) and redress for torture victims	HL Paper 153/HC 553
Twenty-fifth Report	Children's Rights	HL Paper 157/HC 338
Twenty-sixth Report	Legislative Scrutiny: Equality Bill	HL Paper 169/HC 736
Twenty-seventh Report	Retention, use and destruction of biometric data: correspondence with Government	HL Paper 182/HC 1113
Twenty-eighth Report	Legislative Scrutiny: Child Poverty Bill	HL Paper 183/HC 1114

**Session 2007–08**

First Report	Government Response to the Committee's Eighteenth Report of Session 2006–07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006–07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation 2008	HL Paper 57/HC 356
Eleventh Report	The Use of Restraint in Secure Training Centres	HL Paper 65/HC 378
Twelfth Report	Legislative Scrutiny: 1) Health and Social Care Bill 2) Child Maintenance and Other Payments Bill: Government Response	HL Paper 66/HC 379
Thirteenth Report	Government Response to the Committee's First Report of Session 2006–07: The Council of Europe Convention on the Prevention of Terrorism	HL Paper 67/HC 380
Fourteenth Report	Data Protection and Human Rights	HL Paper 72/HC 132
Fifteenth Report	Legislative Scrutiny	HL Paper 81/HC 440
Sixteenth Report	Scrutiny of Mental Health Legislation: Follow Up	HL Paper 86/HC 455
Seventeenth Report	Legislative Scrutiny: 1) Employment Bill; 2) Housing and Regeneration Bill; 3) Other Bills	HL Paper 95/HC 501
Eighteenth Report	Government Response to the Committee's Sixth Report of Session 2007–08: The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 103/HC 526
Nineteenth Report	Legislative Scrutiny: Education and Skills Bill	HL Paper 107/HC 553
Twentieth Report	Counter-Terrorism Policy and Human Rights (Tenth Report): Counter-Terrorism Bill	HL Paper 108/HC 554

Twenty-First Report	Counter-Terrorism Policy and Human Rights (Eleventh Report): 42 days and Public Emergencies	HL Paper 116/HC 635
Twenty-Second Report	Government Response to the Committee's Fourteenth Report of Session 2007–08: Data Protection and Human Rights	HL Paper 125/HC 754
Twenty-Third Report	Legislative Scrutiny: Government Replies	HL Paper 126/HC 755
Twenty-Fourth Report	Counter-Terrorism Policy and Human Rights: Government Responses to the Committee's Twentieth and Twenty-first Reports of Session 2007–08 and other correspondence	HL Paper 127/HC 756
Twenty-fifth Report	Counter-Terrorism Policy and Human Rights (Twelfth Report): Annual Renewal of 28 Days 2008	HL Paper 132/HC 825
Twenty-sixth Report	Legislative Scrutiny: Criminal Evidence (Witness Anonymity) Bill	HL Paper 153/HC 950
Twenty-seventh Report	The Use of Restraint in Secure Training Centres: Government Response to the Committee's Eleventh Report	HL Paper 154/HC 979
Twenty-eighth Report	UN Convention against Torture: Discrepancies in Evidence given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq	HL Paper 157/HC 527
Twenty-ninth Report	A Bill of Rights for the UK?: Volume I Report and Formal Minutes	HL Paper 165-I/HC 150-I
Twenty-ninth Report	A Bill of Rights for the UK?: Volume II Oral and Written Evidence	HL Paper 165-II/HC 150-II
Thirtieth Report	Counter-Terrorism Policy and Human Rights (Thirteenth Report): Counter-Terrorism Bill	HL Paper 172/HC 1077
Thirty-first Report	Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008	HL Paper 173/HC 1078
Thirty-second Report	Scrutiny of Mental Health Legislation: Government Response to the Committee's Sixteenth Report of Session 2007–08	HL Paper/ HC 1079

# Written evidence

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## Letter from the Chair of the Committee to Rt Hon John Hutton MP, Secretary of State for Defence, dated 13 January 2009

AL-SAADON & MUFDHI v UNITED KINGDOM (APPLICATION NO 61498/08)

We are extremely concerned that the United Kingdom appears to have delivered the applicants in this case to the custody of the Iraqi High Tribunal, despite a decision of the European Court of Human Rights indicating to the UK Government that “the applicants should not be removed or transferred from the custody of the United Kingdom until further notice” and a finding by UK courts that there is a substantial risk that they will face the death penalty.<sup>1</sup>

You will be familiar with the detailed facts and chronology of this case.<sup>2</sup> In short:

- The applicants are two Iraqi civilians accused of the murder of two members of the UK Armed Forces.
- They were held by the UK Armed Forces in Basra until some time during the afternoon of 31 December 2008, when they were transferred to the custody of the Iraqi High Tribunal.<sup>3</sup> Those forces formed part of the multinational forces in Iraq pursuant to UN Security Council Resolutions. Their UN mandate expired at midnight on 31 December 2008.
- The applicants argue that their return to the Iraqi High Tribunal for trial, which has the power to impose the death penalty, will lead to a breach of their rights under the European Convention on Human Rights (ECHR), including the right to life (Article 2) and the right to be free from torture, inhuman and degrading treatment or punishment (Article 3) as well as other Convention rights.
- Their case was heard and dismissed by the Court of Appeal on 30 December 2008, which refused to extend an injunction preventing you from ordering the transfer of the applicants to Iraqi custody.
- On the same day, the European Court of Human Rights took an interim measures decision, which indicated to the United Kingdom that the applicants should not be removed from the custody of the United Kingdom until further notice.<sup>4</sup>
- Despite the decision of the European Court of Human Rights, the applicants were delivered to the Iraqi High Tribunal on the afternoon of 31 December 2008.
- We understand that the High Court granted a further emergency injunction on the afternoon of 31 December 2008 to prevent the transfer of the applicants to Iraqi custody, in line with the decision of the European Court of Human Rights. This order was later rescinded as the applicants had already been transferred.

We understand that the Government wrote to the European Court of Human Rights on 31 December 2008, to explain their decision. The Government explained that, in light of the decision of the Court of Appeal, and its analysis of the application of the European Convention of Human Rights and the broader requirements of international law, it was the view of the United Kingdom Government that it had “no lawful option other than transfer to the Iraqi authorities”.<sup>5</sup> In addition, we understand that you have explained that:

The European Court of Human Rights at Strasbourg has asked the UK to retain custody in Iraq of Mr Al Saadon and Mr Mufdhi when we have no legal power to do so. Compliance with Strasbourg requests would normally be a matter of course but these are exceptional circumstances.<sup>6</sup>

Failure to comply with interim measures may breach the right of an individual to petition the European Court of Human Rights for a decision on the application of the European Convention on Human Rights.

I would be grateful if you could provide my Committee with further information about the approach of the United Kingdom Government to this case:

1. On which day and at what time did the United Kingdom Government receive communication of the interim measures decision of the European Court of Human Rights?
  2. On which day and at what time were you, or your officials, made aware of this decision?
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<sup>1</sup> See for example, Independent, *Pair accused of murder handed over to Iraqi authorities*, 31 December 2008; Guardian, *Judges agree transfer of two Iraqis accused of killing British soldiers*, 31 December 2008; Guardian, *Lawyers query transfer of Iraqis accused of killing British troops*, 12 January 2009.

<sup>2</sup> See *Al-Saadon & Mufdhi v Secretary of State for Defence* [2008] EWHC 3098 (Admin); Transcript; Court of Appeal Hearing, 29–30 December 2008.

<sup>3</sup> The applicants were each taken into the custody of UK Armed Forces in April and November 2003, respectively. On 27 December 2007, after a criminal investigation, the Iraqi High Tribunal requested that the applicants be transferred to their custody.

<sup>4</sup> Pursuant to Rule 39 of the Rules of Court of the European Court of Human Rights.

<sup>5</sup> Letter dated 31 December 2008 from Derek Walton, Agent of the Government of the United Kingdom to Mr T L Early, Section Registrar, European Court of Human Rights.

<sup>6</sup> Independent, *Pair accused of murder handed over to Iraqi authorities*, 31 December 2008.



3. At what time on 31 December 2008 were the applicants transferred to the custody of the Iraqi authorities?
4. Were the applicants' legal representatives made aware of the decision to transfer them to the Iraqi authorities on 31 December 2008, and if so, at what time and by what means? If not, why not?
5. I would be grateful if you could provide a more detailed explanation of the Government's view that its decision to transfer the applicants is compatible with the right of individual petition secured by Article 34 ECHR, in the light of the interim measures decision of the European Court of Human Rights. In particular:
  - (a) Why does the Government consider it was appropriate to ignore the interim measures decision of the European Court on the basis of the UK courts' interpretation of international law, and on the application of the ECHR?
  - (b) Does the Government agree that the final interpretation of the Convention and the scope of its application is a matter for the ECHR? If not, please explain the Government's view.
6. I would be grateful if you could outline any communications which the United Kingdom Government has had with the Committee of Ministers of the Council of Europe in respect of this case. We would be grateful for copies of any information sent by the Government to the Committee of Ministers, or which is sent in due course.

I have copied this letter to both the Secretary of State for Foreign and Commonwealth Affairs and the Minister for Human Rights. We will be taking evidence from the Secretary of State for Justice and the Minister for Human Rights on 20 January 2009 and may raise our concerns during this session.

31 January 2009

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**Letter from Rt Hon Bob Ainsworth MP, Minister of State for Armed Forces, Ministry of Defence, dated  
26 January 2009**

AL-SAADON & MUFDHI V UNITED KINGDOM (APPLICATION No 61498/08)

Thank you for your letter of 13 January 2009 to the Defence Secretary regarding the transfer of Mr Al Saadoon and Mr Mufdhi to the physical custody of the Iraqi High Tribunal.

I understand your concern about the Government's decision to effect the transfer notwithstanding the interim measures indicated by the European Court of Human Rights at Strasbourg. I can assure you that we take very seriously our responsibilities in relation to such measures. However, after very careful consideration of the exceptional circumstances of this case, we concluded that the only lawful option was to transfer Mr Al Saadoon and Mr Mufdhi to the Iraqi authorities. To help you understand our position, it might be helpful if I set out the analysis behind our decision.

On 30 December 2008, the Court of Appeal held that Mr Al Saadoon and Mr Mufdhi were not within the jurisdiction of the UK for the purposes of the ECHR. Further, after the expiry of UN Security Council resolution 1790(2007) on 31 December 2008, the UK had no legal power to detain any individuals in Iraq. Thus we were faced with the option of breaching the Rule 39 measure or acting unlawfully in international law. The Iraqi authorities would have been entitled under the law in force after 31 December 2008 to enter the detention facility where Mr Al Saadoon and Mr Mufdhi were held and remove them.

The Court of Appeal recognised this dilemma when they refused to grant an injunction preventing transfer pending any application to Strasbourg, stating:

"It is clear that we could not grant an interim injunction past 31 December and the critical question is whether we should grant some injunction until the end of 31 December. The conclusion we have reached is that the answer is no, because the basis for doing that would contemplate as a possibility that the Strasbourg court could make further orders for interim measures which would require UK personnel to resist the handover, contrary to the United Kingdom's international law obligations. So the application for interim measures is refused".

Turning to your specific questions:

1. *On which day and at what time did the United Kingdom Government receive communication of the interim measures decision of the European Court of Human Rights?*
2. *On which day and at what time were you, or your officials, made aware of this decision?*

On 30 December at 15.37 (UK time, 16.37 Strasbourg time) the ECtHR wrote to the Government indicating measures to be taken under rule 39 of the Rules of Court. It is against that context which the decision of the Government was made, as recorded in the letter to the ECtHR dated 31 December and copied to Public Interest Lawyers. This clearly sets out the Government's position and explained that the decision not to act in accordance with the indication of the Strasbourg court was "wholly exceptional".

3. *At what time on 31 December 2008 were the applicants transferred to the custody of the Iraqi authorities?*

The Applicants were transferred to the physical custody of two Iraqi Police Service officers on 31 December 2008 at 1615 hrs local Iraqi time (ie 1315 hrs UK time).

4. *Were the applicants' legal representatives made aware of the decision to transfer them to the Iraqi authorities on 31 December 2008, and if so, at what time and by what means? If not, why not?*

Notification of decision to transfer was contained in the letter from FCO to the ECtHR of 31 December, which was copied to the applicants' legal representatives by email at 16.00 on 31 December 2008.

5. *I would be grateful if you could provide a more detailed explanation of the Government's view that its decision to transfer the applicants is compatible with the right of individual petition secured by Article 34 ECHR, in the light of the interim measures decisions of the European Court of Human Rights. In particular:*

(a) *Why does the Government consider it was appropriate to ignore the interim measures decision of the European Court on the basis of the UK courts' interpretation of international law, and on the application of the ECHR?*

It is the Government's policy to comply with Rule 39 measures indicated by that Court as a matter of course where it is able to do so. However, in the wholly exceptional circumstances of this case, and in particular given that continued detention of the applicants would have been unlawful, there was no lawful option other than transfer to the Iraqi authorities. The Government therefore took the view that, exceptionally, it could not comply with the measure indicated by the Court; and that this action should not be regarded as a breach of article 34 of the Convention in this case.

(b) *Does the Government agree that the final interpretation of the convention and the scope of its application is a matter for the ECHR? If not, please explain the Government's view.*

The Government accepts that, ultimately, the question as to whether the United Kingdom has complied with its obligations under the Convention in any given case is a matter for the European Court of Human Rights, which has jurisdiction to consider all matters relating to the interpretation and application of the Convention that are referred to it. The final judgments of that Court in cases to which the United Kingdom is a party are binding on the Government.

6. *I would be grateful if you could outline any communications which the United Kingdom Government has had with the Committee of Ministers of the Council of Europe in respect of this case. We would be grateful for copies of any information sent by the Government to the Committee of Ministers, or which is sent in due course.*

There have been no communications between the Government and the Committee of Ministers of the Council of Europe in respect of this case. We attach a copy of the FCO's letter to the Secretary General of the Council of Europe of 31 December 2008, informing the Secretary General of the circumstances surrounding the Government's decision. The attachment referred to in that letter (a transcript of proceedings in the Court of Appeal) was subsequently supplied to the Secretary General's office at their request.

## Annex

### **Letter from the Foreign and Commonwealth Office to the Section Registrar, European Court of Human Rights, Council of Europe, Strasbourg**

APPL NO 61498/08: AL-SAADON & MUFDHI-V-THE UNITED KINGDOM

1. I refer to your letter of 30 December 2008 indicating measures under Rule 39 of the Rules of Court that the applicants should not be removed or transferred from the custody of the Government until further notice.

2. The Court will wish to be aware of the Court of Appeal's unanimous decision yesterday that the applicants do not fall within the jurisdiction of the United Kingdom for the purposes of the Convention, that the United Kingdom detains the applicants only at the request and to the order of the Iraqi Higher Tribunal, and has no discretionary power to hold or release them. It is obliged, in accordance with its international obligations to Iraq to pass the applicants into Iraqi custody. That is the position prior to 31 December 2008; after that date the United Kingdom has no legal basis to continue to detain individuals in any event. I attach a copy of the transcript of the proceedings before the Court of Appeal, including its summary judgment; a fully reasoned judgment is expected in due course. The court will take note in particular of the conclusion of the Court of Appeal that after 31 December 2008 the UK will have no power to move the applicants anywhere else or to prevent the Iraqis taking the applicants from British custody, and moreover, that "British troops could not be ordered to take any steps to prevent that happening".

3. I am now writing to inform you that the applicants were transferred to the Iraqi authorities earlier today. The Government took this action in accordance with their obligations under international law, including their obligations to the Government of Iraq, and in light of the decision of the Court of Appeal.

The issues and the background are set out in my letter of 30 December 2008, and in detail in the Government's skeleton arguments before the Divisional Court and the Court of Appeal, copies of which have already been provided to the Court.

4. In the circumstances, continued detention of the applicants would have been unlawful. Given that there was no lawful option other than transfer to the Iraqi authorities, the Government took the view that, exceptionally, it could not comply with the measure indicated by the Court; and further that this action should not be regarded as a breach of Article 34 of the Convention in this case.

5. The Government regard the circumstances of this case as wholly exceptional. It remains the Government policy to comply with Rule 39 measures indicated by the Court as a matter of course where it is able to do so.

6. The Government reserve the right to address this issue fully in further observations, should this be necessary.

26 January 2009

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**Letter from the Chair of the Committee to Phil Woolas MP, Minister of State for Borders and Immigration, Home Office, dated 12 May 2009**

BAIAI V SECRETARY OF STATE FOR THE HOME DEPARTMENT

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments involving a declaration of incompatibility under Section 4 of the Human Rights Act 1998.

I am writing to ask for further information in respect of the case of *Baiyai v Secretary of State for the Home Department*. This case determined that the requirement that any marriage outside the Church of England involving a person subject to immigration control must be subject to a Certificate of Approval issued by the Secretary of State was incompatible with the right to enjoy respect for religion and belief without discrimination (as guaranteed by Article 9 and 14 ECHR). The Government accepts that the exemption of the Church of England from the Certificate of Approval regime is in breach of the Convention. It is currently considering, after discussions with the Church of England, how to extend the operation of the scheme to Church marriages.

In its response to our last report on this issue, published in January 2009, the Government explained:

The Government is committed to remedying the declared incompatibility with Article 14... The UK Border Agency is liaising with relevant stakeholders and is considering the most appropriate way to remedy the incompatibility. We are conscious of the House of Lords find that the scheme could represent a disproportionate interference with Article 12 for those applicants who are needy and not able to afford the fee for a Certificate of Approval application, and are considering very carefully the implications of the House of Lords judgment in this respect. This aspect relates to the secondary legislation, and is separate from the declaration of incompatibility which of course concern the primary legislation.<sup>7</sup>

We understand that the compatibility of the Certificate of Approval scheme with the right to marry and the right to respect for belief or religion without discrimination (Articles 12, 9 and 14) is being challenged at the European Court of Human Rights (*O'Donoghue v United Kingdom*, App No 34848/07)

1. *What steps do the Government plan to take to remove the incompatibility in Section 19 of the Asylum and Immigration Act (Treatment of Claimants etc) Act 2004 with Article 9 and 14 ECHR?*
2. *Your predecessor explained that the Registrar Service and the Church of England had been reluctant to implement changes to the current Certificate of Approval scheme before the judgment of the House of Lords in this case. The Government told us three years ago that it intended to remove the discrimination identified in the declaration of incompatibility. If there is any reason for any delay in extending the Certificate of Approval scheme to the Church of England, I would be grateful for an explanation of that reason and the Government's timetable for action.*
3. *In the light of the guidance given by the House of Lords, what steps, if any, does the Government consider is necessary in order to ensure that the Certificate of Approval scheme is operated in a manner which is compatible with Article 12 ECHR?*

12 May 2009

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<sup>7</sup> Cm 7534, page 28.

**Letter to the Chair of the Committee from Phil Woolas MP, Minister of State, Home Office,  
dated 12 November 2009**

BAIAI v SECRETARY OF STATE FOR THE HOME DEPARTMENT

I am writing to inform you of our intentions with regard to Certificates of Approval (CoA) for marriage and civil partnerships and further to your letter of 12 May. I apologise for the extreme delay in responding to your request for information.

As you know, following the House of Lords judgment in the case of *Baiai v the Secretary of State for the Home Department*, the compatibility of the Certificate of Approval scheme with the right to marry and the right to respect for belief or religion without discrimination (Articles 12, 9 and 14) is being challenged in the European Court of Human Rights (*O'Donoghue v United Kingdom*, Application No 34848/07).

Regarding Article 12, the House of Lords found in *Baiai* that a fixed fee of £295 for CoA applications was capable of interfering with the right to marry in respect of needy applicants. As a result, the UK Border Agency suspended the £295 CoA application fee in April this year and at the end of July the Agency introduced a fee repayment scheme for needy applicants who had previously paid a CoA fee. With these changes, we believe the CoA scheme is currently operating in a way that is consistent with Article 12. Further information on the CoA repayment scheme may be found on the UKBA website at the link: [www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/coa-fee-repayment](http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/coa-fee-repayment)

Turning now to the declaration of incompatibility with Articles 14 and 9 (right to respect for belief or religion without discrimination), resulting from the exemption of the Anglican Church in England and Wales. The Government informed the European Court of Human Rights in August (in relation to the *O'Donoghue* case) that we would notify the Court this Autumn how we propose to remedy the incompatibility.

As you are aware, the UK Border Agency has sought for some time to bring marriages after Anglican preliminaries in England and Wales within the CoA scheme but has been unable to find a workable solution. The imperative need to respond to the declaration of incompatibility, together with the other changes to the CoA scheme since 2005 which we believe have weakened its effectiveness, have led us to conclude that we should deal with the incompatibility by removing the scheme. We propose to bring forward a Remedial Order under Section 10 of the Human Rights Act 1998 to achieve this.

Preparation of a Remedial Order will begin immediately with a view to laying a proposal before Parliament as early as possible in the New Year. We are publishing our intentions with respect to CoAs alongside other proposals for reform of the marriage route to settlement in the Command Paper *Simplifying Immigration Law Cm 7730* which is being laid before Parliament today. We will ensure that our rigorous new systems to help us identify abuse before we grant status on the basis of marriage are in place by the time the CoAs are withdrawn.

The JCHR of course has an important role to play in scrutiny of Remedial Orders. At this stage, we are envisaging using the non-urgent procedure and I will write to you again in due course with the rationale and detail of our proposal.

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**Letter from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, to the Chair of the  
Committee, dated 21 May 2009**

COMMITTEE OF MINISTERS' 2008 ANNUAL REPORT ON SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS

I write to draw your attention to the recent publication by the Committee of Ministers of the Council of Europe of their *Annual Report on Supervision of the Execution of Judgments of the European Court of Human Rights*. The report is designed to provide a summary of progress in this area by the States in their implementation work and the Committee in its supervision of the process. A hard copy of the report will follow shortly, when received from Strasbourg, but the text may also be accessed online via the Council of Europe website.

The Government takes its duty to comply with judgments of the ECtHR very seriously and is committed to remedying breaches of human rights as quickly as possible. The report shows that the UK has performed well in many of the areas examined. In particular, the following statistics demonstrate this commitment:

- Of the cases the Committee of Ministers agreed to close, 13% were UK cases (the second-highest percentage). The UK was also responsible for the highest percentage of leading cases that the Committee of Ministers agreed to close (13%).
- The UK accounts for only 2% of leading cases still pending before the Committee of Ministers after two years.

The UK Government remains committed to the European Convention on Human Rights and to continuing to give effect to the rights contained in the Convention at the national level in line with its obligations under the Convention. We look forward to continuing to work with the JCHR on this important aspect of the Government's human rights work in the future.

21 May 2009

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**Letter from the Chair of the Committee to Rt Hon John Healey MP, Minister for Housing, Department for Communities and Local Government, dated 9 June 2009**

MCCANN v UNITED KINGDOM (APP NO 19009/04, 13 MAY 2008)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).

On 13 May 2008, the European Court of Human Rights gave judgment in the case of *McCann v UK*. It held that the lack of adequate procedural safeguards in possession proceedings violated the right to respect for home (Article 8 ECHR). The Court held:

The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.<sup>8</sup>

Shortly after the decision, the Housing and Regeneration Bill was considered by the House of Lords. Baroness Hamwee tabled an amendment which sought to give effect to the *McCann* judgment. Baroness Andrews opposed the amendment on three grounds. First, domestic courts were already required to take ECHR jurisprudence into account (Section 2(1) Human Rights Act 1998). Secondly, the Strasbourg Court accepted that the proportionality defence would only be successful in exceptional cases and, according to the Government, the proposed amendment would complicate and delay the vast majority of cases. Thirdly, judgment was pending from the House of Lords in the related case of *Doherty*.<sup>9</sup> The amendment was withdrawn.

On 30 July 2008, the House of Lords gave judgment in *Doherty v Birmingham City Council* [2008] UKHL 57. The Secretary of State intervened arguing, in the light of the ECtHR's decision in *McCann*, that the House of Lords should follow the approach of the minority in *Kay v London Borough of Lambeth* [2006] UKHL 10 (that is, that in exceptional cases, the occupier could be permitted to argue that his individual personal circumstances made the application of the law disproportionate in his case in breach of Article 8 ECHR).<sup>10</sup> The House of Lords however disagreed with this argument and with the approach of the ECtHR in *McCann*.

In the light of the ECtHR judgment and its consideration by Parliament and the House of Lords, we would be grateful for your response to the following questions:

1. What steps, if any, does the Government intend to take to give effect to the ECtHR's decision in *McCann*?
2. Does it propose to use primary legislation to give effect to the ECtHR's judgment? If not, why not?
3. Why has the Government chosen not to remedy the breach identified in *McCann* by remedial order?
4. On what evidence does the Government base its conclusion (given during the debates on the Housing and Regeneration Bill) that legislative amendment in the light of *McCann* would complicate and delay the vast majority of cases?
5. Given the House of Lords' decision in *Doherty*, does the Government remain satisfied that domestic courts can take the decision in *McCann* into account? Please explain how in practice they are able to do so.

In addition, please provide us with copies of the Government's submissions to the Committee of Ministers, including its submission of 14 October 2008, and ensure that we continue to be updated as further information is provided.

9 June 2009

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<sup>8</sup> Para 50.

<sup>9</sup> HL, 9 July 2008, Cols 808–810.

<sup>10</sup> The House of Lords also unanimously held that where there was inconsistency between rulings of the domestic courts and the ECtHR, the domestic courts should follow the binding precedent of higher domestic courts.

**Letter to the Chair from Ian Austin MP, Parliamentary Under Secretary of State, Department for Communities and Local Government, dated 5 July 2009**

RE McCANN v UNITED KINGDOM

Thank you for your letter of 9 June to John Healey asking for information about the Government's position on and response to the European Court of Human Rights' judgment, in the above case, that the UK was in breach of the European Convention on Human Rights. Your letter has been passed to me for a response.

I am conscious that you sought a reply by 23 June and I apologise for not keeping to that date. Your letter, I'm afraid, took longer than it should have done to reach me and relevant officials and has required some careful consideration across several Government Departments.

Since my substantive response is lengthy I've numbered it and included it below this covering note. You will see that it addresses each of the five questions raised in your letter in turn. I've also enclosed, as requested, copies of the Government's submissions to the Committee of Ministers in this case. We will of course keep you updated if further information is provided.

*What steps, if any, does the Government intend to take to give effect to the ECtHR's decision in McCann?*

1. The Government has informed the Committee of Ministers that it considers that the case of *McCann* should now be closed. However, it has said that if the Committee considers it would be preferable to await the judgment of the European Court of Human Rights ("ECtHR") in *Kay v United Kingdom* (application no 37341/06), the Government is willing to do so, but will take no further steps regarding implementation pending the *Kay v United Kingdom* judgment.

2. The decision in *Doherty* took fully into account the decision of the ECtHR in *McCann*: see Lord Hope at [15]–[21], Lord Scott at [82]–[88], Lord Walker at [115]–[121] and Lord Mance at [140], [161]–[163].

3. In order to understand how their Lordships developed and modified their judgment in *Kay v London Borough of Lambeth and Leeds City Council v Price* [2006] UKHL 10 [2006] 2WLR 570 ("*Kay*") in the light of *McCann* it is necessary to consider their decisions in *Kay* and *Doherty v Birmingham City Council* [2008] UKHL 57 ("*Doherty*") briefly.

4. The leading majority speech in *Kay* was given by Lord Hope who explained at [para] 110:

*"Subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out ... Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it to do so under section 3, in a way that is compatible with Article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: Wandsworth London Borough Council v Winder [1985] AC 461. The common law as explained in that case is, of course, compatible with Article 8. It provides an additional safeguard."*

5. In summary, the decision of the majority in *Kay* in the House of Lords established that where a landlord has an unqualified right to possession, an occupier may do one of two things. He may argue that the law is incompatible with Article 8 and seek a declaration of incompatibility ("gateway (a)"). Or he may raise a public law defence by arguing that the public authority landlord's decision to seek possession is so unreasonable that no reasonable person would consider it justifiable, and that possession should accordingly be refused on that ground ("gateway (b)").

6. Lord Bingham, giving the leading minority judgment adopted the following formulation as to how the courts should approach Article 8 defences to possession proceedings at para [39]:

*"(1) It is not necessary for a local authority to plead or prove in every case that domestic law complies with Article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with Article 8. (2) If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met, the court should make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case*

on one of two grounds. (3) The two grounds are: (a) that the law which requires the court to make a possession order despite the occupier's personal circumstances is Convention-incompatible; and (b) that, having regard to the occupier's personal circumstances, the local authority's exercise of its power to seek a possession order is an unlawful act within the meaning of section 6. (4) Deciding whether the defendant has a seriously arguable case on one or both of these grounds will not call for a full-blown trial. This question should be decided summarily, on the basis of an affidavit or of the defendant's defence, suitably particularised, or in whatever other summary way the court considers appropriate. The procedural aim of the court must be to decide this question as expeditiously as is consistent with the defendant having a fair opportunity to present his case on this question..."

7. Thus, whilst the minority considered that there would be a heavy presumption that Article 8 would not provide a defence to possession proceedings where the law gave the landlord an unqualified right to possession, it accepted that an argument could in principle be raised that, in the light of the occupier's personal circumstances, it was a breach of the local authority's duty under section 6(1) of the Human Rights Act 1998 to seek a possession order.

8. The House of Lords' decision in *Doherty* was preceded by the judgment of the ECtHR in *McCann v United Kingdom*. In his leading judgment in *Doherty*, Lord Hope at para [19] accepted that the House of Lords "must take into account any judgment of the Strasbourg court and give practical recognition to the principles that it lays down." Lord Hope acknowledged at paragraph 36 that the way in which the formula expressed by him in paragraph 110 of *Kay* worked in cases of this kind required further development and to some extent modification.

9. He went on to say that:

*"in this situation it would be unduly formalistic to confine the review strictly to traditional Wednesbury grounds. The considerations that can be brought into account in this case are much wider. An examination of the question whether the respondent's decision was reasonable, having regard to the aim it was pursuing and the length of time that the appellant and his family have resided on the site, would be appropriate"* (paragraph 55).

10. The case was remitted to allow for a gateway (b) challenge to be considered by the High Court.

11. The Court of Appeal considered the House of Lords' decision in *Doherty* in the case of *Doran v Liverpool City Council* [2009] EWCA CIV 146. Toulson LJ, with whom the other members of the Court agreed, held in paras [48]–[52] that in relation to gateway (b) the effect of *Doherty* was two fold:

*"First, there is no formulaic or formalistic restriction of the factors which may be relied upon by the licensee in support of an argument that the council's decision to serve a notice to quit, and seek a possession order, was one which no reasonable council would have taken. Such factors are not automatically irrelevant simply because they may include the licensee's personal circumstances, such as length of time of occupation. In Doherty, where the family had been in occupation for a substantial time without causing any trouble, but the council wanted to use the site in a different way, it might also be thought relevant whether the council had taken any steps to offer the family, or help them to acquire, alternative accommodation.*

*Secondly, the question whether the council's decision was one which no reasonable person would have made is to be decided by applying public law principles as they have been developed at common law, and not through the lens of the Convention.*

*There is no conflict between these two propositions, which should be capable of being applied without additional complexity. As Baroness Hale observed in Kay at para 190, in a passage cited by Lord Walker in Doherty at para 108:*

*"it should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide: see R v Lincolnshire County Council ex parte Atkinson (1995) 8 Admin LR 529; R (Casey) v Crawley Borough Council [2006] EWHC 301 (Admin). Having said that the question whether the council's decision was unreasonable has to be decided by applying public law principles as they have been developed at common law, it is to be remembered that those principles are not frozen. Even before the enactment of the [Human Rights Act], our public law principles were being influenced by Convention ways of thinking. Since its enactment, the process has gathered momentum. It is now a well recognised fact that the Convention is influencing the shape and development of our domestic public law principles, whether one uses the metaphors of embedding, weaving into the fabric, osmosis or alignment. (see the judgment of Lord Walker in Doherty, at para 109.)"*

12. The case of *McGlynn v Welwyn Hatfield District Council* [2009] EWCA Civ 285 illustrates how such principles may be applied in practice. The case was remitted to the first instance court to determine the reasonableness of the local authority's decision to serve the notice to quit.



13. In *Doherty* their Lordships held that the scope for a gateway (b) challenge is wider than a traditional collateral public law challenge in possession proceedings, such as was raised in *Wandsworth LBC v Winder* [1985] AC 461. In *Central Bedfordshire Council v Taylor and others*, [2009] EWCA Civ 613 Lord Justice Waller, with whom the other members of the court agreed, stated at para [22]:

*“Even if in Kay Lord Hope intended gateway (b) to be confined to what I might term a “rationality” challenge, in his speech in Doherty Lord Hope intended to extend to some extent the scope of judicial review beyond rationality even if not as far as straightforward challenge by reference to the Convention.”*

14. In summary, Lord Hope, who gave the leading judgment in *Doherty* made it clear that the *McCann* decision had been taken into account and the decision in *Kay* had been modified and developed accordingly. The recent decisions of the Court of Appeal have clarified some of the modifications that were introduced in *Doherty*.

*Does it propose to use primary legislation to give effect to the ECtHR’s judgment? If not why not?*

15. The Government, as previously stated, considers the case of *McCann* is ready to be closed. Accordingly, it does not consider that legislation is required to give effect to *McCann*. As noted above, the House of Lords considered that they had taken *McCann* into account when deciding *Doherty* and subsequent cases have developed a common law approach that, by applying *Doherty*, takes account of the ECtHR judgment in *McCann*.

16. The ECtHR is due to consider again the extent of the protection afforded to an occupier by Article 8, in *Kay v UK*. If the ECtHR conclude, contrary to their Lordships’ decision, that *Doherty* does not give effect to the decision in *McCann*, we hope that will be clear from their judgment.

17. If the ECtHR conclude that the House of Lords’ decision in *Doherty* does not provide adequate protection to certain categories of occupier, it is difficult to predict with any certainty which alternative approach they will favour. They may endorse that of the minority in the House of Lords’ decision in *Kay* (as they did in *McCann*), or decide that even the minority in *Kay* did not go far enough in protecting Article 8 rights.

18. Should the ECtHR find against the Government in *Kay v United Kingdom*, we will of course consider the implications of the judgment carefully in order to reach a decision on the most appropriate measures to implement it. Our consideration would include the possibility of legislation but we cannot speculate in advance of any adverse judgment as to whether this would be the approach adopted.

*Why has the Government chosen not to remedy the breach identified by McCann by remedial order?*

19. The Government does not consider that it is necessary to legislate to implement *McCann* for the reasons set out above. If, following the decision in *Kay v United Kingdom*, it becomes clear that fundamental changes are required to be made to social housing legislation, the Government will at that stage consider whether it is appropriate to bring in such changes by remedial order, bearing in mind their potentially far-reaching and controversial nature.

*On what evidence does the Government base its conclusion (given during the debates on the Housing and Regeneration Bill) that legislative amendment in the light of McCann would complicate and delay the vast majority of cases?*

20. The Appellate Committee in *Kay* were clear that firm objective criteria should be imposed by which a judgment could be made on the cases in which an Article 8 defence would be arguable. At para [20] in *Doherty* Lord Hope said:

*“unless parameters or guidelines are set down, the judgment in each case will be a subjective one. Every solicitor who is asked to advise an occupier will have to consider whether it is arguable that the decision to seek his eviction was not proportionate. If he decides to raise this argument the court will have to examine the issue. The whole point of the reasoning of the majority [in Kay] was to reduce the risks to the operation of the domestic system by laying down objective standards on which the courts can rely.”*

21. In addition, Lord Nicholls, who was in the minority in *Kay*, stated in *Kay* at paras [54–55]:

*“Day in, day out, possession orders are routinely made in county courts all over the country after comparatively brief hearings. The hearings are mostly brief because the time needed to dispose fairly of the formalities and also of questions of reasonableness, where they arise, is usually short. This will no longer be the position if, as has been contended, local authorities must now plead and prove in every case that domestic law meets the requirements of article 8.*

*I am unable to accept this remarkable contention. The course proposed would be a recipe for a colossal waste of time and money, in case after case, on futile challenges to the Convention-compatibility of domestic law. On the contrary, despite the possibility of a successful challenge under article 8, I see*

*no reason for the present practice to change. Courts should proceed on the assumption that domestic law strikes a fair balance and that it is compatible with the requirements of article 8 and also article 1 of the first protocol.*

*This assumption is of course rebuttable...*"

22. Further, it is clear from Lord Bingham's analysis (which was approved by the ECtHR in *McCann*) that he envisaged that the onus would be on the defendants to raise (exceptionally) a seriously arguable Article 8 case before the Court was obliged to consider it. By contrast, the proposed amendment to the Housing and Regeneration Bill suggests that the Court would be required to consider evidence relating to Article 8 in every case. 22.

23. The House of Lords' approach in *Doherty* and *Kay* is based on an acknowledgment that Parliament has taken a conscious decision to grant security of tenure only selectively. In cases where it has not been granted, a deliberate decision has been taken that summary possession should ordinarily be permitted. Unless the law itself can be challenged as incompatible with the Convention, or a public law challenge is available, the effect of *Doherty* and *Kay* is that Parliament must have been taken to have acted proportionately in limiting security of tenure in the way that it has. The question of proportionality is deemed to have been taken into account at the point which Parliament formulates the general law.

24. The existing (intricate) statutory framework has evolved over the years in part to ensure that public authority landlords make objective decisions on the respective merits of the competing claims of individuals with a need for social housing and balance the interests of tenants, landlords and third parties. To allow a merits review to take place in all cases would undermine that system and amount to giving protection akin to security of tenure to all occupiers of a property of a public authority landlord. It seems inevitable that, if arguments were to be heard on Article 8 as a matter of course, the majority of cases would take longer to be heard. Part of the rationale for the existing system, is that by creating a clear right to repossess properties in certain circumstances, housing authorities can efficiently and cost-effectively carry out their functions in allocating housing to those most in need. The House of Lords in *Kay* and *Doherty* were of that view and, for that reason sought to impose parameters and guidelines, to achieve a measure of legal certainty and to prevent Article 8 arguments being raised in every possession case.

*Given the House of Lords' decision in Doherty, does the Government remain satisfied that the domestic courts can take the decision in McCann into account?*

25. Lord Bingham, with whom the rest of the Appellate Committee unanimously agreed, gave judgment in *Kay* on the question of whether a court which would ordinarily be bound to follow the decision of a higher domestic court is or should be no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the court of Strasbourg. He concluded that that certainty is best achieved by adhering, even in the Convention context, to the domestic rules of precedent (at para [43]). A more fundamental reason still for adhering to the domestic law of precedent was, in his view, to ensure effective implementation of the Convention by constructive collaboration between the Strasbourg court and the national courts of member states (para [44]).

26. The Government remains of the view that *Doherty* fully took into account the decision in *McCann*. If, on the other hand, a lower court were to consider domestic case-law to be inconsistent with that of the ECtHR it would be able to express that view and give leave to appeal to a higher court.

5 July 2009

#### **Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 11 June 2009**

LIBERTY AND OTHERS v UNITED KINGDOM (APP NO 58243/00, 1 JULY 2008)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgment in *Liberty and others v United Kingdom*, which became final on 1 October 2008. In *Liberty and others*, the Court found that the interception of the applicants' communications under the Interception of Communications Act 1985 (repealed by the Regulation of Investigatory Powers Act 2000 (RIPA)) breached the right to respect for private life and correspondence. It held:

The Court does not consider that the domestic law at the relevant time indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it did not, as required by the Court's case-law, set out in a form accessible to the public any indication of the procedure to be followed for selecting for examination, sharing, storing and destroying intercepted material. The interference with the applicants' rights under Article 8 was not, therefore, "in accordance with the law". (para 69)

On 17 April 2009, the then Home Secretary, Jacqui Smith MP launched a review of and public consultation on RIPA.<sup>11</sup> The consultation, which includes new draft Codes of Practice, closes on 10 July 2009.

I would be grateful for your response to the following questions:

1. What steps, if any, does the Government intend to take to give effect to the ECtHR's decision in *Liberty and others*?
2. Is the Government satisfied that the legal deficiencies identified by the ECtHR in *Liberty and others* have been rectified by repeal of the Interception of Communications Act 1985 and the enactment of the Regulation of Investigatory Powers Act 2000 and its Code of Practice?
3. In particular, is the Government satisfied that publicly accessible information on the current procedure for "selecting for examination, sharing, storing and destroying intercepted material" is available, and if so, where can it be found?
4. To what extent will Government work following on from its consultation on RIPA aim to implement the ECtHR's decision in *Liberty and others*?

In addition, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

11 June 2009

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**Letter to the Chair from Rt Hon Alan Johnson MP, Home Secretary, dated 14 July 2009**

LIBERTY AND OTHERS v UNITED KINGDOM ( ECtHR APP NO 58243/00, 1 JULY 2008)

You wrote inquiring how we were implementing the ECtHR judgment in the above case. The questions are reproduced below with the answers for ease of reference.

1. *What steps, if any, does the Government intend to take to give effect to the ECtHR's decision in Liberty and others?*

The decision in *Liberty and others* concerned the Article 8 compatibility of the power to intercept external communications under the Interception of Communications Act 1985 ("IOCA"). IOCA has since been replaced by the Regulation of Investigatory Powers Act 2000 ("RIPA"). The main purpose of RIPA (as set out in the Explanatory Notes) was to ensure that the various investigatory powers encompassed within the Act are used in accordance with human rights.

2. *Is the Government satisfied that the legal deficiencies identified by the ECtHR in Liberty and others have been rectified by repeal of the Interception of Communications Act 1985 and the enactment of the Regulation of Investigatory Powers Act 2000 and its Code of Practice?*

Yes, but the Government will continue to keep the legislation under review in the light of European case law.

3. *In particular, is the Government satisfied that publicly accessible information on the current procedure for "selecting for examination, sharing, storing and destroying intercepted material" is available, and if so, where can it be found?*

Information is found with the Act itself, the code of practice, and the Interception Commissioner's annual reports.

4. *To what extent will Government work following on from its consultation on RIPA aim to implement the ECtHR's decision in Liberty and others?*

The Government consultation on "Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice" primarily dealt with public authorities who are able to use:

- Communications data.
- Directed surveillance.
- Covert human intelligence sources.

and the purposes for which these powers can be used. Revised draft codes of practice for covert surveillance and property interference and covert human intelligence sources were published as part of the consultation.

As identified in the consultation document, the Government is proposing to make a small number of minor changes to the Interception Code of Practice and the revised code will be published (and any representations made on the code will be considered ) before the Order bringing the revised code into force is laid and is subject to debate by both Houses of Parliament.

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<sup>11</sup> *Regulation of Investigatory Powers Act 2000: Consolidating Orders and Codes of Practice*, Home Office, April 2009.

5. *In addition, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided*

Liberty and others will be considered by the Committee of Ministers at its 15–16 September meeting. In addition to proof of the 7,500 Euro payment and interest to Liberty, set by the Court in respect of costs and expenses, we have provided the following information:

Other individual measures: the Annotated Agenda notes for the June 2009 meeting requested information on the fate of any of the applicants' communications that might have been intercepted under IOCA. IOCA was replaced by RIPA which entered into force on 2 October 2000. RIPA, and the Interception of Communications Code elaborated thereunder, sets out safeguards regarding the duration for which material can be kept, and regarding its destruction.

These, and the other safeguards set out in the RIPA regime, will equally be applied to any material obtained prior to RIPA's entry into force. General measures: as previously stated, IDCA has been replaced by RIPA, which contains additional foreseeability requirements. The Government is still considering whether any additional general measures are required.

14 July 2009

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**Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 8 July 2009**

BULLEN AND SONEJI V UNITED KINGDOM (APP NO 3383/06, 8 JANUARY 2009)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgment in *Bullen and Soneji v United Kingdom*, which became final on 1 April 2009. In *Bullen and Soneji*, the applicants complained that the length of criminal proceedings against them, which included confiscation proceedings, had contravened the reasonable time requirements of Article 6(1) ECHR. The Court found a breach of Article 6(1) holding:

“In light of the importance of what was at stake for the applicants in this case and without discounting the complexity of the legal issue in question, the Court finds the periods of delay attributable to the State, when taken cumulatively, to be unreasonably long and in breach of the reasonable time requirement as provided by Article 6 of the Convention.” (para. 71)

I would be grateful for your response to the following questions:

1. What steps, if any, does the Government intend to take to give effect to the ECtHR's decision in *Bullen and Soneji*?
2. Does the Government propose to revise guidance and training to relevant authorities such as prosecutors and the courts to ensure that future proceedings meet the reasonable time requirement in Article 6(1)? If so, please provide us with information about the revisions which the Government proposes. If not, please explain why not.

In addition, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

8 July 2009

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**Letter to the Chair from Rt Hon Alan Johnson MP, Home Secretary, dated 23 July 2009**

BULLEN AND SONEJI V UNITED KINGDOM (APP NO 3383/06, 8 JANUARY 2009)

Thank you for your letter of 8 July.

The Government considers that no individual measures are required to give effect to this judgment, given the Court's findings at paragraphs 73–79 of the judgment. The Court dismissed as manifestly unfounded the complaint that there had been unfairness in relation to the making of the confiscation orders, stating, “There are no grounds to suggest that the ultimate re-imposition of the confiscation orders against the applicants, albeit significantly delayed, was inconsistent with the essence of the offences to which they had pleaded guilty or that they were not reasonably foreseeable”.

The outcome would not therefore have been different absent the violation. Although there was unreasonable delay in the proceedings, Mr Soneji and Mr Bullen were convicted of serious offences and it remains the case that they should be deprived of their criminal benefit in accordance with the legislation.

In response to your specific questions, we have taken the following steps to give effect to the judgment. The Crown Prosecution Service (CPS) and the Revenue and Customs Prosecution Office (RCPO) have disseminated the judgment to their prosecutors. The CPS and RCPO have issued guidance reminding prosecutors of the need to make progress in confiscation proceedings, to comply with court directions on timing and to have regard to the reasonable time requirement in Article 6 of the ECHR.

The National Policing Improvement Agency (NPIA) has also issued guidance to Accredited Financial Investigators in the police service and other agencies reminding them of the need to be ready to proceed with confiscation hearings as soon as possible.

I am enclosing copies of the guidance issued by CPS, RCPO and NPIA. These have also been sent to the Committee of Ministers, under cover of the Government's submissions of 8 April and 29 June, copies of which are also enclosed.

In addition, the Government is discussing with the judiciary the most appropriate way to implement this judgment in relation to court processes. Options being considered include a practice direction or circulars to Court staff.

I am sending a copy of this letter to Michael Wills, Ministry of Justice.

23 July 2009

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**Letter from the Chair of the Committee to Rt Hon Alan Johnson MP, Home Secretary, dated 15 July 2009**

A v UNITED KINGDOM (APP No 3455/05, 19 FEBRUARY 2009, GRAND CHAMBER)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR). On 19 February 2009, the Grand Chamber of the European Court of Human Rights found the following violations of the ECHR in respect of the detention under the now repealed Part 4 of the Anti-Terrorism Crime and Security Act 2001 (ATCSA) of a number of applicants:

- Article 5(1): The Court found that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals (para 190);
- Article 5(4): On the basis of the open material disclosed to four applicants, the Court concluded that there had been a violation of Article 5(4) as the applicants were not in a position effectively to challenge the allegations against them (paras 223 and 224);
- Article 5(5): The Court held that there was no enforceable right to compensation for the applicants' unlawful detention in breach of Articles 5(1) and/or 5(4).

Whilst Parliament repealed Part 4 of the ATCSA 2001, following the judgment of the House of Lords in this case, the Grand Chamber judgment has wider implications for the Government's policy on those suspected of terrorism.

Following the repeal of Part 4, Parliament enacted a system of control orders which may be imposed on both nationals and non-nationals (Prevention of Terrorism Act 2005). This legislation is subject to annual renewal, on which we have reported each year. Our most recent Report was published on 27 February 2009.<sup>12</sup> Relying on the Grand Chamber judgment in *A v United Kingdom*, we recommended that the controlled person should be provided with the gist of the closed material which supports the allegations made against them. We also recommended that the statutory framework should be amended to provide that rules of court for control order proceedings require the Secretary of State to provide a summary of any material which fairness requires the controlled person to have an opportunity to comment on.<sup>13</sup> The Government rejected our recommendations, stating that it was possible under section 3 of the Human Rights Act 1998 to interpret the existing provisions compatibly with Article 6. Describing the procedure to be followed by the judge and the Secretary of State, the Government concluded that "no control order will be upheld through a process whereby the individual's right to a fair trial has not been protected".<sup>14</sup>

The Government has also extended, by the Terrorism Act 2006, the maximum period of pre-charge detention for terrorism offences from 14 to 28 days. This is subject to annual renewal by Parliament on which we have reported. In our most recent annual renewal Report, we pointed to the Grand Chamber decision in *A* and the recent House of Lords' decision in *AF*.<sup>15</sup> We expressed concern that the statutory framework for the extension of pre-charge detention expressly provides for information to be withheld from the suspect and their lawyer, and for them to be excluded from parts of the hearing at which the determination of whether or not to authorise further detention is made. We recommended that the legal framework governing

<sup>12</sup> Fifth Report of Session 2008–09, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009*.

<sup>13</sup> Para. 27.

<sup>14</sup> The Government Reply to the Fifth Report from the JCHR, *Counter-Terrorism Policy and Human Rights (Fourteenth Report): Annual Renewal of Control Orders Legislation 2009*, Cm 7625, May 2009, p 1.

<sup>15</sup> *Secretary of State for the Home Department v AF* [2009] UKHL 28.

judicial authorisation of extended detention be amended to provide stronger procedural safeguards for the rights of the detained person such as those we suggested as amendments to the Counter-Terrorism Bill. We stated that unless those amendments to the statutory framework are made, we remained of the view that the renewal of the maximum extended period of 28 days risks leading in practice to breaches of Article 5(4).<sup>16</sup>

We wrote to you on 11 June 2009 asking how the Government proposes to respond to the House of Lords judgment in *AF* and requested a reply by 25 June 2009. We note that we are still awaiting a response and look forward to receiving it as soon as possible.

In the light of the above, and in addition to our questions in our June letter, we would be grateful for your response to the following questions:

1. What steps has and is the Government taking to implement the Grand Chamber judgment in *A v UK*?
2. Specifically, how do proceedings for (a) control orders and (b) extended periods of pre-charge detention comply with the requirement that sufficient information should be disclosed to individuals so that they can effectively challenge the allegations against them?  
Schedule 8, paragraph 5 of the Terrorism Act 2000 appears to preclude a claim for compensation where an individual is detained under the Act and subsequently released without charge.
3. Does the Government consider paragraph 5 of Schedule 8 to the Terrorism Act 2000 to be compatible with the right in Article 5(5) ECHR to compensation for detention in contravention of Article 5? If so, please explain why.
4. In addition to paragraph 5 of Schedule 8 of the Terrorism Act 2000, are there other circumstances in which individuals might be detained without an enforceable right to compensation? If so, what are they?
5. How does the Government propose to ensure that individuals are able to claim compensation domestically for any unlawful detention without having to go to the ECtHR?

We understand that the Government has provided information to the Committee of Ministers which is currently being assessed. Please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

15 July 2009

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**Letter to the Chair from Rt Hon Alan Johnson MP, Home Secretary, dated 1 October 2009**

A & OTHERS v UK—FEBRUARY 2009 JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECtHR)

Thank you for your letter dated 15 July which expands upon your queries on control orders (11 June 2009) to include 28 day pre-charge detention. I sent you a substantive response to your June letter on 15 September.

In response to the specific questions you have raised in your July letter:

1. *What steps has and is the Government taking to implement the Grand Chamber judgment in A & Others v UK?*

As you know, Part 4 of the Anti-terrorism, Crime and Security Act 2001 (ATCSA) was repealed in March 2005 when the Prevention of Terrorism Act 2005 came into force. The 2005 Act introduced control orders which, unlike the provisions of Part 4 of the ATCSA, apply to British citizens as well as foreign nationals and stateless persons.

The United Kingdom continues to detain individuals pending their deportation from the United Kingdom as provided for under Article 5(1)(f) of the Convention. The statutory basis for this is contained in Schedule 3 to the Immigration Act 1971.

Since the legal regime found by the ECtHR to have violated the European Convention of Human Rights (ECHR) is no longer in force, the Government considers no further general measures are necessary.

In *AF & Others*, the House of Lords applied the same interpretations of paragraph 4(3)(d) of the Schedule to the 2005 Act established in *SSHD v AF* and *MB* [2007] UKHL 46, but felt obliged to take into account the ECtHR's judgment in *A & Others v UK*. It commented that the Court of Appeal's October 2008 judgment on control orders (*SSHD v AF, AM and AN*; *AE v SSHD* [2008] EWCA Civ 1148) had correctly interpreted the October 2007 judgment of the House of Lords when it endorsed the Government's position—that there was no irreducible minimum disclosure necessary to ensure compliance with Article 6 (the right to a fair trial) of the ECHR.

However, their Lordships concluded that they now had to replicate the test applied by the ECtHR in *A & Others v UK* (handed down shortly before commencement of the House of Lords hearing) for the stringent control orders before them. My letter of 15 September outlines the Government's response to this.

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<sup>16</sup> Eighteenth Report of Session 2008–09, *Counter-Terrorism Policy and Human Rights (Fifteenth Report): Annual Renewal of 28 Days*, HL Paper 199, HC 726, para 29.

In regards to the financial awards made in *A & Others v UK*, the Government has paid the just satisfaction award. The ECtHR awarded €2,800 to the eighth applicant and a total of €26,500 to the first, third, fifth, sixth, seventh, ninth, tenth and eleventh applicants as pecuniary and non-pecuniary damage; and €60,000 to the applicants jointly in respect of costs and expenses. The sums other than the €2,800 (totalling €86,500) were paid to the applicants' solicitors on 15 May. The €2,800 awarded to the eighth applicant has been paid into the applicant's account, which is subject to an asset freeze in accordance with United Nations sanctions.

2. *Specifically, how do proceedings for (a) control orders and (b) extended periods of pre-charge detention comply with the requirement that sufficient information should be disclosed to individuals so that they can effectively challenge the allegations against them?*

My letter of 15 September sets out the Government's position in relation to both control orders and pre-charge detention.

3. *Does the Government consider paragraph 5 of Schedule 8 to the Terrorism Act 2000 to be compatible with the right in Article 5(5) ECHR to compensation for detention in contravention of Article 5? If so please explain why.*

Your letter states that paragraph 5 of Schedule 8 to the Terrorism Act 2000 appears to preclude a claim for compensation where an individual is detained under that Schedule and subsequently released without charge. There are two points to make in relation to that.

First, compensation is not available simply where a person is held but released without charge. The fact that a person is not ultimately charged does not render the detention arbitrary or unlawful. Detention is justified under Article 5 if there is reasonable suspicion that the arrested person has committed an offence and grounds exist to justify the continuation of detention—conditions that are provided for under the 2000 Act.

Secondly, where the detention is unlawful, compensation is available in the civil courts for example through an action for unlawful arrest or false imprisonment.

The purpose of paragraph 5 of Schedule 8 is not to oust a challenge to the legality of detention under Schedule 8 and the Home Office has never suggested that this is the case. Paragraph 5 falls in a section headed "status". Its purpose is to do with ensuring that the detention is legal custody even though the detainee may not be held in a police station the entire time. This is in recognition of the fact that a detainee may for example be held at a place designated by the Secretary of State under paragraph 1(1) of Schedule 8 that is not a police station, may be transferred to a prison after a period of 14 days' detention or may be transferred to court for an extension hearing. Paragraph 5 is to ensure that notwithstanding this, the person is in "legal custody". And the effect of this is, for example, that the person could be charged with escaping from custody in the event of an escape.

4. *In addition to paragraph 5 of Schedule 8 of the Terrorism Act 2000 are there other circumstances in which individuals might be detained without an enforceable right to compensation? If so, what are they?*

The Home Office is not aware of any legislation that would prevent a civil claim for damages following unlawful detention being brought.

5. *How does the Government propose to ensure that individuals are able to claim compensation domestically for any unlawful detention without having to go to the ECtHR?*

Any individual can bring a claim for unlawful detention and compensation without having to go to the ECtHR. Compensation is available in the domestic civil courts as mentioned above.

1 October 2009

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**Letter from the Chair of the Committee to Rt Hon Dawn Primarolo MP, Minister of State for Children, Young People and Families, Department for Children, Schools and Families, dated 21 July 2009**

RK AND AK v UNITED KINGDOM (APP NO 38000(1)/05, 30 SEPTEMBER 2008)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).



I am writing to inquire about the Government's response to the judgment in RK and AK v United Kingdom. In RK and AK, the applicants complained that they did not have an effective remedy for their complaints relating to the taking into care of their child for child protection concerns arising from the child's injury. Their child was subsequently discovered to have brittle bone disease and was returned to the parents. The events occurred before the coming into force of the Human Rights Act 1998 (HRA) and the applicants were therefore unable to bring a claim for breach of Article 8 ECHR (the right to respect for family life). The Court held that there had been a violation of Article 13:

"The Court considers that the applicants should have had available to them a means of claiming that the local authority's handling of the procedures was responsible for any damage which they suffered and obtaining compensation for that damage. Such redress was not available at the relevant time. Consequently, there has been a violation of Article 13 of the Convention." (para. 45)

I would be grateful for your response to the following questions:

1. How many current cases is the Government aware of which involve allegations of negligence and/or breaches of the Convention which predate the coming into force of the HRA? Of those, how many are before (a) the Court of Appeal, (b) the House of Lords and (c) the European Court of Human Rights?
2. In relation to the cases mentioned in Question 1 above, is the Government taking steps to adequately settle those claims where there is a high likelihood of a finding of a breach of Article 13 by the ECtHR, in order to avoid the cost and inconvenience to both parties of pursuing a case to Strasbourg? If not, why not?
3. Please provide details of the steps that the Government has taken to ensure that the implications of this judgment for local authorities and child protection agencies are widely known. For example, has the Government written to local authorities, or amended guidance, circulars or training to reflect the judgment?
4. Has the Government advised local authorities and their lawyers not to seek strike outs in similar cases to RK and AK? If not, why not?

In addition, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

21 July 2009

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**Letter to the Chair from Rt Hon Dawn Primarolo MP, Minister of State for Children, Young People and Families, dated 24 August 2009**

RK AND AK v UNITED KINGDOM (APP NO 38000(1)/05, 30 SEPTEMBER 2008)

Thank you for your letter of 21 July asking four questions in relation to the European Court of Human Rights' judgement in RK and AK in United Kingdom. My response is set out below.

1. *How many current cases is the Government aware of which involve allegations of negligence and/or breaches of the Convention which predate the coming into force of the HRA? Of those, how many are before (a) the Court of Appeal, (b) the House of Lords and (c) the European Court of Human Rights?*

Whilst Government departments co-operate and share relevant expertise when dealing with a case to which the Government is a party and lists are kept, and shared, of various cases, the Government does not keep one centralised list of all the domestic litigation in which it is involved. Therefore, it unfortunately would not be possible to readily provide a list of cases before the Court of Appeal and House of Lords where a remedy is sought for alleged breaches of the Convention that predate the Human Rights Act 1998. However, based on the information that is available, DCSF is not aware of any domestic cases that raise this issue.

As far as cases before the European Court of Human Rights are concerned, the Government normally only becomes aware of applications to that Court when they are formally communicated to the Government by the Court's Registry. We are aware of a small number of applications of this nature currently before the ECtHR. It is possible that there are further applications pending before the Court that raise the specified issue of which we are not yet aware.

2. *In relation to the cases mentioned in Question 1 above, is the Government taking steps to adequately settle those claims where there is a high likelihood of a finding of a breach of Article 13 by the ECtHR, in order to avoid the cost and inconvenience to both parties of pursuing a case to Strasbourg? If not, why not?*

The action taken by the Government in each piece of litigation in which it is involved is based on the individual circumstances of the case together with legal advice. While in principle the government is usually prepared to consider settlement in cases of this type it is not appropriate for it to comment on the solutions currently being pursued in individual cases.

3. Please provide details of the steps that the Government has taken to ensure that the implications of this judgement for local authorities and child protection agencies are widely known. For example, has the Government written to local authorities, or amended guidance, circulars or training to reflect the judgement?

The position in this case was that the primary claim, namely of a breach of Article 8, was rejected by the European Court of Human Rights. The Court did find a breach of Article 13, as the applicants had no means of claiming that the local authority's handling of procedures was responsible for any damage that they suffered. However, the Court acknowledged that the Human Rights Act 1998, which came into force in October 2000, now provides for a means of redress in cases like these, and satisfies the UK's obligations under Article 13. No further general measures are needed to implement this case.

4. Has the Government advised local authorities and their lawyers not to seek strike outs in similar cases to RK and AK? If not, why not?

It is not clear what the JCHR consider would constitute "similar cases" to RK and AK v UK. That was one of a group of three applications that were made to European Court of Human Rights together. Both the underlying facts and, to some degree, the claims made by the applicants were different in each case.

Every case has of course to be considered on its own merits. The UK Government rarely seeks to strike out domestic cases unless they appear to be fundamentally flawed, and to have no merit. Nor would it seek to advise a local authority on whether to seek a strike out. Local authorities must form their own views in the circumstances of each case in question.

I am copying this to Michael Willis.

24 August 2009

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**Letter from the Chair of the Committee to Rt Hon Jack Straw MP, Secretary of State and Lord Chancellor, dated 21 July 2009**

**MONITORING THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS FINDING BREACHES OF HUMAN RIGHTS: ANNUAL REPORT**

In our Report on *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, my Committee agreed to continue its work on scrutiny of the Government's responses to judgments against the United Kingdom by the European Court of Human Rights and declarations of incompatibility made under Section 4 HRA 1998.<sup>17</sup> In that Report, we confirmed our commitment to taking a more systematic approach to our work in this area and to producing regular reports on any significant issues.

In August 2007, we received the first part of the Government's response to that Report, responding to our recommendations in respect of individual cases and committing to responding separately on broader issues. In our Annual Report, published in January 2008, we expressed our concern about the outstanding element of the Government's response to our recommendations on the mechanisms for responding to adverse human rights judgments in Government.<sup>18</sup> In the Government's response to that Report, Michael Wills MP explained that it was "taking quite some time to investigate the possibilities in this area, and the extent to which the Committee's recommendations would be possible and effective".<sup>19</sup>

In October 2008, we published our second annual report on the Government's response to human rights judgments, pointing to the Government's continuing failure to respond to our report and requesting a response by the end of the parliamentary session.<sup>20</sup> We also expressed our disappointment at the Government's failure to respond to our request for a memorandum on the Government's progress over the previous 12 months in dealing with adverse judgments.<sup>21</sup> The Government responded to our report in January 2009 rejecting our recommendation for a separate annual report on progress in dealing with adverse judgments as it considered that there would be little additional benefit.<sup>22</sup>

We are currently preparing for the publication of their next Report on this issue, which we expect to publish shortly after our oral evidence session with Michael Wills MP on 27 October 2009. In advance of our evidence session with the Minister, we would like to give you an opportunity to submit written evidence on the Government's work on the implementation of judgments over the past year. In particular, we would welcome any of the following:

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<sup>17</sup> Sixteenth Report of Session 2006–07, *Monitoring the Government's Response to Court Judgment Finding Breaches of Human Rights*, paras 155–163.

<sup>18</sup> Sixth Report of Session 2007–08, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, Appendix, para 19.

<sup>19</sup> Eighteenth Report of Session 2007–08, *Government Response to the Committee's Sixth Report of Session 2007–08: The Work of the Committee in 2007 and the State of Human Rights in the UK*, Appendix, para 19.

<sup>20</sup> Thirty-first Report of Session 2007–08, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, para 9.

<sup>21</sup> Para 14.

<sup>22</sup> *Responding to Human Rights Judgments: Government Response to the Joint Committee on Human Rights' Thirty-first Report of Session 2007–08*, Cm 7524, para 36

- Comments or information on the Government's general work on adverse human rights judgments, either from the European Court of Human Rights or the domestic courts, since June 2008. In particular, we would be grateful if you could outline any steps which the UK Government have taken to meet the Recommendation of the Committee of Ministers on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights (CM (2008) 2), adopted in February 2008;
- Submissions on progress in respect of any of the cases considered in our last Report, including any updated information provided to the Committee of Ministers;
- A brief report on all adverse human rights judgments, either from the European Court of Human Rights or in respect of declarations of incompatibility made in our domestic courts, since June 2008, following the model adopted in the Netherlands and in line with our previous recommendations. It would assist our work if this could include:
  - the Government's reaction to the case and any work planned to provide a response to the judgment;
  - if no remedial order is planned, we would be grateful for an explanation why the Government considers a remedial order is not necessary;
  - if the Government intends to bring forward a remedial order, we would be grateful if you could explain whether the urgent procedure will be used, and if not, why not.

In order to assist your response, I have attached a provisional list of cases which we plan to consider in our Report. We have already written to individual departments in relation to these cases. We plan to publish this letter, and to invite members of the public and civil society to submit evidence to us on these issues.

I have copied this letter to Michael Wills MP, and to the Secretary of State for Foreign and Commonwealth Affairs, as I understand that the Minister, or officials at the Foreign and Commonwealth Office who work closely with the Committee of Ministers on the implementation of Strasbourg Judgments, may also wish to write to the Committee on these issues.

21 July 2009

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**Letter to the Chair from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice,  
dated 30 September 2009**

THE GOVERNMENT'S RESPONSE TO HUMAN RIGHTS JUDGMENTS

Thank you for your letter of 21 July to Jack Straw regarding the Government's response to the Human Rights judgements you highlight. In your letter, you made a number of specific requests for information, which I shall address in the same order raised.

THE GOVERNMENT'S WORK ON HUMAN RIGHTS JUDGMENTS SINCE JUNE 2008

The Government takes seriously its obligation to respond fully and in good time to judgments of the European Court of Human Rights. As you know, we have a strong record in doing so, having had many judgments discharged from scrutiny by the Committee of Ministers of the Council of Europe over the last two years. The Government likewise remains committed to responding effectively and rapidly to declarations of incompatibility once they are no longer subject to appeal.

In both of these areas, MoJ officials work with their colleagues across Whitehall to provide advice and encourage progress and in partnership with their colleagues in the Foreign and Commonwealth Office in respect of Strasbourg judgments.

Although this light-touch co-ordination role is effective, we continue to consider if there are ways in which MoJ officials can better support other departments in implementing judgments that fall within their policy remit. At this time, we are considering whether and how to develop further and formalise the guidance that is given to departments.

The Government has been pleased this year to welcome to the United Kingdom a delegation from Georgia who, at the instigation of the Council of Europe, came to study as a model of good practice the procedures the Government has in place for the conduct of European Court of Human Rights litigation and for the implementation of Strasbourg judgments. Similarly, in relation to the implementation of the judgments in the Northern Ireland cases (of which more below), a delegation from Russia is scheduled to visit the Historic Enquiries Team (HET) in Northern Ireland in late October. The purpose of this visit will be to present the HET methodology and processes in more detail, focussing particularly on issues around the disclosure of information and family liaison, so as to demonstrate how to get the most out of the evidence still available in historic cases despite the passing of time.

*Recommendation CM/Rec (2008) 2 on efficient domestic capacity for rapid execution of the judgments of the European Court of Human Rights*

This recommendation was adopted by the Committee of Ministers of the Council of Europe in February 2008. It suggests that States consider appointing a co-ordinator of their national response to European Court of Human Rights judgments.

The Joint Committee recommended in its last Report<sup>23</sup> that the Ministry of Justice should adopt such a role. For the reasons given in the Government's response<sup>24</sup> to that Report, we are not persuaded that there would be any significant benefit in instituting a stronger co-ordination mechanism than that which currently exists.

*Judgments considered in the Committee's last Report*

The information below updates the position in respect of cases mentioned in the Joint Committee's last Report and the Government's response thereto. I shall cover only those cases about which the Joint Committee has *not* specifically requested further information from the Government department responsible for the implementation of the judgment. In these cases, I understand that responses have been, or will shortly, be sent and which I therefore do not propose to repeat here. In line with this approach, there will also be a separate letter responding to the Joint Committee's request for information regarding *Hirst v UK* shortly.

Two cases<sup>25</sup> also remain subject to continuing judicial proceedings. In these two cases there is therefore no final judgment which, if adverse, would fall to be implemented.

*Trade union membership (ASLEF v UK)*<sup>26</sup>

The Joint Committee recognised in its last Report the Government's effective implementation of this judgment.<sup>27</sup>

At its meeting of 2–5 June 2009, the Committee of Ministers decided that the Government had taken the appropriate action needed to implement this judgment effectively, and accordingly agreed to close its scrutiny of the case. The Committee will do so by way of a final resolution in due course.

*Corporal punishment of children (A v UK)*<sup>28</sup>

In the judicial review challenging the revised law on corporal punishment of children in Northern Ireland, the Northern Ireland Court of Appeal dismissed the appeal of the Northern Ireland Commissioner for Children and Young Persons without considering the substance of the case on the ground that she was not a "victim"<sup>29</sup> of the act about which she complains.

The Northern Ireland High Court had earlier considered in detail and rejected the Commissioner's arguments that Northern Ireland legislation is incompatible with the Convention. The Court of Appeal cast no doubt on this judgment of the High Court. The Commissioner has indicated that she does not intend to appeal further.

The Crown Prosecution Service monitoring has identified one case since the law was changed in which the defence of "reasonable punishment" was raised. The charge in that case was of child cruelty, the defendant having beaten his children with a riding crop. The judge directed the jury that under section 58 of the Children Act 2004 "reasonable punishment" is not a defence to the charge of child cruelty. Both prosecution and defence lawyers were aware of this legal position and agreed the accuracy of the judge's direction prior to its being given to the jury. The defendant was convicted. This case shows clearly that the new law is working in practice.

The Government has for some time taken the view that the UK is now fully compliant with the European Court of Human Rights judgment in this case. If the case of A came to court now, the defence of 'reasonable punishment' would not be available. In September 2008 the Committee of Ministers noted with satisfaction the changes in the legislative framework made following the judgment and the wide range of accompanying awareness-raising measures.

<sup>23</sup> *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, 31st Report of Session 2007–08, 31 October 2008, at paragraph 18

<sup>24</sup> *Responding to Human Rights Judgments: Government Response to the Joint Committee on Human Rights' 31st Report of Session 2007–08*, 27 January 2009

<sup>25</sup> *Carson v UK* is currently before the Grand Chamber of the European Court of Human Rights, the applicants have sought referral of the Chamber's judgment in the Government's favour. In *Clift v UK*, following his unsuccessful appeal to the House of Lords (*R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54), the applicant has applied to the European Court of Human Rights. In its last Report, the Committee acknowledged that the Government had effectively resolved the declaration of incompatibility made in the case brought by Mr Clift's domestic co-appellants.

<sup>26</sup> Note 2 at page 11.

<sup>27</sup> Note 1 at page 45.

<sup>28</sup> Note 2 at page 22.

<sup>29</sup> Within the meaning of section 7(1) of the Human Rights Act 1998.

At its meeting on 2–5 June 2009 the Committee decided that the Government had taken the appropriate action needed to implement the judgment in the case of *A v UK* effectively and accordingly agreed to close its scrutiny of the case. It instructed the Secretariat to draft a final resolution formally closing the case. The UK Government fully supported the decision in the light of the conclusions of the Committee's debate in September 2008 and developments since then, including the Government's continuing work to promote positive parenting. This includes the publication of a booklet, intended for parents, explaining the law on smacking and actively discouraging the practice. The booklet, *Being a Parent in the Real World*, has now been published and is being widely distributed.

The Committee adopted a final resolution closing its scrutiny of the case at its 15–16 September 2009 meeting.

*Investigations into the use of lethal force (McKerr, Jordan, Finucane, Kelly, Shanaghan and McShane v UK)*<sup>30</sup>

The Government has put together a detailed package of measures to implement these judgments, the detail of which is set out in the last Government response in this area.

As further noted in that response, the Committee of Ministers has previously made clear in its public assessments that the United Kingdom has met many of the requirements of the judgments. At its meeting of 17–19 March 2009, the Committee adopted an interim resolution, of which I enclose a copy, closing a number of measures relating to this group of cases.

The general measure on defects in police investigations has now been closed, recognising that the Historical Enquiries Team (HET) is appropriately structured and has the capacity to finalise its work. The general measure on violation of Article 34, found in the *McShane* case, has also been formally closed.

Only one general measure remains outstanding, which relates to the Police Ombudsman's five-year review of her powers. This review has now been published, and the Government's consultation thereon closed on 5 March 2009. The Government is now considering the responses to that consultation.

The March 2009 interim resolution also closed individual measures in two of the six cases. In *McShane*, the HET has reported on its investigation, and the inquest and related judicial review proceedings have concluded. The Director of Public Prosecutions for Northern Ireland is considering whether any further criminal proceedings should be brought in light of the facts revealed by the inquest. Any proceedings as a result of his review would take the usual course through the criminal prosecution process.

In *Finucane*, the Government has taken appropriate steps to remedy the violations found by the Court relating to lack of public scrutiny and the access of the family to the investigation. The Government continues to discuss with the family the possibility of holding a statutory inquiry into Mr Finucane's death. These discussions are however separate from the implementation of the judgment, which is now complete.

The four remaining cases are subject either to inquest proceedings, or review by the HET or the Police Ombudsman. The results of the *Finucane* and *McShane* cases demonstrate that the Government is committed to carrying out effective investigations as far as possible in accordance with the UK's obligations under Article 46 of the ECHR, and to ensuring rapid progress of investigations as far as that is within the Government's power.

*Access to social housing (Morris v Westminster City Council)*<sup>31,32</sup>

Schedule 15 to the Housing and Regeneration Act 2008, which resolves this incompatibility, came into force on 2 March 2009. The effect of this provision is set out in the last Government response.

The declarations of incompatibility made in this case and in the related case of *Gabaj* have therefore been resolved.

*Security of tenure for Gypsies and Travellers (Connors v UK)*<sup>33</sup>

Section 318 of the Housing and Regeneration Act 2008 will remove the exclusion for local authority Gypsy and Traveller sites from the Mobile Homes Act 1983. This will improve security of tenure for Gypsies and Travellers on local authority sites, and complete the implementation of this judgment. The Order bringing this provision into force in England is expected to be laid before Parliament in the autumn.

*Request for report on all adverse human rights judgments*

The Joint Committee recommended in its last Report<sup>34</sup> that the Government should publish an annual report on adverse judgments, as is the practice in the Netherlands.

In the previous Government response, it was noted that:

- it is already the practice of the Government to draw declarations of incompatibility to the Joint Committee's attention, and to update the Committee on any later appeals;

<sup>30</sup> Note 2 at page 15.

<sup>31</sup> Also *R (Gabaj) v First Secretary of State*.

<sup>32</sup> Note 2 at page 25.

<sup>33</sup> Note 2 at page 21.

<sup>34</sup> Note 1 at paragraph 14.

- the Ministry of Justice also encourages lead departments to update the Joint Committee regularly on their plans for responding to declarations of incompatibility;
- the Ministry of Justice maintains a list of all declarations of incompatibility and their resolution, of which each regular update is sent to the Joint Committee’s legal advisers; and
- action plans for the implementation of Strasbourg judgments are now mandatory, of which copies are provided to the Joint Committee in respect of United Kingdom cases whenever possible.

For these reasons, the previous response concluded that:

“...the Joint Committee already regularly receives, and has available to it, information about judgments against the United Kingdom. A report such as that envisaged by the Joint Committee would require a significant commitment of public resources, from which the Government considers there would be little additional benefit.”<sup>35</sup>

This remains the Government’s view. It should, in addition, be noted that the FCO regularly informs the Committee of any adverse Strasbourg judgments that are handed down.

I hope that this information is useful to the Committee in its inquiry, and I look forward to the conclusions you draw in your report.

30 September 2009

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**Letter from the Chair of the Committee to Rt Hon Jack Straw MP, Secretary of State for Justice,  
dated 21 July 2009**

*Hirst (No 2) v United Kingdom*

During this session, the Joint Committee on Human Rights will be continuing its practice, established in the previous Parliament, of reviewing the implementation of judgments of the European Court of Human Rights finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to ask for further information about the Government’s response to the judgment of the Grand Chamber of the European Court of Human Rights in *Hirst (No 2) v United Kingdom*. In that case, the Grand Chamber decided that the current ban on prisoners’ voting in the UK is disproportionate and incompatible with the Convention right to participate in free and fair elections (guaranteed by Article 3 of Protocol 1 ECHR). That the relevant statutory provisions have never been subject to a full parliamentary debate played a part in the decision of the court. The statutory ban has also been declared incompatible with Convention rights under Section 4 of the Human Rights Act 1998 by the Court of Session in Scotland. We understand that a further challenge to the blanket ban by Peter Chester, a prisoner currently serving a life sentence, but who has served the “tariff” set for his offence.<sup>36</sup>

The Committee last reported on this case in its report on the Political Parties and Elections Bill (Fourth Report of Session 2008–09), where we revisited our two previous reports on human rights judgments, regretting the delay in the Government’s response to this judgment. We concluded:

It is unacceptable that the Government continues to delay on this issue. The judgment of the Grand Chamber was clear that the blanket ban on prisoners voting in our current electoral law is incompatible with the right to participate in free elections (paragraph 1.19)

The Government published its second stage consultation on the issue of prisoners’ voting on 8 April 2009. We have seen the information provided by the Government to the Committee of Ministers in April 2009, summarising the Government’s position and introducing the second stage of consultation. It indicates that there may be some time after the consultation closes in September, before the Government introduces any legislative solution to address the breach identified by the Grand Chamber:

Following its conclusion, the Government will consider the next steps towards implementing the judgment through legislation.<sup>37</sup>

At its last meeting in early June 2009, the Committee of Ministers reached a similar conclusion about the delay in this case and indicated that it would be willing to consider an interim resolution in respect of the delay by the UK on this occasion, if progress were not made by December 2009. The Ministers’ Deputies:

[...] expressed concern about the significant delay in implementing the action plan and recognised the pressing need to take concrete steps to implement the judgment particularly in light of upcoming United Kingdom elections which must take place by June 2010 at the latest.<sup>38</sup>

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<sup>35</sup> Note 2 at page 36.

<sup>36</sup> Daily Mail, *Child killer gets legal aid to launch bid for vote (and you’re paying)*, 10 July 2009.

<sup>37</sup> Ministry of Justice, Information Note to Committee of Ministers, 8 April 2009.

<sup>38</sup> CM/Del/Dec(2009)1059immediatE/08 June 2009; 1059th (DH) meeting, 2–4 and 5 (morning) June 2009—Decisions adopted at the meeting.

During a debate on a probing amendment proposed by Lord Ramsbottom to the Coroners and Justice Bill, on this issue, one of our members, Lord Lester of Herne Hill, asked the Minister, Lord Bach whether the Government would consider using the remedial order process after the consultation was complete, in order to ensure that the Government's proposals would be in force before the next general election. Lord Bach replied:

We do not think that this is an appropriate issue for a remedial order; it is an appropriate issue for both Houses to decide whether and how this particular ruling of the European Court of Human Rights should be brought into force. (HL Deb 15 July 2009)

*We have already raised our serious concerns about the delay in this case. We would be grateful if you could answer a number of questions on the Government's second consultation and other recent developments.*

#### *The Second Stage Consultation*

In our last report on this issue, we asked the Government to publish the responses to the first stage consultation, in order to allow for more effective public and parliamentary scrutiny of the Government's approach. In the Government's response to our report, it did not deal with our request. The Second Stage Consultation summarises the responses, but the responses themselves are not publicly available, unless published by individual consultees.

1. *We would be grateful if you could agree to publish the responses to the first stage consultation—if necessary, redacted to protect anonymity, if requested—to allow for more effective parliamentary and public scrutiny of the Government's next steps.*

We note that the Government accepts that the responses to its consultation was "heavily polarised". Of 88 respondents, 41 responses argued in favour of full enfranchisement and 25 responses argued in favour of the status quo. The Government makes no comment on the fact that a significant proportion of the responses to the consultation argue in favour of full enfranchisement, an option rejected by the Government before the consultation took place. We understand that the Government does not support this option, but it would be helpful if the Government could provide a more detailed response to the arguments proposed by the individual respondents to its consultation.

2. *How does the Government respond to the significant number of responses to the first consultation which argued in favour of full enfranchisement? In particular, please outline the consultation respondent's arguments in favour of full enfranchisement and the Government's responses to them.*

The Government's consultation proposes four options for consultation, each based on the duration of sentence being served by a prisoner (roughly one, two or four years and a hybrid of two or four years). This would mean all prisoners crossing a custodial threshold would automatically be deprived of the right to vote. Only four respondents to the first stage consultation argued in favour of a system of enfranchisement based on duration of sentence.

3. *Given the low numbers of respondents to the first stage consultation who favoured this approach, we would be grateful if you could explain why the Government has adopted this approach.*

In our earlier report on this issue, we noted the conclusion of the Grand Chamber in *Hirst* that:

[The standard of tolerance required by the Convention] does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights are imposed on an individual who has, for example, seriously abused a public position or whose conduct has threatened to undermine the rule of law or democratic foundations [...] The severe measure of disenfranchisement must, however, not be undertaken lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.

4. *We would be grateful if you could explain the Government's view that maintaining a blanket ban for all prisoners serving a custodial sentence over a set duration is justified, proportionate and compatible with Article 3 of Protocol 1 ECHR. Please specify any other similar arrangements which operate in other Council of Europe States which have influenced the Government's thinking on this issue.*

5. *In particular, we would be grateful if you could explain how an absolute ban based on length of sentence (a) allows for a sufficient link between the sanction, the offence and the rule of law or its democratic foundations and (b) allows for the consideration of the conduct and circumstances of each individual offender.*

The second stage consultation includes further consultation proposals in respect of the involvement of judicial discretion in removing the right to vote. During the debate on the Coroners and Justice Bill in July 2009, Lord Bach explained that the Government was "not entirely opposed" to allowing each judge to consider an individual case on its merits. This however is not provided for in any of the four options proposed for detailed consultation. The consultation paper explains:



A system that places the decision on enfranchisement or disenfranchisement completely on the sentencing court would impose considerable burdens on the courts and on institutions where individuals are currently held in custody. Fundamentally, however, the Government agrees with the argument that ultimately Parliament must debate and decide the extent of the franchise.

6. Please list the additional burdens on the courts and on institutions where individuals are currently held in custody which affected the Government's view on whether or not sentencing courts should be responsible for decisions in respect of the right of an individual prisoner to vote.

7. *Why does the Government consider that it would be inappropriate for Parliament to delegate the decision on the extent of an individual's right to participate in elections to the sentencing court?*

The consultation explains the Government's view that removal of the franchise is not "only a punitive measure" in order to justify the decision on the bar being taken by politicians rather than the independent and impartial trial judge. This appears at odds with the Grand Chamber decision in *Hirst* which refers to removal of the franchise as a sanction. As the Government will understand, specific safeguards generally accompany the imposition of criminal sanctions (Article 6 ECHR).

8. Please explain why the Government's view that removal of the franchise should not be treated like any other criminal sanction is compatible with the decision of the Grand Chamber in *Hirst* and Article 6 ECHR.

#### *Remedial Orders*

9. We would be grateful if you could provide reasons why the Government considers that the consideration of both Houses of a remedial order on affirmative resolution will not provide adequate opportunity to debate the issues explored by the Grand Chamber in its decision and the Government's proposals to remove the breach in *Hirst*.

#### *The Committee of Ministers*

10. We would be grateful if you could provide us with any information which the Government has provided the Committee of Ministers since its decision in June 2009 expressing concern about the delay in this case and calling for a solution before the next general election.

11. In particular, we would be grateful if you could tell us:

- (a) Whether the Government has made any commitment to ensure that a solution will be in place before the next general election; and
- (b) Any steps which the Government intends to attempt to meet this goal.

#### *Further Convention challenges?*

12. Please explain whether the Government considers that the conduct of a general election before the blanket ban in Section 3 of the Representation of the People Act is removed will be compatible with the United Kingdom's international obligations under the Convention, including Article 13 ECHR.

13. We would be grateful if you could provide us with the details of any further Convention challenges pending against the Government, either before our domestic courts or at the European Court of Human Rights, based on the failure of the United Kingdom to remove the blanket ban in Section 3 of the Representation of the People Act 1983. Please include any details of the grounds of the challenge and any Government response.

21 July 2009

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**Letter to the Chair from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice,  
dated 8 October 2009**

HIRST (NO 2) v UNITED KINGDOM

Thank you for your letter dated 21 July, in which you asked a number of questions about the Government's implementation of the *Hirst (No 2)* judgment.

You will be aware from the Government's second consultation paper, *Voting rights of convicted prisoners detained within the United Kingdom*, published on 8 April 2009, and from the Annotated Agenda notes published following the 1059th meeting of the Council of Europe's Committee of Ministers' Deputies (CoM) on 3 June, that the position of the UK Government remains that there are legitimate reasons for removing a prisoner's right to vote. The Government believes that the right to vote forms part of the social contract between the individual and the State, and that it is a proper and proportionate response to breaches of that contract that result in imprisonment. However we take our responsibilities under the European Convention on Human Rights in respect of ECtHR decisions seriously.

You ask a number of specific questions in your letter. For ease of reference, I have repeated these in this reply.

1. *We would be grateful if you could agree to publish the responses to the first stage consultation—if necessary, redacted to protect anonymity, if requested—to allow for more effective parliamentary and public scrutiny of the Government’s next steps.*

My officials have prepared a copy of the full individual responses (with some personal data redacted in accordance with data protection legislation) which will be published and sent to you under separate cover. It is worth adding that the total number of responses received was 90, as opposed to the published figure of 88. The difference is a result of an administrative oversight within the Department. The responses not included in the published consultation response were from JUSTICE and from Steve Foster, an academic at Coventry University. Both supported the full enfranchisement of prisoners, and had their responses been included in the document would have increased the number of those in favour of enfranchisement from 41, to 43.

2. *How does the Government respond to the significant number of responses to the first consultation which argued in favour of full enfranchisement? In particular, please outline the consultation respondents’ arguments in favour of full enfranchisement and the Government’s responses to them.*

3. *Given the low numbers of respondents to the first stage consultation who favoured this approach, we would be grateful if you could explain why the Government has adopted this approach.*

4. *We would be grateful if you could explain the Government’s view that maintaining a blanket ban for all prisoners serving a custodial sentence over a set duration is justified, proportionate and compatible with Article 3 of Protocol 1 ECHR. Please specify any other similar arrangements which operate in other Council of Europe States which have influenced the Government’s thinking on this issue.*

5. *In particular, we would be grateful if you could explain how an absolute ban based on length of sentence (a) allows for a sufficient link between the sanction, the offence and the rule of law or its democratic foundations and (b) allows for the consideration of the conduct and circumstances of each individual offender.*

The Government has made clear its opposition to full enfranchisement for all convicted prisoners and conducted the first stage consultation on that basis. Although we have taken account of the number of respondents to the first consultation paper who urged full enfranchisement, as the second consultation paper notes, the responses to the first consultation paper were heavily polarised. On the question of how far the franchise should be extended to convicted prisoners in custody, the second stage consultation paper notes that the majority of respondents made strong representations for the introduction of either full enfranchisement (41 responses, or approximately 47%), or continuing with the UK’s current policy of total disenfranchisement (22 responses, or 25%),<sup>39</sup> and many respondents made no comment or gave a “not applicable” answer to many of the questions.

The reasons for the Government’s proposals for limited, rather than full, prisoner enfranchisement are set out in the second stage consultation paper. On page 21 of that paper, the Government states that it accepts that “it must act in a way that is compatible with its obligations under the ECHR [and] so any approach will need to be within the margin of appreciation afforded to signatory states in applying Convention rights.” Therefore:

“The Government has reached the preliminary conclusion that to meet the terms of the judgment a limited enfranchisement of convicted prisoners in custody must take place, with eligibility determined on the basis of sentence length.”

Regarding the decision not to enfranchise prisoners sentenced to four years and over, the consultation paper states (pages 25–26):

“In line with its view that the more serious the offence that has been committed, the less right an individual should have to retain the right to vote when sentenced to a period of imprisonment, the Government does not intend to permit the enfranchisement of prisoners who are sentenced to four years’ imprisonment or more in any circumstances. The Government believes that this is compatible with the ECtHR ruling in *Hirst (No 2)*.”

Additionally, as the second stage consultation document makes clear at page 24:

“Although few respondents to the first stage consultation document actively agreed with a system of enfranchisement based on sentence length, many respondents did not engage with the question given their support for either full enfranchisement or retaining a total ban; and nor was there a clear expression of support for the alternative approach of the decision being handed to sentencers.

The Government considers that, in general, the more serious the offence that has been committed, the less right an individual should have to retain the right to vote when sentenced to imprisonment. Tying entitlement to vote to sentence length would have the benefit of establishing a clear relationship between the seriousness of the offence, or offences, and suspension of the right to vote. The Government believes it would also be more administratively straightforward to achieve than leaving discretion to the sentencer. In addition, the Government is obliged to take account of the degree to which any sentence length chosen as the “cut off” point is compatible with the ECHR. In determining the length of a custodial sentence,

<sup>39</sup> As stated in answer to the first question, two further responses were received in favour of full enfranchisement, bringing the total to 43, or 48%.

sentencers take into account the nature and gravity of the offence and, in most cases, the individual circumstances of the offender. Under these proposals, the suspension of the right to vote will only occur where those factors are such as to have led a sentencer to conclude not only that the offence is such as to warrant a custodial sentence rather than some other form of punishment, but also that a term of a some length is appropriate.”

You ask whether the Government’s proposed approach to enfranchisement arrangements for convicted prisoners has been informed by practice in other Council of Europe Member States. In fact, this was discussed in the first stage consultation paper. This noted (pages 20–21) that policies within the (then) 41 Council of Europe countries ranged from 18 that practised full or virtually full enfranchisement to 13 (including the UK) who maintained a blanket ban. Regarding those states that impose a partial ban on prisoners’ voting rights, it was noted that:

“For example, in Belgium, prisoners who receive a sentence length of longer than 4 months are disqualified [and] the period of disenfranchisement may actually exceed the period of the sentence. Austria disenfranchises prisoners serving more than one year, while in Italy, those serving a sentence of five years or more are disqualified.”

There is, therefore, no uniformity on this issue, and a number of Contracting States do place restrictions on the right to vote based on sentence length. As the Grand Chamber noted (at paragraph 84):

“In a case such as the present, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Art 3 of Protocol No 1”.

6. *Please list the additional burdens on the courts and on institutions where individuals are currently held in custody which affected the Government’s view on whether or not sentencing courts should be responsible for decisions in respect of the right of an individual prisoner to vote.*

7. *Why does the Government consider that it would be inappropriate for Parliament to delegate the decision on the extent of an individual’s right to participate in elections to the sentencing court?*

8. *Please explain why the Government’s view that removal of the franchise should not be treated like any other criminal sanction is compatible with the decision of the Grand Chamber in *Hirst and Article 6 ECHR*.*

The Government has consistently been clear that it considers that for an issue as important as prisoner voting rights, upon which strong and often contrary views are held, Parliament should have the opportunity to debate the principles behind prisoner enfranchisement and the competing interests at stake and to assess the proportionality of any measures taken to restrict the right to vote. Further, it is right that in general Parliament should set the legislative threshold or thresholds at which convicted prisoners ought to retain the right to vote or have that vote restricted.

The Government accepts, of course, that any restriction upon the right to vote must be proportionate, but for the reasons set out above, namely that the sentencing decision itself takes into account the nature and circumstances of the offence and the individual circumstances of the offender, it considers that legislative thresholds for disenfranchisement based on sentence length may in principle be a proportionate means of implementing the judgment. The Grand Chamber in *Hirst (No.2)* did not state that the only permissible means of restricting the rights afforded by Article 3, Protocol 1 was by express judicial decision in every case, but stated that it was “primarily for the state concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention.” (para 83 of the judgment). As already noted, many states operate a system of partial disenfranchisement which does not depend upon the decision of sentencers in each individual case.

That said, as you rightly state, Lord Bach indicated in the debate on Lord Ramsbotham’s amendment to the Coroners and Justice Bill on 15 July 2009 that the Government is not entirely opposed to giving sentencers some role in the decision; indeed this is expressly provided for in one of the four options which is currently out to consultation. However, as Lord Bach also said, “this approach needs to be considered very carefully”.

In relation to the additional burdens posed by any options which require the judicial sentencer to take decisions to restore or withdraw voting rights from offenders at the point of handing down a sentence, the Government does consider that such an option would impose additional burdens both on the Court and the UK penal institutions in which offenders are detained.

In the case of the courts, it is clear that a requirement to make a judgment on enfranchisement at the point of sentence which takes account of the individual circumstances of the offender will impose an additional burden on the sentencing court. The Government is mindful of the need not to underestimate the impact on the courts of any new requirements.

In relation to the additional burden that such an option could place on penal institutions, an approach to enfranchisement based entirely on judicial discretion would need to be carefully designed in order to minimise the administrative burden on the prison establishment. In order to facilitate registration and voting, prison officers will need to undertake some form of verification of applications to register to vote.

In the event that enfranchisement is determined by the sentencing judge, there will need to be a mechanism to enable the prison authorities to check eligibility, and this would need to be designed to minimise the burden on those institutions.

Nonetheless, despite the potential for such additional burdens, the Government is not entirely opposed to the possibility of giving sentencers some role in the enfranchisement of prisoners, and, as stated above, one of the options set out in the consultation paper expressly provides for this.

9. *We would be grateful if you could provide reasons why the Government considers that the consideration of both Houses of a remedial order on affirmative resolution will not provide adequate opportunity to debate the issues explored by the Grand Chamber in its decision and the Government's proposals to remove the breach in Hirst.*

You ask about the Government's view that a remedial Order under section 10 of the Human Rights Act would not be appropriate as the means for legislating for the implementation of the response to the *Hirst* judgment. The Grand Chamber ruling in *Hirst (No 2)* affirmed:

“As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there was no evidence that Parliament had ever sought to weigh the competing interests, or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It could not be said that there was any substantive debate by...the legislature on the continued justification...for maintaining such a general restriction on the right of prisoners to vote.”

The Government therefore considers it inappropriate for a remedial order—which is a summary procedure as compared to the usual process for enacting primary legislation—to be the means by which prisoner enfranchisement is enacted. The Government considers that in the special circumstances of this case, concerning an issue as fundamental as extending the franchise, Parliament should have the opportunity to debate and, if it considers necessary, amend any legislation implementing the judgment.

10. *We would be grateful if you could provide us with any information which the Government has provided the Committee of Ministers since its decision in June 2009 expressing concern about the delay in this case and calling for a solution before the next general election.*

11. *In particular, we would be grateful if you could tell us:*

- (a) *Whether the Government has made any commitment to ensure that a solution will be in place before the next general election; and*
- (b) *Any steps which the Government intends to attempt to meet this goal.*

12. *Please explain whether the Government considers that the conduct of a general election before the blanket ban in Section 3 of the Representation of the People Act is removed will be compatible with the United Kingdom's international obligations under the Convention, including Article 13 ECHR.*

The Government has previously provided the Joint Committee with its most recent update to the Committee of Ministers, which was provided to the Committee of Ministers in April 2009 for the meeting of 2–5 June 2009. This is attached (Annex A). However, a further update will be provided in advance of the Committee of Ministers' meeting in December, when the case is next due to be considered. We will, of course, provide the Joint Committee with a copy of any information submitted.

We have noted the Committee of Ministers' comments and the decision adopted in relation to this case. However, given that the consultation on this topic has only very recently concluded, we are not in a position to provide additional information at this time.

However, even if the concern of the ECtHR expressed in *Hirst (No 2)* were not remedied by the next general election, this would not in the Government's view call into question the legality of the elections themselves.

The Government recognises that the implementation of this judgment is taking some time. However, the issues around prisoner voting are complex and require full consultation and consideration. The Government is actively working to resolve the issues, and the results of the second stage consultation will inform this work. As this second consultation has now concluded, the Government will consider the next steps towards implementing the judgment in legislation.

13. *We would be grateful if you could provide us with the details of any further Convention challenges pending against the Government, either before our domestic courts or at the European Court of Human Rights, based on the failure of the United Kingdom to remove the blanket ban in section 3 of the Representation of the People Act 1983. Please include any details of the grounds of the challenge and any Government response.*

The Government faces a judicial review by Peter Chester, who seeks a declaration of incompatibility in respect of section 3 of the Representation of the People Act 1983 and a declaration that he is entitled to vote in European elections. Permission has been granted and the case is listed in the Administrative Court on 22 October 2009. There are a number of cases in Scotland which although technically pending were sisted (stayed) earlier this year.

We are aware of three further cases at the Court of Human Rights regarding prisoners' voting rights in Scotland and Northern Ireland. They are Application Numbers 8195/08, 60041/08 and 60054/08. The cases raise whether there has been a breach of Article 3, Protocol 1 in relation to various elections, whether the Northern Ireland Assembly is a "legislature" for the purposes of that Article, and whether the Applicants have had an effective domestic remedy in accordance with Article 13 of the Convention. These cases have only been notified to the Government recently, and the Government has not yet provided its observations.

I hope that you find this reply helpful.

8 October 2009

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**Letter from the Chair of the Committee to Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 17 December 2009**

*Hirst (No 2) v United Kingdom*

The Joint Committee on Human Rights is continuing its practice of monitoring the Government's response to adverse human rights judgments. During our evidence session on 2 December 2009, we asked you for further information in respect of the Government's consultation on prisoners' voting rights. Since that session, the Council of Europe's Committee of Ministers has issued an interim resolution in respect of the delay in that case. The interim resolution is a significant and serious step and is couched in unambiguous terms. The Committee of Ministers "expresses serious concern that the substantial delay in implementing the judgment has given rise to a significant risk that the next United Kingdom general election . . . will be performed in a way that fails to comply with the Convention".<sup>40</sup>

On 15 December 2009, you responded to a written question by Mark Oaten MP, "noting" the interim resolution and again confirming that the Government was considering the outcome of its second consultation on this issue.<sup>41</sup> On the same day, Lord Bach gave a similar response to an oral question by Lord Ramsbottom. He explained that the Government would "respond when we are ready to respond" and that it was the Government's view that the legality of the election would not be affected by the ongoing incompatibility with the ECHR caused by the blanket ban on prisoner voting.<sup>42</sup>

The UK is now under an obligation to give effect to that judgment, including to avoid further repeat future violations (Article 46, ECHR). Although the judgment has no direct effect in our domestic legal system and cannot directly change the law, the UK is under an international legal obligation to act.

I would be grateful if you could:

- provide a fuller explanation of the Government's response to the Interim Resolution of the Committee of Ministers. In particular:
- please explain, how the Government intends to respond to the Committee of Ministers' call on the UK to "rapidly adopt the measures necessary to implement the judgment of the Court".

In the past, the Government has explained its view that it will be difficult to create a Parliamentary consensus on this issue.<sup>43</sup> You have explained that the Constitutional Reform and Governance Bill, currently before Parliament, could not provide an appropriate vehicle for reform, as to do so would make it a "Christmas tree" Bill.<sup>44</sup>

- In the light of the concerns of the Council of Europe, will the Government reconsider bringing forward amendments to the Constitutional Reform and Governance Bill to implement the *Hirst* judgment?
- The Government has explained its view that the *Hirst* judgment cannot effect the domestic legality of the forthcoming elections. Please explain the Government's view of the the UK's international law obligations arising from the *Hirst* judgment.

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<sup>40</sup> Interim Resolution CM/Res.

<sup>41</sup> HC Deb, 15 Dec 2009, Col 1043 W.

<sup>42</sup> HC Deb, 15 Dec 2009, Col 1393–1394. This repeats a view expressed in your letter dated 8 October 2009.

<sup>43</sup> Fourth Report of Session 2008–09, *Political Parties and Elections Bill*, para 1.15–1.16.

<sup>44</sup> Uncorrected transcript, 2 December 2009.

- What stance on this case does the Government propose to take at the Committee of Ministers meeting in March 2010, should no further progress have been made?
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**Letter to the Chair of the Committee from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 25 January 2010**

HIRST (NO 2) v UNITED KINGDOM

Thank you for your letter dated 17 December 2009, in which you asked a number of additional questions about the Government's implementation of the *Hirst* (No 2) judgment.

As the Government has reiterated on a number of occasions, the right to vote goes to the essence of the offender's relationship with democratic society, and the removal of the right to vote in the case of some convicted prisoners can be a proportionate and proper response following conviction and imprisonment. However, we remain committed to implementing judgments of the European Court of Human Rights, including the *Hirst* (No 2) judgment.

To this end, we have published two consultation papers, the second of which set out a range of options for the enfranchisement of prisoners based on sentence length, with the aim of linking enfranchisement to the seriousness of the offence committed. In addition, the second consultation paper also invited views on a number of practical issues around the enfranchisement of prisoners: for example, how the registration process would work in practice; how residence would be defined for the purposes of elections; and how prisoners would cast their votes. That second consultation has now closed, with over 100 responses, which we are carefully considering.

I turn now to the specific questions you have raised, which are set out in bold below for ease of reference.

**I would be grateful if you could:**

- **Provide a fuller explanation of the Government's response to the Interim Resolution of the Committee of Ministers. In particular:**
- **Please explain, how the Government intends to respond to the Committee of Ministers' call on the UK to "rapidly adopt the measures necessary to implement the judgment of the Court"**

The Government acknowledges the concerns expressed in the interim resolution made by the Council of Europe's Committee of Ministers in the case of *Hirst* (No 2). The Government takes its obligations under the European Convention on Human Rights seriously and is committed to implementing the *Hirst* (No 2) judgment. As stated above, the Government is carefully analysing the responses to second stage consultation and will consider the next steps towards implementing the judgment in legislation in due course. Our approach to the implementing the *Hirst* (No 2) judgment will aim to arrive at a solution which respects the judgment of the Court whilst taking into account the traditions and political context of the United Kingdom.

**In the light of the concerns of the Council of Europe, will the Government reconsider bringing forward amendments to the Constitutional Reform and Governance Bill to implement the *Hirst* (No 2) judgment?**

As I stated when I gave evidence to the JCHR on 2 December, I do not believe that implementing *Hirst* (No 2) as an amendment to what is already a comprehensive and wide-ranging piece of legislation is appropriate. Extending the franchise to convicted prisoners to any degree would require a considerable number of practical considerations to be resolved as well as issues of principle.

**The Government has explained its view that the *Hirst* (No 2) judgment cannot affect the domestic legality of the forthcoming elections. Please explain the Government's view of the UK's international law obligations arising from the *Hirst* (No 2) judgment.**

Whilst the Government is bound under Article 46 of the ECHR to implement decisions of the European Court of Human Rights, such decisions do not have the effect of striking down the national law to which they relate. The UK is a dualist legal system in which international law obligations must be translated into domestic law via Parliament. Therefore, whilst the Government accepts that the Court in *Hirst v UK* (No 2) found that section 3 of the Representation of the People Act 1983 is not compliant with its international law obligations under the Convention, the domestic law continues in force. Similarly, this decision does not have any impact on the continuing validity of our current body of domestic election law.

It is of course the case that the Government remains committed to the European Convention on Human Rights and to fulfilling our obligation under the Convention to implement the judgments of the European Court of Human Rights. The Convention system is carefully constructed to allow States flexibility in how they implement judgments of the Court and allows States reasonable timescales in which to do so; the system rightly allows this flexibility in order to allow some leeway for the implementation of particularly complex judgments which raise difficult issues that cannot be solved quickly. This balance helps to ensure respect for the sovereignty of each state whilst maintaining effective scrutiny of rights protection.

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**What stance on this case does the Government propose to take at the Committee of Ministers meeting in March 2010, should no further progress have been made?**

The Committee of Ministers (CoM) are well aware of the Government's position on this issue. Since the *Hirst* (No 2) judgment we have kept the CoM updated, including a detailed note in June of last year, together with a detailed statement for its recent meeting on 1–4 December 2009. We will continue to keep the CoM updated on our progress on this case, and will make further representations at its meeting in March 2010.

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**Letter to the Chair from Patricia Lewsley, Commissioner for Children and Young People, dated October 2009**

IMPLEMENTATION OF STRASBOURG JUDGMENTS AND DECLARATIONS OF INCOMPATIBILITY

I am writing in relation to your ongoing review with regards to the UK's implementation of adverse human rights judgments.

As you may be aware it is our principal aim to safeguard and promote the rights and best interests of children and young people.

I note that you have already directed a number of questions to the Minister of State for Children, Young People and Families relating to the cases of *Marper v UK* as well as *RK and AK v United Kingdom*.

With regards to *RK and AK v United Kingdom* I note the court's ruling that the decision taken by the state effectively breached the human rights of the parents. At all times my paramount consideration must be the best interests of the child and in consideration of this, while [ appreciate that the litigants involved in this matter were the parents, I note that there is no discussion or consideration given to any potential breach of the child's rights in these circumstances.

I would therefore be keen to determine whether or not the government are aware or have been aware of cases where a child or young person who was wrongfully removed from their parents or taken into care, have issued proceedings seeking redress of this—whether this be on their own behalf after they reach the age of 18 or by way of a next friend if they are still a minor?

I have noted the December 2008 ruling in *Marper v UK* and have previously stated my concerns together with the Children's Commissioners for England and Wales around the indefinite retention of children's DNA. In particular, you may be aware that in our joint evidence to the UN Committee on the Rights of the Child in June 2008 where we argued that the indefinite retention of children's DNA—including the DNA of unconvicted children—fails to respect their right to privacy and family life under Article 16 of the Convention. You will be aware that the UN Committee shared this view in its concluding observations in November 2008.

We have urged the UK Government and devolved administrations to look to the Scottish model regarding DNA retention as offering a credible balance between private rights and public interests. Particularly given that the European Court's view that the Scottish position is "notably consistent" with the Council of Europe Data Protection Convention. The English and Welsh Commissioners and I have re-stated our position in August of this year in a joint response to the recent consultation on "Keeping the Right People on the UK DNA Database". I attach a copy of our response to this consultation for your consideration.

If you have any questions, please do not hesitate to contact me.

October 2009

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**Letter from the Chair of the Committee to Rt Hon Jack Straw MP, Secretary of State for Justice and Lord Chancellor, dated 13 October 2009**

SZULUK v UNITED KINGDOM (APP No 36936/05, 2 JUNE 2009)

The Joint Committee on Human Rights is continuing its practice of reviewing the implementation of judgments of the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (ECHR).

I am writing to inquire about the Government's response to the judgment in *Szuluk v United Kingdom*. In *Szuluk*, the applicant complained that the reading of a prisoner's medical correspondence with his doctor was a breach of the Article 8 ECHR right for respect for correspondence. The Court held "in light of the severity of the applicant's medical condition, the Court considers that uninhibited correspondence with a medical specialist in the context of a prisoner suffering from a life-threatening condition should be afforded no less protection than the correspondence between a prisoner and an MP".<sup>45</sup> It concluded that "the monitoring of the applicant's medical correspondence, limited as it was to the prison medical officer, did not strike a fair balance with his right to respect for his correspondence in the circumstances."<sup>46</sup>

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<sup>45</sup> Para 53.

<sup>46</sup> Para 54.



We note that since the facts which gave rise to Mr Szuluk's complaint, the relevant law has changed, that the NHS now provides medical care to prisoners and that Prison Service Order (PSO) 4411 is relevant.

I would be grateful for your response to the following questions:

1. What steps does the Government propose to take to implement domestically the decision of the ECtHR in *Szuluk*?
2. Specifically, does the Government propose to revise PSO 4411, Chapter 5, to make clear that correspondence between a prisoner and a medical professional should be subject to confidential handling arrangements, similar to those applicable to legal advisors, Members of Parliament, or the then Healthcare Commission? If so, in what way(s) does it propose to revise the PSO?
  - (a) If the Government does not propose to amend PSO 4411, please explain why not and how it will ensure compliance with the judgment?
  - (b) Similarly, if the Government proposes not to include medical professionals within the list of organisations/individuals within para 5.1 which are subject to confidential handling arrangements, please explain on what basis the Government believes such a distinction to be justified.
3. Does the Government consider that any amendments to the Prison Rules, Prison Service Instructions or other Prison Service Orders are necessary to ensure compliance with Article 8 in relation to correspondence between a prisoner and his or her medical advisor? If so, what amendments does it propose to make?

In addition, please provide us with copies of the Government's submissions to the Committee of Ministers and ensure that we continue to be updated as further information is provided.

13 October 2009

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**Letter to the Chair of the Committee from Rt Hon Jack Straw MP, Lord Chancellor and Secretary of State for Justice, dated 8 November 2009**

SZULUK v UNITED KINGDOM (APP No 36936/05, 2 JUNE 2009)

Thank you for your letter of 13 October in which you inquire about the Government's response to the judgment in *Szuluk v United Kingdom*. The Government intends to make the changes to Rules and guidance necessary to implement the judgment. I have responded in more detail to your three questions as set out below.

1. *What steps does the Government propose to take to implement domestically the decision of the ECtHR in Szuluk?*
2. *Specifically, does the Government propose to revise PSO 4411, Chapter 5, to make clear that correspondence between a prisoner and a medical professional should be subject to confidential handling arrangements, similar to those applicable to legal advisors, Members of Parliament, or the then Healthcare Commission? If so what way(s) does it propose to revise the PSO?*
3. *Does the Government consider that any amendments to the Prison Rules, Prison Service Instructions or other Prison Service Orders are necessary to ensure compliance with Article 8 in relation to correspondence between a prisoner and his or her medical advisor? If so, what amendments does it propose to take?*

In the light of the judgment in *Szuluk*, the Government has put in hand work to amend Prison Rule 35A, YOI Rule 11 and Prison Service Orders 4411 Prisoner Communications and 3050 Continuity of Healthcare for Prisoners. The changes to the Rules will make provision for correspondence between prisoners and a treating medical practitioner (in cases where there is a diagnosed life threatening illness) to be subject to confidential handling arrangements, similar to those applicable to legal advisors and Members of Parliament. Guidance in PSO 4411 and PSO 3050 will support these Rule changes. We do not believe that any other Orders will need to be amended to give effect to the judgment.

The changes to Prison Rule 35A and to YOI Rule 11 have been drafted and are currently the subject of final consultation across the National Offender Management Service and Department of Health (Offender Health). The Rule changes are subject to the negative resolution procedure and we expect to be in a position to lay them before the Christmas recess.

I attach a copy of the Government's submissions to the Committee of Ministers as requested and will provide further updates on progress as appropriate.

SZULUK V UNITED KINGDOM (APPLICATION NO 36936/05)  
INFORMATION SUBMITTED BY THE UNITED KINGDOM GOVERNMENT

INDIVIDUAL MEASURES

1. *Just satisfaction:*

- arrangements to make the just satisfaction payment are in hand; and
- I will forward information on payment of just satisfaction in due course.

2. *Other individual measures:*

- the Government intends to take the following individual measures:
  - Revising Prison Service orders to comply with the decision. Prison Service Orders are executive directions, which dictate the policies and procedures that should be followed within the prison. They are widely available on the Prison Service website, [www.hmprisonservice.gov.uk](http://www.hmprisonservice.gov.uk). Legal advisers and policy teams are working to amend PSO 4411 Prisoner Communications Correspondence and PSO 3050 Continuity of Healthcare for Prisoners. These documents are being agreed and will be published in due course.

GENERAL MEASURES

3. *Publication:*

- the judgment has been published in the *Times Law Report* on 17 June 2009 (Application No 36936/05) and in *Butterworth's Medico-Legal Reports* at 108 BMLR 190 (2009). The judgment is available on online legal databases including [www.echr.coe.int](http://www.echr.coe.int) and English databases Lexisnexis, Lawtel and Westlaw.

4. *Dissemination:*

- the judgment has been disseminated to Her Majesty's Prison Service, including all prison governors and the relevant policy groups within Government.

5. *Other general measures:*

- the Government considers no further general measures are necessary because it has reviewed all relevant existing regulations and guidance and is overseeing the amendment of the Prison Services Orders to ensure they are fully compliant with the *Szuluk* judgment.

6. The Government considers that all necessary measures have been taken and the case should be closed.

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**Letter to the Clerk of the Committee from Caroline Parkes, Researcher, British Irish Rights Watch,  
dated 24 November 2008**

British Irish Rights Watch (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW takes no position on the eventual constitutional outcome of the conflict.

BIRW welcomed the Joint Committee on Human Rights' recent report, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*. We made a short submission to the Committee's inquiry on this issue.

BIRW share the Committee's disappointment at the limited response from the government on the JCHR's previous recommendations, which indicates a disregard for the views of both the Committee and the European Court. This disregard undermines the UK's reputation as a protector of human rights and sends a message to wider society that devalues human rights. Our hope and expectation is that the Government would respond to the European Courts judgments, and by association, the Committee's recommendations, with urgency. It is not acceptable that the UK is one of the top ten states in terms of delays in respect of leading cases or that it has the highest proportion of leading cases awaiting an acceptable resolution for longer than five years. Such a poor record robs the UK of any claim it might make to being a world leader when it comes to respect for human rights.

We acknowledge the Committee's comments regarding the need for the Government to co-ordinate their response to the Court's judgments in a more centralised manner. We agree that the Ministry of Justice is the most appropriate place for this to occur.

We welcome the Committee's continuing concerns in relation to the implementation of judgments relating to the effective investigation of the use of lethal force in Northern Ireland. The United Nations' Human Rights Committee recently criticised the delays in the investigation into murders in Northern Ireland and the problems with the Inquiries Act 2005. They concluded: "The State party should conduct, as a matter of particular urgency given the passage of time, independent and impartial inquiries in order to ensure a full, transparent and credible account of the circumstances surrounding violations of the right to life in Northern Ireland." (Concluding observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, 30 July 2008).

We welcome the JCHR's recommendation that the Government publish an explanation of its approach in each case. However, we hope that this will not be used as an excuse by the Government to further delay implementation.

We note the JCHR's comments on the Historical Enquiries Team (HET). Our concerns about the independence of the HET focussed less on a belief that HET officers were biased but rather on the fact that the HET report directly to the Chief Constable of the PSNI, thus robbing the HET of the independence required by the European Court. A recent leaked report by Dr Patricia Lundy highlighted further areas of concern particularly in relation to access to intelligence documents. (See *Report criticises how PSNI HET team investigates murders*, *Belfast Telegraph*, 17 November and *Cold case team "must change" says academic*, by Chris Thornton, *Belfast Telegraph*, 17 September 2008). BIRW is supportive of the HET's work but we continue to have concerns about them; specifically that they are not Article 2 compliant and that a serious financial shortfall from their budget was recently only narrowly averted.

The forthcoming report of the Consultative Group on the Past, expected in early 2009, is likely to recommend a fully independent investigative process for deaths arising out of the conflict. We hope that the Committee will monitor these developments. In our view, any such arrangements must draw on the experience garnered by the HET so far; provide at least as good a service as the HET, particularly in terms of family liaison; and be adequately resourced.

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**Letter to the Clerk of the Committee from Christopher Stanley, Research and Casework Manager,  
British Irish Rights Watch, dated 27 October 2009**

We write in response to the forthcoming publication by the Joint Committee on Human Rights of the report *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*.

We apologise for submitting this evidence after the closure date of the consultation period.

As you are aware British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.

We continue to welcome the role of the Joint Committee on Human Rights in monitoring the Government's response to judgments from the European Court of Human Rights.

**THE UK'S FAILURE TO IMPLEMENT EUROPEAN DECISIONS**

BIRW is concerned at the continued tardiness shown by the UK Government in providing proper national-level redress where there has been a violation of the European Convention. We agree that the implementation of judgments would benefit from a more centralised and co-ordinated approach and believe that this role should be provided by the Ministry of Justice. We also agree with the JCHR's earlier recommendation that the Government's response to the remedying of breaches should be considered with more urgency in future.

We welcomed the statement of the Committee in its previous Annual Report of 2008 regarding delays in implementing investigations into the use of lethal force (McKerr, Jordan, Finucane, Kelly, Shanaghan, Kelly and McShane v UK):

"66. A number of NGOs continue to campaign for effective, independent inquiries to take place on these cases and for effective investigations into similar cases in Northern Ireland and beyond. Both Amnesty International and British Irish Rights Watch have strongly criticised the Government's approach in relation to each of these cases, and draw particular attention to the case of Finucane. British Irish Rights Watch argue that our Government's approach to Article 2 ECHR

inquiries is particularly hampered by two factors: (a) an entrenched culture of Government secrecy and (b) the narrow approach of the domestic courts to cases which took place before the introduction of the Human Rights Act. We have expressed our own concerns on each of these issues. We continue to regret the delay in providing Article 2 compliant investigations in respect of each of these cases. We recommend that the Government publish a full and up to date explanation of its approach to each case, including the reasons for continuing delay.”<sup>47</sup>

Another year has passed and despite continued pressure by the Committee and NGOs there is no sign of movement from the Government.

#### S AND MARPER V UK (30562/04 AND 30566/04) 04 12 08

BIRW responded to the Home Office Consultation following the ECtHR judgement in *S and Marper v UK*. As you are aware this judgement did not seek to limit the ability of the police to solve crimes or hinder the investigatory process; rather it acknowledged that the UK was out of step with the rest of Europe. The confusion which ensued when the judgment was published served to ensure that the changes to the system were viewed as an attack on the ability of the police to carry out full investigations and solve crimes, which was a misrepresentation.

BIRW acknowledged the difficulty faced by the Government in their response to the *S and Marper v UK* judgment: the need to balance the protection of life with respect for the right to privacy and the wider principle of the presumption of innocence. However, this balance cannot be struck by disproportionately treating all citizens as suspects.

A DNA profile should only be held where an individual is convicted of a crime. There should be no exceptions to this principle. As Professor Sir Alec Jeffreys, the scientist who developed the techniques for DNA sampling, said, the retention of the profiles of innocent people leads to a “presumption of likely future guilt”.<sup>48</sup>

We remain concerned that the Government appears to have forgotten a fundamental principle of the criminal justice system, the presumption of innocence. Those not charged or convicted with a crime, and thus innocent, should not have their DNA, fingerprints or other profiles kept by the police. We also object to the automatic taking of DNA; we believe that DNA should either be taken for the purposes of comparing it to DNA found at the crime scene or for the purposes of elimination. If it is found to be irrelevant to the crime, it should be destroyed immediately.

We understand that since the *S and Marper v UK* judgment, the Government has continued to add individuals to the database; according to media reports, approximately 300,000 profiles have been added.<sup>49</sup>

The choice by the Government to make changes to the retention and destruction of DNA samples/profiles by way of regulations rather than primary legislation is a disappointment. Considering the contentious nature of the issue, we believe it would be more beneficial and appropriate for there to be full Parliamentary debate and scrutiny. You will be aware that the JCHR in its own report concluded that: “We are concerned at the Government’s approach to implementation of this important judgment. Whilst the Government is right to consider that the public may wish to be consulted on proposals for reform, we are alarmed that the substance of these proposals will not be contained in primary legislation, subject to the usual scrutiny by both Houses.”<sup>50</sup>

#### AL-SAADON AND MUFDDHI V UK (61498/08) 30 06 09

BIRW and others have made a successful application to be joined as third party interveners in the case of *Al-Saadoon and Mufdhi v UK*. We are aware that both applicants were transferred into the jurisdiction of the Iraqi High Tribunal by the British military. At present the case against the two defendants has been cancelled due to insufficient evidence but they remain in custody pending an appeal to the Court of Cassation by either the Public Prosecutor or the original complainant.

As an intervener in this application BIRW considers that two questions identified by the JCHR in its letter to the Secretary of State for Defence on 13 January 2009 remain to be answered by the Government through its submissions to the ECtHR:

- (a) Why the Government considered it was appropriate to ignore the interim measures decision of the European Court on the basis of the UK courts’ interpretation of international law, and on the application of the ECHR?
- (b) Did the Government agree that the final interpretation of the Convention and the scope of its application is a matter for the ECtHR?

<sup>47</sup> Joint Committee on Human Rights *Monitoring the Government’s Response to Human Rights Judgments: Annual Report 2008* HL Paper 173/HC 1078 page 27.

<sup>48</sup> Q&A: The national DNA database, by Dominic Casciani, BBC News, 7 May 2009.

<sup>49</sup> DNA database expanding by 40,000 profiles a month, Christopher Hope, *Daily Telegraph*, 14 July 2009.

<sup>50</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Policing and Crime Bill*, Tenth Report of Session 2008–09, 31 March 2009, p 40–41.

On 3 July 2009 the ECtHR delivered its decision on the admissibility of the Al-Saadoon application against the UK. As you are aware, at this stage, the Court only decided as a preliminary question whether the applicants had been within the UK jurisdiction within the meaning of Article 1 of the Convention. The ECtHR addressed the point in the following manner:

“In the Court’s view, the applicants remained within the United Kingdom’s jurisdiction until their physical transfer to the custody of the Iraqi authorities on 31 December 2008. The questions whether the United Kingdom was under a legal obligation to transfer the applicants to Iraqi custody and whether, if there was such an obligation, it modified or displaced any obligation owed to the applicants under the Convention, are not material to the preliminary issue of jurisdiction (see, *mutatis mutandis*, *Bosphorus*, cited above, 138) and must instead be considered in relation to the merits of the applicants’ complaints.”)

This passage clearly exhibits the Court’s thinking that conflicting norms cannot negate jurisdiction. They may only be taken into account when considering the merits of the case. The principle remains clear that the Convention supersedes any external conflicting law.

It is on this point that the application of Al-Saadoon will continue to be argued and that the Government should be minded to accept.

We welcome the continued scrutiny provided by the Joint Committee on Human Rights on these issues and ask that the Joint Committee encourages the Government to respond to the European Court’s judgments promptly.

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### Memorandum submitted by the Immigration Law Practitioners Association, dated 30 September 2009

#### *Implementation of Strasbourg Judgments and Declarations of Incompatibility*

##### SUMMARY

ILPA draws attention to the continued failure to give effect to the decision of the House of Lords in the case of *Baiar*<sup>51</sup> and to the ways in which its own attempts to press the Government on this matter have been no more successful than those of the Joint Committee.

ILPA draws attention to the judicial review challenge to fees for Certificates of Approval and the Government’s *Observations* and *Further Observations* in the case of *O’Donoghue*<sup>52</sup> before the European Court of Human Rights on Certificates of Approval and recommends that the Committee consider earlier and ongoing delays in the light of these developments. ILPA considers that these provide evidence that the Government’s approach to date has been to do as little as possible, as late as possible, to implement the judgment and of its failure to appreciate the gravity of the past and ongoing breach of human rights in this case.

ILPA invites the Committee to press the government on the implications of the judgment in *S & Marper v UK*<sup>53</sup> for data retained under Immigration Act powers.

ILPA invites the Committee to press the government on cases in which the European Court of Human Rights has repeatedly issued letters under Rule 39 of its Rules of Court to urge the UK government not to remove Tamils to Sri Lanka and draws parallels with this and the government’s conduct of the litigation relating to gender discrimination and widow’s benefits as detailed in the Committee’s *Monitoring the implementation of human rights judgments Annual Report 2008*<sup>54</sup> (hereinafter *Annual Report 2008*) and relates this to wider areas of concern about the UK Border Agency’s lack of respect for the rule of law.

ILPA draws attention to violations of the right to liberty resulting from detention under immigration powers and the way in which individuals are having to litigate to assert these rights rather than the UK Border Agency learning the lessons of precedent.

ILPA draws attention to the UK Border Agency’s failure to give effect to the judgment of the Court of Appeal in *ZO (Somalia)* [2009] EWCA Civ 442 and thus to deny certain persons seeking asylum the right to work (an interference with their Article 8 right to private life) and that this is not “in accordance with the law” being contrary to European Union law.

ILPA observes that human rights cannot be expected to bear the full weight of the constitutional settlement and that a precondition for the respect of human rights is respect for the rule of law. ILPA sets out its evidence for its view that the UK Border Agency has failed to respect the rule of law. In this regard

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<sup>51</sup> *R (1) Mahmoud Baiar (2) Izabela Trzcinska (3) Leonard Bigoku (4) Agolli Melek Tilki) v Secretary of State for the Home Department & (1) Joint Council for the Welfare of Immigrants (2) AIRE Centre (Interveners)* [2008] UKHL 53.

<sup>52</sup> *O’Donoghue v United Kingdom*, ECtHR(App No 34848/07).

<sup>53</sup> Case of *S & Marper v UK* (ECtHR, Application Nos 30562/04 and 30566/04).

<sup>54</sup> Thirty-first report of session 2007–2008, HL Paper 173, HC 1078.

ILPA draws attention to the decisions in the cases of *RN (Zimbabwe) CG* [2008] UKAIT 83; *Metock v Ireland, C-127/08* and *R (HSMP Forum Ltd) v SSHD* [2008] EWHC 664 (Admin) and *R (HSMP Forum (UK) Ltd) v SSHD* [2009] EWHC (Admin) and the risks of violations of human rights resulting from removal without notice including in the case of *X v SSHD* CO/9617/2008.

## INTRODUCTION

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration an asylum through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups and has given both written and oral evidence to many parliamentary committees, including the Joint Committee on Human Rights.

This Memorandum is provided in response to the Committee's Call for Evidence of 30 July 2009 and deals with the response of the UK Border Agency to judgments concerning human rights.

ILPA notes the Committee's general comments<sup>55</sup> in its *Monitoring the implementation of human rights judgments Annual Report 2008*<sup>56</sup> and agrees that it would be helpful if responses to human rights judgments were monitored across government and reports made to the Committee in a systematic manner. ILPA shares the Committee's concerns about delay.

## THE RIGHT TO MARRY

In its Annual Report 2008<sup>57</sup> the Committee drew attention to comments in paragraph 135–127 of its second Annual Report<sup>58</sup> (2007), following the judgment of the Court of Appeal in *Baiai*.<sup>59</sup> The Committee questioned whether administrative convenience and public costs were sufficient justification for delay in removing the discriminatory elements of the scheme<sup>60</sup> and concluded:

*"101 The continued application of a provision of domestic legislation that the UK courts have decided is incompatible with the Convention is inconsistent with our commitments to give full effect to the protection of the Convention to all people in the UK. It leads not only to the continued likelihood that people in the UK may be treated in a way which breaches their fundamental rights but also that they will only be able to secure a remedy in Strasbourg. We repeat our previous calls to Government to provide coherent guidance to Government on responding to declarations of incompatibility. This guidance should cover not only the obligations of the HRA 1998 but also the responsibilities of the UK under its international obligations."*

The Committee went on to observe that:

*"103. We note the Government's reference to its interim guidance on Certificates of Approval, which was designed to reduce the impact of the Certificate of Approval scheme, pending the decision of the House of Lords. However, we consider that it has no real implications for the ongoing discrimination identified by the Court of Appeal, which continues to mean those who wish to marry in a Church of England service are treated more favourably than others."*

ILPA agrees with this analysis.

The delay in implementation to which the Committee drew attention must be viewed in the light of the Government response, or, more accurately, the lack of response, following the judgment of the House of Lords in *Baiai*.<sup>61</sup>

The House of Lords handed down judgment on 30 July 2008. By this time the Government had had ample time to ponder the possible outcomes of the appeal to the House of Lords, having before it the judgments in the High Court of 10 April 2006<sup>62</sup> and Court of Appeal on 23 May 2007,<sup>63</sup> and to make provision for every eventuality. Yet the response to the decision of the House of Lords was yet more delay.

Following the judgment of the House of Lords ILPA repeatedly requested from the UK Border Agency information about how the UK Border Agency would respond to the judgment in *Baiai*. We grouped this request with requests to be provided with information on other judgments, for example the judgment of the European Court of Justice in *Metock*.<sup>64</sup> ILPA sits on the UK Border Agency's Corporate Stakeholder Group and sought repeatedly to raise the question of the UK Border Agency's respect for the rule of law at meetings of that group.

<sup>55</sup> Annual Report 2008. Conclusions and Recommendations, p43, conclusions 1–6.

<sup>56</sup> *Op cit.*

<sup>57</sup> Annual Report 2008, Paragraph 96ff.

<sup>58</sup> Sixteenth report of session 2006–2007, Monitoring the Government's response to Court judgments finding breaches of human rights, HL paper 128, HC 728.

<sup>59</sup> *Op cit.*

<sup>60</sup> Annual Report 2008, para 99.

<sup>61</sup> *Op cit.*

<sup>62</sup> *R (Baiai) v Secretary of State for the Home Department and Another* [2006] EWHC 823.

<sup>63</sup> *Secretary of State for the Home Department v R (Baiai) et ors* [2007] EWCA Civ 478.

<sup>64</sup> *Op cit.*

It was with great surprise that ILPA read the Government's observations in the case of *O'Donoghue v United Kingdom* before the European Court of Human Rights (App No 34848/07), in which the Government contended that the delay in implementation of the *Baiai* judgment was due to the need to consult with stakeholders. This echoes the government's response to the Committee's Annual Report 2008,<sup>65</sup> where it stated:

*"The UK Border Agency is liaising with relevant stakeholders and is considering the most appropriate way to remedy the incompatibility."*

ILPA, a member of the UK Border Agency's Corporate Stakeholder group, which has pressed repeatedly for a response to the House judgments in *Baiai*, is at a loss to know who these relevant stakeholders are. ILPA was not consulted, despite having repeatedly attempted to press the Government on what it would do, and when, to implement the judgment. To ILPA's knowledge, the AIRE Centre and the Joint Council for the Welfare of Immigrants were not consulted either despite having been intervenors in the *Baiai* case and having brought a subsequent challenge to seek to force to the government to give effect to the judgment.<sup>66</sup> The Government's *Observations* in *O'Donoghue* fail to make clear that the Committee has long been pressing the Government on the question of Certificates of Approval. ILPA questions whether the Government *Observations* (and *Further Observations*) give the European Court of Human Rights a clear picture of the way in which the *Baiai* judgment has been approached in the UK.

The House of Lords in *Baiai* held, *inter alia*, that it was an interference with the right to marry that people subject to immigration control who wished to marry in any rites other than those of the Anglican church needed a Certificate of Approval for which they had to pay a fixed fee of £295.

The House of Lords held:

*"It is plain that a fee fixed at a level which a needy applicant cannot afford may impair the essence of the right to marry which is in issue... A fee of £295 (£590 for a couple both subject to immigration control) could be expected to have that effect."* (para 30 per Lord Bingham)

Yet nothing was done. The AIRE Centre and the Joint Council for the Welfare of Immigrants brought a challenge by way of judicial review (CO/2346/2009).

Silber J's consent order in CO/2346/2009 is dated 7 April 2009. It states

*"...the parties agreeing that, in the light of the decision of the House of Lords in Baiai v Secretary of State for the Home Department [2008] 3 WLR 549, to charge a fee of £295 to applicants for permission to marry in the United Kingdom (under section 19(3)(b) of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 is ultra vires insofar as it infringes the rights under ECHR Article 12 of a needy applicant."*

And on 9 April 2009 fees were suspended. That should and could have been done on 30 July 2008. That the case was settled by consent and the rapidity of the response themselves call into question the reasons for the earlier delay.

Only in August 2009 did the UK Border Agency publish a scheme by which some applicants could reclaim the fee unlawfully charged between 2005 and 2009. The scheme is restrictive<sup>67</sup> and is unlikely to assist all those who suffered breaches of their human rights as a result of the fee. Fixed levels of savings and income are made the test of whether a person could afford the fee. Thus only a household with a total joint net income of under £236 a week for six months prior to making an application in 2009 could qualify for a refund of the fee, despite the level of the fee being considerably more than that weekly income. Those whose immigration status requires that they have no recourse to public funds will only obtain a refund in exceptional circumstances, even if they fall below the £236 joint income level.

The blanket prohibition on the right to marry without such a certificate and the exception for the Anglican church remain. The House of Lords held

*"...subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriages are marriages of convenience or whether they are not. This is a disproportionate interference with exercise of the right to marry"*. (para 31 per Lord Bingham)

The UK Border Agency website, at [www.ukba.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/still](http://www.ukba.homeoffice.gov.uk/visitingtheuk/gettingmarried/certificateofapproval/still) refers only to the judgment of the Court of Appeal and not to the wider finding of the House of Lords. It retains the exception for the Anglican church some three and a half years after the High Court had pointed out why this constituted unlawful discrimination.

The Committee stated in its 2008 Annual Report

*"The Government has not explained how any proposals to create a separate scheme for the Church of England would be justifiable and compatible with Article 14 ECHR. In the light of the outcome of the Government's appeal to the House of Lords, and the continued operation of the Certificate of*

<sup>65</sup> *Op cit.*

<sup>66</sup> See below.

<sup>67</sup> See the guidance at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/partners-other-family/coa-refund-form>



*Approval Scheme, we expect the Government's proposals for the removal of the discriminatory exemption for Church of England marriages, together with a full explanation of their compatibility with the Convention, to be published without delay. We call on the Government to send us its proposals as soon as they are available.*<sup>68</sup>

ILPA notes that this has not been done.

The Committee drew attention in its 12 May 2009 letter<sup>69</sup> to Phil Woolas MP, Minister of State for Borders and Immigration, to the *O'Donoghue* case<sup>70</sup> and asked for an update on the implementation of the judgment in *Baiai*. The Committee stated:

*"The Government told us three years ago that it intended to remove the discrimination identified in the declaration of incompatibility. If there is any reason for any delay in extending the Certificate of Approval scheme to the Church of England, I would be grateful for an explanation of that reason and the Government's timetable for action."*

ILPA understands that no response has been received to the letter, by the requested response date of 4 June 2009, or at all.

Since the judgment of the House of Lords in *Baiai*, new immigration legislation, the Borders, Citizenship and Immigration Act 2009, has completed its passage through parliament. Thus there has been an opportunity to address the shortcomings of the Certificate of Approval scheme in primary legislation and to revisit s19 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This opportunity has not been taken.

#### OTHER CASES

##### *Tamil Rule 39 applications*

In its Annual Report 2008 the Committee stated:

*111. The President of the ECtHR, its most senior Registrar, the Group of Wise Persons appointed to consider the future of the Court, and other commentators have all recognized that an inordinate amount of the Court's time is taken up by repeat or clone cases which arise from failures to remedy a particular breach of the Convention. ...States are encouraged to meet problems locally once a problem has been identified, in order to avoid unnecessarily diverting the resources of the ECtHR. ...Recently, we have been concerned by three sets of cases where we are aware that a number of clone cases are pending for hearing before the Court. We discuss two of these issues below. A third issue concerns a significant number of Rule 39 applications made in respect of cases pending against the United Kingdom. Rule 39 allows the Court to order interim measures in respect of a case. We understand that around 200–250 new Rule 39 applications per month are made against the UK before the ECtHR. Between January 2008 and June 2008, there were, in total, 1415 new Rule 39 applications against the UK. Although a significant number of these applications are refused, they may present a heavy burden on the resources of the ECtHR.*

*112. A significant number of these cases have been brought by Tamil asylum seekers seeking to prevent their deportation and return to Sri Lanka from the UK. This issue was recently considered in a lead case by the ECtHR and we intend to return to this issue in correspondence with the relevant Ministers. [footnotes omitted].*

Rule 39(1) of the Rules of Court of the European Court of Human rights states

*"The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it."*

In the Tamil cases highlighted by the Committee, the rule has been invoked in cases involving the removal of persons to countries where, it is alleged, they will face breaches of their human rights, when the removal is being challenged before the European Court of Human Rights. People from other countries who are in similar positions, for example Somalis, have also relied upon Rule 39 letters. Even where a person does not have a Rule 39 letter from the European Court of Human Rights, it would still be possible to apply for an injunction from a High Court judge if one had notice of a threatened removal.

The difficulty is that too often one does not have such an opportunity and in such circumstances a Rule 39 letter is likely to look like a better bet than an injunction.

<sup>68</sup> Annual Report 2008, para 106.

<sup>69</sup> Available on the Committee's website.

<sup>70</sup> *Op cit.*

It had been UK Border Agency policy to give a minimum period of notice to people detained that they were facing imminent removal and to tell them the flight details. *The I[mmigration] and N[atinality] D[irectorate] Statement of Policy: Judicial review challenges following notification of removal directions* stated:

**Notice of removal**

1. From 12 March 2007 IND will give at least 72 hours notice of removal, including two full working days. The last 24 hours of the 72 hours will include a working day (to allow proceedings to be filed during this period).
2. When notifying an individual of directions for removal, IND will indicate to the individual:
  - that the case is one to which paragraph 18 of the Practice Direction supplementing Part 54 of the Civil Procedure Rules applies, and
  - the address to which any claim must be copied to IND in accordance with paragraph 18.2(2) of the Practice Direction.
3. IND will aim to provide a short, factual summary of the case with the notice of removal including a brief immigration history and other relevant information (including the name of a responsible officer to contact in the event of an injunction).
4. At the time of being notified of the removal, the individual will be advised by IND to seek legal advice and, if detained, provided with the means to contact a legal adviser or representative.

In March 2007, the predecessor of the UK Border Agency (the Immigration and Nationality Directorate) adopted a new policy on removals and judicial review in which it set out the minimum notice that would be given of a removal. The new policy, however, included that it would not necessarily provide any notification of removal to certain groups. These included some particularly vulnerable people, notably those at risk of self-harm and unaccompanied children facing removal to a third country. ILPA has consistently raised concerns regarding this. On 23 April 2009 ILPA wrote to the UK Border Agency expressing a range of concerns over judicial review of removal, viz:

- Objection to the published exceptions, whereby notice of removal is given to neither the applicant nor their legal representative.
- Objection to the unpublished, secret exception—DSO 07/2008 which came to light in the case of *X v SSHD CO/9617/2008*. The judge held the Detention Service Order to be unpublished and that this rendered the removal unlawful. He held that, even had the Order been published, X fell outwith its scope and its application to his case was therefore unlawful. He held that he held that the failure to give notice had been part of a deliberate attempt to mislead so that X would not have access to his lawyers at Refugee and Migrant Justice. He held that it could not be said that X did not have a claim worth pursuing. X has now been recognised as a refugee.

ILPA has yet to receive a substantive response to these concerns although it continues to press the UK Border Agency for one as a matter of urgency. The UK Border Agency has not changed its policy.

We draw attention to the Order in an application for interim relief in case CO/10522/2009 in which the judge invited the Secretary of State to consider whether removals on this basis (to Afghanistan) pending guidance on the application of Article 15 of the European Qualification Directive<sup>71</sup> to removals to that country until the point, pending before the higher courts, has been decided. ILPA has seen no information from the UK Border Agency that such consideration has taken place despite a significant number of injunctions having been granted on this basis.

ILPA has seen cases where it is has taken 17 months for a person to be returned to the UK following a finding that the removal was unlawful. In other cases, the person is never found, and one can only speculate on the numbers of such people who had no opportunity to challenge their removal and have never even been sought.

We recall the comments made by the Committee in its 2008 Annual Report on the Government's approach to cases involving gender discrimination and widow's benefits. The Committee stated:

*"119. However, we recommend that the Government's approach to clone cases should be more proactive. Government policy on settlement appears to be based upon the existence of an admissible application to Strasbourg. This places the onus on the individual who has been affected by a breach which has already been identified by the ECtHR to come forward and to invest time and money in the preparation of a claim. As legal proceedings develop and costs accumulate, settlement negotiations may become more difficult.*

*120. We consider that in any similar cases in future, the Government should encourage the European Court of Human Rights to identify a batch of cases to treat as lead cases, or as pilot judgments (a development which we consider below). Where a systemic problem or a breach which may lead to a significant number of well founded applications by individuals is identified, the Government is already*

<sup>71</sup> Directive 2004/83/EC.

*obliged to consider what steps are necessary to remove the breach, prevent future breaches and compensate those affected by the breach. This obligation should be approached imaginatively and include consideration of whether more innovative steps can be taken at a domestic level in order to provide a speedy remedy for those affected by the breach, if possible, in a way which avoids unnecessary public expenditure. These steps could include, for example, the creation of a well-publicised Government sponsored compensation scheme, avoiding the need for individual applicants or Government departments to incur significant legal expenses. While, after exhausting these domestic remedies, an individual must be free to take a claim to Strasbourg, these steps could help reach equitable solutions without adding unnecessarily to the list of cases pending against the UK."*

These comments have a particular resonance in the Tamil Rule 39 cases but they are applicable to a much wider range of cases in which the UK Border Agency is involved.

ILPA sees a large number of cases in which the Home Office settle a judicial review while maintaining the position challenged in the case settled in other pending cases. One result of a failure to follow precedent and to manage cases is that those people not able to bring a challenge suffer violations of their human rights that are not remedied at all. Those able to bring a challenge may suffer violations of their human rights that continue for longer than they would have done had the Home Office followed precedent. As the legal aid budget comes under increasing scrutiny, at the risk that criteria for eligibility will be more tightly drawn so that fewer people will benefit,<sup>72</sup> it is important to scrutinise how much money is being spent fighting points in one case that have already been won in another case. It not only the Home Office's expenditure in legal fees but that of the Legal Services Commission and individuals paying in their own cases, that should be cause for concern.

*Case of S & Marper v UK (ECtHR, Application Nos. 30562/04 and 30566/04) and wider questions of data protection*

It is important that the Government make efforts to identify the wider implications of human rights judgments, so that those within their wider ambit do not have to bring separate cases to the European Court of Human Rights. ILPA urges the Committee to press the government on the implications of the *Marper* case for persons whose data is obtained under immigration act powers. In the Borders, Citizenship and Immigration Act 2009, provision is made to extend the fingerprinting powers contained in the Immigration and Asylum Act 1999 to include those made subject to a mandatory ("automatic") deportation order under the UK Borders Act 2007. During the passage of the 2009 Act ILPA raised the question of the implications of the *Marper* judgment for the extensive powers of the Agency to take and retain the data of migrants. The Lord Avebury laid amendment 111 and the question was debated.<sup>73</sup> The Minister, the Lord West of Spithead, indicated that a forensics White Paper would be published later in the year and provided no assurances.<sup>74</sup>

The UK Border Agency's Asylum Process Instruction on Fingerprinting (dated Nov 2006 but marked "re-branded December 2008") states:

*"Dependants of claimants may also be fingerprinted. Children under sixteen years of age may be fingerprinted, but only in the presence of a responsible adult, who cannot be a member of UK Border Agency staff or a person authorised to take fingerprints. The policy on fingerprinting children under five years of age is currently under review. A pilot involving the taking of fingerprints of claimants and dependants aged under five began in February 2006. This pilot is taking place for claims made at the ASUs in Croydon and Liverpool only."*

It is unclear what the present situation is with regards to any such pilot.

In September 2009 the UK Border Agency announced a new pilot project called the "Human Provenance Pilot".<sup>75</sup> It is stated to be the Agency's intention to use isotope analysis and DNA testing on adults claiming to be Somali whom the Agency does not consider vulnerable. No information is provided in the Asylum Process Instruction<sup>76</sup> about storage and retention of this data. There is information about asking for consent, but no information about informed consent and provision is made for a refusal to consent. Standard paragraphs for insertion into a "reasons for refusal" letter in the Instruction rely on a refusal to consent:

*"When you attended the Asylum Screening Unit, you were asked to provide isotope and DNA samples to ascertain your country/area/clan of origin. It is noted that you refused to provide samples. Case Owners should insert reason(s) why the applicant did not provide samples by referring to the Screening Officer's comments on the consent form which should be attached to the HO file (if not, also check CID "Notes").*

*Use where a reasonable explanation has been given*

<sup>72</sup> See *Legal Aid: Refocusing on Priority Cases* Legal Services Commission consultation opened 16 July 2009, closes 8 October 2009.

<sup>73</sup> *Hansard* HL Report 4 March 2009: Col 782ff.

<sup>74</sup> *Op cit*, Col 786.

<sup>75</sup> See the Asylum Process Instruction *Nationality Swapping: Isotope Analysis and DNA testing*, 27 August 2009.

<sup>76</sup> *Op cit*.

It is considered that you gave a reasonable explanation for failing to provide samples.

*Use where no reason has been given or a reasonable explanation has not been given for refusing to provide samples (do not use this standardised wording in isolation—refer to 7.2.2 Addressing Refusal to Provide Samples, within the Refusal Letter)*

You did not give a reasonable explanation for failing to provide samples. It is considered that a person in genuine need of international protection would assist the authorities of a safe country in establishing the validity of his/his/her application for asylum. Your failure to do so undermines your claim to be a refugee.” [emphasis in original]

Wider questions of data protection and confidentiality give rise to concerns about the UK Border Agency’s respect for the rule of law, discussed below. UK Border Agency press releases frequently make reference to “identifiable” individuals. Press releases on illegal working frequently point to a named workplace or one that is identifiable, especially when picked up by the local press, and say the employer may be liable to a civil penalty if shown not to have checked documents. ILPA members have seen cases in which such releases have been issued even in circumstances where UK Border Agency officials have indicated to employers that they will not face a civil penalty because they had conducted checks properly.

#### THE RIGHT TO LIBERTY: UNLAWFUL DETENTION UNDER IMMIGRATION ACT POWERS

There have been several recent High Court cases in which the courts have found instances of unlawful detention under Immigration Act powers.<sup>77</sup>

ILPA wishes to draw the Committee’s particular attention to the decision of the High Court in December 2008 in the case of *R (Abdi & Ors) v SSHD* [2008] EWHC 3166 (Admin). In this case the Court ruled on the legality of Home Office policy on detention of foreign national prisoners after their sentences were over. The policy had been kept secret from detainees, their lawyers and the courts for over two years even though Home Office lawyers repeatedly advised there to be serious questions as to the legality of both keeping the policy secret and the substance of the policy.

The judge began his judgment by describing the Home Office’s conduct as “*unedifying*” and “*disquieting*.” He found that it was unlawful to have kept the policy secret; and that the substance of the policy was unlawful. It was finally published on 9 September 2008, but had been in operation, secretly and in contradiction to published policy, since at least May 2006.

#### RIGHT TO PRIVATE LIFE: *ZO (Somalia)* [2009] EWCA Civ 442

In *ZO (Somalia)* it was held that denying those who had made a “fresh” asylum claim<sup>78</sup> the right to work when the fresh claim remained undecided after 12 months breached rights under the EU Reception directive. Although *ZO* and the other applicants in the particular case have been given permission to work, the Government has indicated that it will not apply the judgment to other people in the same position pending the appeal to the House of Lords.

#### IMPLEMENTATION OF HUMAN RIGHTS JUDGMENTS AND THE BROADER QUESTION OF RESPECT FOR THE RULE OF LAW

The cases above provide an example of ILPA’s concerns at the way in which the UK Border Agency and Home Office react to human right judgments. The Government response to the Committee of Ministers’ recommendation, endorsed by the Joint Committee on Human Rights, on a coordinating role across Government to ensure implementation of human rights obligations is therefore not encouraging.<sup>79</sup>

In April 2009 in a response to a request for agenda items for the UK Border Agency’s Corporate Stakeholder group, ILPA asked that the question of the UK Border Agency’s respect for the rule of law be an agenda item for that group and raised the following questions:

- Does the Agency perceive a difference between statute law and the judgments of the courts in terms of whether they must be followed?
- What is the Agency’s understanding of precedent—eg if the Agency concedes a case/pays damages on the basis that it should not have done what it did to the individual in the particular case does this affect the Agency’s view of whether it can do the same thing to someone else?
- When a court judgment says that the Agency is doing something unlawful, what delay does the Agency consider acceptable in complying with the judgment?

<sup>77</sup> See eg *R (on the application of FR (Iran)) v Secretary of State for the Home Department* [2009] EWHC 2094 (QB). See Also (CO/11526/2008)—Determination Awaited.

<sup>78</sup> See Immigration Rules, HC 395, paragraphs 360 and 360A.

<sup>79</sup> *Government Response to the Joint Committee on Human Rights’ Thirty-first Report 2007–08* Cm 7524, paras 31–32.

- When the Agency loses a court case, for how long does it consider it is reasonable for it to continue doing what it has always done while its lawyers consider the judgment?
- How can the Agency state it is considering a judgment when its Presenting Officers are going into court and putting forward an interpretation (or different interpretations) of that judgment or case owners making a decision (or different decisions) on the basis of that judgment?

The matter was briefly discussed at the meeting and ILPA was told that a representative of ILPA would be invited to the UK Border Agency's Litigation Strategy Board to discuss the matters in more depth. Despite ILPA having pressed subsequently for the invitation, it has yet to materialise. Subsequent presentations, most notably that of the UK Border Agency's Chief Executive at the Immigration Advisory Service Annual Conference on 21 July 2009, have led ILPA to be concerned that the creation of a Guidance, Litigation and Appeals Directorate within the Agency, far from providing a way in which to respond rapidly to judgments, creates a bureaucracy that will delay such responses.

ILPA's questions to the Agency were born of ILPA's concerns that in many instances, the UK Border Agency has:

- failed to give effect to the judgments of the courts in a timely manner or, in some cases, at all;
- failed to ensure consistency of approach—conceding one case on a particular point, only to decide and/or fight another on the same point;
- used secret and unpublished instructions, including unlawful instructions;
- failed to respect principles of fairness and as to the conduct of legal proceedings.

Human rights law cannot in and of itself bear the full weight of what the Committee described in its Annual Report 2008 as "...the rule of law, or the democratic settlement within a State."<sup>80</sup> The Committee's Annual Reports provide an opportunity to scrutinise how respect for the rule of law is underpinning respect for human rights.

Most immigration cases have human rights implications. Risks include violations of, *inter alia*, Articles 2, 3 4, 5 and 8. ILPA sets the comments above in context by raising some of the other cases and matters that have given rise to the concerns enumerated above.

***R (HSMP Forum Ltd) v SSHD [2008] EWHC 664 (Admin) and R (HSMP Forum (UK) Ltd) v SSHD [2009] EWHC (Admin)***

These judgments of April 2008 and March 2009 respectively address matters that the Committee had already held<sup>81</sup> gave rise to breaches of Article 8 ECHR, saying in its August 2007 Report, *Highly Skilled Migrants Programme: changes to the immigration rules*.<sup>82</sup>

*"The changes to the Rules are so clearly incompatible with Article 8, and so contrary to basic notions of fairness, that the case for immediately revisiting the changes to the Rules in Parliament is in our view overwhelming"*

Yet it took litigation (two rounds) and the provision by the courts of a deadline for implementation, before the UK Border Agency would address all matters identified in the Committee's report.

**RIGHT TO LIFE, RIGHT TO BE FREE FROM TORTURE, INHUMAN AND DEGRADING TREATMENT, RN (ZIMBABWE)**

On 19 November 2008, the Asylum and Immigration Tribunal handed down judgment in *RN (Zimbabwe)*<sup>83</sup> holding that those who could not demonstrate loyalty to the regime would face persecution on return to Zimbabwe.

In a letter to ILPA dated 3 January 2009 the then Home Secretary confirmed that asylum cases would be reviewed in the light of the decision of the Asylum and Immigration Tribunal in *RN (Zimbabwe)*. In February and March 2009 the Secretary of State represented that she accepted the decision in *RN*, including before the Court of Appeal where this was the basis for persuading the Court to reject a challenge to previous country guidance in the case of *HS (Zimbabwe) v Secretary of State for the Home Department*, [2009] EWCA Civ 308. Instead a consent order dated 11 March 2009 was issued, stating that the case would be reconsidered in the light of the new country guidance. The Secretary of State took the same position in the many cases pending behind *HS*. Yet, less than two weeks later, on 24 March 2009, the Chief Executive of the UK Border Agency wrote to ILPA and others, enclosing a new Operational Guidance Note on Zimbabwe and indicating that the UK Border Agency would no longer comply with the judgment in *RN*.

<sup>80</sup> Annual Report 2008, Paragraph 58.

<sup>81</sup> <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/173/173.pdf>

<sup>82</sup> Twentieth report of session 2006–7, HL Paper 173, HC 993.

<sup>83</sup> *Op cit*.

It was the Agency's contention that RN related only to post election violence, yet in *RN* itself a special further hearing had been convened on 30 October 2008 prior to judgment being handed down to address precisely this point. Moreover, the position taken by the Agency was that it considered the situation to have effectively reverted to that expressed in the previous country guidance (ie the very matter that had been before the Court of Appeal). The UK Border Agency has not, to the best of ILPA's knowledge, ever provided any evidence to suggest that the situation changed between 11 March 2009 and 24 March 2009.

### *Metock v Ireland, C-127/08 ECJ and the issue of residence documents*

Failures to comply with legal obligations can result in the need to turn to human rights as a backstop. This is the case for EEA nationals and their family members whose Article 8 rights are breached by failure to implement, and delays in implementing, EEA law. It is instructive to consider these cases alongside human rights cases to understand the wider problem of the implementation of judgments and respect for the rule of law.

This judgment of the European Court of Justice was handed down at about the same time as the judgment of the House of Lords in *Baiai*, on 25 July 2008. This dealt with applications by non-EEA national family members for EEA family permits and held that such applications could be made at any issuing post and the immigration status of the family member in that country should not be a bar to applying. Ireland issued a press release promising compliance the following day and produced new statutory instrument on 31 July 2008.<sup>84</sup> The UK Border Agency took no action until December 2008, when it amended instructions on its internal website with no publicity.<sup>85</sup>

Between July and December 2008 affected cases were being decided and were being argued by Presenting Officers before the courts and the Tribunal. There was no published guidance and different Presenting Officers, in different courts, took different approaches. This meant that the UK Border Agency was continuing to act contrary to the law.

Meanwhile ILPA continues to voice its concerns at the huge delays in issuing residence documents to non-EEA national family members, contrary to Article 8(2) of EU Directive 2004/38<sup>86</sup> which has been transposed into UK law through the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003).

Article 8(2) of the Directive provides that for EU nationals exercising free movement rights in the UK, three months after arrival, they are entitled to a registration certificate which "shall be issued *immediately*" (emphasis added). For third country national family members of an EU national Article 10 applies, which states that these persons shall be issued a residence card "no later than six months after the date on which they submit the application." Further the article states "A certificate of application for a residence card shall be issued immediately." Yet delays of 12 to 18 months are common. The reason given to applicants who complain about delays is that staff were transferred to deal with foreign national prisoners. When applicants' representatives complain about delay and begin legal action, the UK Border Agency normally issues the document and pays the costs of the action, and damages. Those who do not have such representatives continue to wait. This delay is illegal and goes towards breaches of Article 8.

### CONCLUSION

We recall the Committee's comments in paragraph 104 of its Annual Report 2008:

104. ...where the Government accepts part of a statutory scheme is incompatible with the Convention, but proposes to appeal against a wider declaration of incompatibility, a choice must be made about the timing of any reform. This choice must clearly strike a balance between the cost,

<sup>84</sup> The European Communities (Free Movement of Persons) (Amendment) Regulations 2008 (Statutory Instrument No 310 of 2008).

<sup>85</sup> ILPA was told on 17 December 2008: "Amendments have been made to European Casework Instructions chapters 1, 2 and 5 as these were, in small part, affected in small sections by the judgment <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/>. Chapter 3 of the ECIs and the relevant Entry Clearance Guidance on the UKVisas website will be updated shortly to reflect these amendments."

<sup>86</sup> Article 8(2) of the Directive provides that for EU nationals exercising free movement rights in the UK, three months after arrival, they are entitled to a registration certificate which "shall be issued *immediately*" (emphasis added). For third country national family members of an EU national Article 10 applies, which states that these persons shall be issued a Residence card "no later than six months after the date on which they submit the application". Further the article states "A certificate of application for a residence card shall be issued immediately." As the Directive consolidates the previously applying EU law, it builds on the rights which its beneficiaries already had acquired under the previous law, see C 127/08 *Metock* para 59. "The same interpretation must be adopted *a fortiori* with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to "strengthen the right of free movement and residence of all Union citizens", so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals." Under the previous Directive (64/221) article 5(1) stated, "A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit." Thus the six month long stop in Article 10(1) Directive 2004/38 must be read as exactly that: a long stop where issues of public policy or security arise, not as a norm.

administrative inconvenience and parliamentary time involved in removing the incompatibility and the detriment suffered by those who are affected by the ongoing application of the incompatible provisions. In our view this balance can only be struck on a case-by-case basis. In some circumstances, a breach could have so significant an effect that no degree of administrative inconvenience might justify the failure to bring forward a remedy without delay. We consider that the following factors will be relevant to the assessment of the weight to be given to the need for a speedy remedy:

- the right being infringed, the nature of the breach identified and the impact on individuals affected;
- whether the individuals affected or likely to be affected are vulnerable;
- whether the provision affects a significant number of people;
- whether delay will undermine the value of a remedy for a significant number of people;
- whether an interim administrative response is in place which removes or reduces the impact of the breach identified by the Court;
- the likely time until the final appeal is heard in the case.

ILPA is concerned that the reference to striking a balance between cost and administrative convenience and the detriment suffered by those whose human rights have been breached may give comfort where none is intended. The cases above are examples of breaches of human rights where the Government has determined that there is not only “no rush” but no need to do anything until forced to act as a result of subsequent litigation. ILPA considers that in all cases a remedy should be brought forward “*without delay*” and that delay, rather than the time taken to implement the judgment, is what has been experienced in the cases described.

ILPA considers that it is fundamental to respect for the rule of law that the Government act as rapidly to give effect to the judgment of the courts as to give effect to the legislation that it has brought into force. It is open to the Government of the day to appeal a case in which it loses. It is open to the Government of the day to go to Parliament to seek to change the law to reverse a decision of the courts that it does not like. All too often a point of principle is decided against the Agency but each affected individual must litigate to obtain the application of that principle to his or her case. Many cannot and many, as a result, suffer or continue to suffer violations of their human rights. Where the Agency acknowledges that changes must be made it is unreasonably slow to make such changes and individuals suffer violations of their human rights in the interim. The result is lack of respect for the rule of law and irremediable, or ongoing, breaches of human rights.

*Alasdair Mackenzie*  
Acting Chair

30 September 2009

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### **Memorandum submitted by Liberty, dated September 2009**

#### INTRODUCTION

1. On 30 July 2009, the Joint Committee on Human Rights (JCHR) called for evidence on: (i) the implementation of judgments in the European Court of Human Rights (ECtHR) finding the UK to be in breach of the European Convention on Human Rights (the “ECHR”); and (ii) the adequacy of the Government’s response to declarations of incompatibility made under the Human Rights Act 1998 (HRA). In this response we draw out some general observations about the Executive’s and Parliament’s responses to such decisions.

2. We welcome the JCHR’s role in considering the UK’s response to ECtHR judgments and declarations of incompatibility. Rather than giving the courts the final say, the HRA retains an important role for the Executive and Parliament in determining how rights are protected. The JCHR helps to ensure that this role is properly performed by, for example (i) bringing adverse decisions of the Strasbourg and UK’s courts to Parliament’s attention; (ii) pressuring the Executive to respond to such judgments in an appropriate and timely manner; and (iii) scrutinising proposed new laws to limit the risk of future adverse decisions.

#### IMPLEMENTATION OF ECtHR JUDGMENTS

3. All the Strasbourg decisions identified in the JCHR’s call for evidence raise important human rights issues. We are pleased that the JCHR has written to the relevant Government departments about these decisions, seeking information about their proposed courses of action, and that it is now seeking evidence



from interested parties. In this response we do not comment on every decision mentioned, but focus instead on those decisions in which Liberty has been involved, by way of interventions or lobbying Parliament, and those we regard as raising broader issues requiring government action.

#### S AND MARPER V UNITED KINGDOM<sup>87</sup>

4. S and Marper related to the UK's policy of indefinite retention of DNA profiles and samples of all persons arrested for a recordable offence. S was 11 years old when he was arrested and charged with armed robbery. Despite being acquitted after trial, his fingerprints and DNA were retained by the police. Mr Marper was arrested in 2001 and charged with harassment of his partner. Charges against him were discontinued, and yet the police retained his DNA and fingerprints. All samples were retained on a national database pursuant to section 64(1A) of the Police and Criminal Evidence Act 1984. S and Marper submitted that the retention of the samples interfered with their right to a private life pursuant to Article 8 of the ECHR.

5. The ECtHR found a violation of Article 8, holding that the protection of personal data was of fundamental importance to a person's right to respect for private life. Especially in the case of minors, the retention of an unconvicted person's data was held to be harmful, given the importance of that person's future development and integration in society. In particular, the ECtHR, held that the "blanket and indiscriminate nature" of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences failed to strike a fair balance between competing public and private interests. The State had overstepped any acceptable margin of appreciation and the retention of such information constituted a disproportionate interference with the applicants' right to respect to private life.

6. The Government's response to the S and Marper decision has been to introduce provisions in the Policing and Crime Bill<sup>88</sup> enabling it to make secondary legislation setting out details about the retention, use and destruction of fingerprints and DNA. It has also rushed through a Home Office consultation on the matter.<sup>89</sup>

7. Liberty regards this response as inadequate and disappointing. At the very least, an issue as important as the retention of intimate DNA profiles on a centralised database, must be properly debated and considered by Parliament and not left to secondary legislation. Liberty is currently lobbying for changes to the Policing and Crime Bill<sup>90</sup> to try and ensure that the substantive requirements regarding retention, use and destruction of DNA samples and profiles are set out in primary legislation.<sup>91</sup>

8. Liberty's concerns about the growth of the National DNA Database are well documented and available in our response to the recent consultation.<sup>92</sup> Our concerns about the Government's current proposals can be summarised as follows:

- Most problematically, the Government's proposal to remove the profiles of those who have not been convicted of any offence, either because they have been acquitted or no charges were laid or were later dropped, is limited to six and twelve years according to the offence for which they were arrested. These figures are based on flimsy research, compare unfavorably with the position in other European countries and fail to have due regard for the presumption of innocence.
- The approach taken towards children fails to fully appreciate the harmful effect on minors of being on the National DNA Database.
- Further, the Government has given no consideration to deleting the DNA profiles of adults, and many children, convicted of minor offences.
- The consultation paper makes no mention of the disproportionate over-representation of people from BME backgrounds on the DNA database, and the proposals do nothing to address this imbalance.

9. Liberty believes that DNA evidence can be a highly effective crime detection and prosecution tool. We take no issue with the collection of DNA from suspects for the purposes of a criminal investigation. Our concerns relate to the regime of permanent retention of DNA of people arrested for any recordable offence, even if no charge or conviction follows. Public protection is incredibly important, but so is respect for a person's private life. The significant value of DNA retention as an intelligence and evidence tool must be balanced against the incredibly intimate nature of material that reveals much more than the identity of the

<sup>87</sup> Application Nos 30562/04 and 30566/04, 4 December 2008.

<sup>88</sup> Clauses 96–98.

<sup>89</sup> Keeping the Right People on the Database: Science and Public Protection, May 2009. See Liberty's response to the consultation, August 2009, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-dna-database-consultation.pdf>

<sup>90</sup> Due to be brought back to Committee Stage in the House of Lords on 13th October 2009.

<sup>91</sup> Liberty's most recent briefing on the Policing & Crime Bill is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-committee-stage-lords.pdf>

<sup>92</sup> See above note 3.

person profiled. We hope that the Government will recognise the importance of the right to a private life and ensure the National DNA Database is set on a statutory footing in primary legislation and retains only that data that is necessary and proportionate.

AL-SAADON & MUFDHI v UNITED KINGDOM<sup>93</sup>

10. Liberty has intervened in the case of *Al-Saadoon & Mufdhi v UK* which is currently before the ECtHR. The ECtHR's interim judgment issued on 30 June 2009 was the first decision of the ECtHR on the application of the ECHR to UK forces in Iraq. The applicants were Iraqi nationals and officials of the Ba'ath Party, accused of murdering two members of the UK armed forces. They were held by UK forces in Basra until 31 December 2008 when they were transferred to the custody of the Iraqi High Tribunal ("the IHT"), which intended they would be held in Rusafa Prison prior to their trial. They complained about the transfer, relying on Articles 2 (right to life), 3 (prohibition against torture) and 6 (right to a fair trial) and Article 1 of Protocol No 13 (abolition of death penalty). They also complained about the fact that they were transferred to the Iraqi authorities despite the Court's indication under Rule 39 of its Rules of Court, in breach of Articles 13 (right to an effective remedy) and 34 (right of individual petition).

11. The applicants brought judicial review proceedings in the UK challenging, among other things, the legality of their transfer to the IHT. This was unsuccessful, as was their appeal to the Court of Appeal which was dismissed on 30 December 2008. The Court accepted that there was a real risk that the applicants would be executed but, as they were being held within another sovereign State, they did not fall within the UK's jurisdiction and the UK therefore had no discretionary power of its own to hold, release or return the applicants. It held that the UK was in essence detaining the applicants only at the request and order of the IHT and was obliged to return them to the IHT in accordance with UK-Iraq arrangements. Even if the applicants did fall within the UK's jurisdiction, the Court held that the death penalty was not contrary to international law and there was no evidence that a crime against humanity would be committed or the applicants tortured if they were transferred. In those circumstances the Court held that the UK's obligation to respect Iraqi sovereignty and transfer the applicants had to take precedence.

12. Immediately after that decision, the applicants applied to the ECtHR for an interim measure to prevent the British authorities making the transfer. The ECtHR indicated to the UK Government that the applicants should not be removed or transferred from their custody until further notice. The following day the UK Government informed the ECtHR that, principally because the UN Mandate, which authorised the role of British forces in arrest, detention and imprisonment tasks in Iraq, was due to expire at midnight on 31 December 2008, they could not comply with the interim measure and had transferred the applicants to Iraqi custody earlier that day. On 16 February 2009 the applicants were refused leave to appeal by the House of Lords. The applicants' trial before the IHT commenced on 11 May 2009. The charges against them have now been dismissed for lack of evidence. The Iraqi Government has appealed and may seek a retrial.

13. In its interim judgment, the ECtHR held that the United Kingdom had jurisdiction over the applicants, since the UK authorities had total and exclusive control, first through the exercise of military force and then by law, over the detention facilities in which the applicants were held. The ECtHR further held that the applicants' complaints that, at the moment they were transferred, there were substantial grounds for believing that they were at real risk of being subjected to an unfair trial before the IHT followed by execution, raised serious questions of fact and law which were of such complexity that they had to be determined on an examination of the merits. Those complaints under Articles 2, 3 and 6 and Article 1 of Protocol No. 13 were therefore declared admissible. The issue of the admissibility of the complaints under Articles 13 and 34, closely connected to those complaints, were joined to the merits of the case. The complaints under Article 2 and 3 concerning the conditions of detention and the risk of ill treatment in Rusafa Prison were held inadmissible, as the applicants had not exhausted all available domestic remedies before the British courts.

14. On the issue of jurisdiction, Liberty believes that the ECHR applies extra-territorially where a Convention state exercises effective authority and control, whether factual or legal, over a person. The ECtHR's judgment on this issue is significant, since it places more emphasis on *de facto* control than is to be found in the previous case law. It is indicative of a wider application of extra-territorial jurisdiction than that applied by, for example, the House of Lords in *Al-Skeini*.<sup>94</sup>

15. In respect of international obligations, Liberty believes that international treaties do not displace the UK's obligations under the ECHR. However, if a state is acting pursuant to another international treaty which provides for equivalent, if not identical, protections to those within the ECHR, the state is presumed to comply with the ECHR. If there is any conflict which cannot be resolved by interpretation of the conflicting instruments, then a state must incur international responsibility for breaching one of the obligations. Further, in the context of *Al-Saadoon*, Convention states are obliged to ensure by diplomatic means that any agreements relating to the transfer of detainees to non-Convention states provide for equivalent protections to those under the ECHR.

<sup>93</sup> ECtHR, Application No: 61498/08, 30 June 2009.

<sup>94</sup> *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26.

16. Liberty has grave concerns about the Government's failure to comply with the ECtHR's interim measure, notwithstanding its stated reasons for doing so. Interim measures are binding on contracting states and failure to comply with them dangerously undermines the whole system of protection of Convention rights.

#### LIBERTY V UNITED KINGDOM<sup>95</sup>

17. This case concerned communications interception by the Ministry of Defence (MoD) of Liberty's telephone, fax and email communications between 1990 and 1997. Liberty made complaints to the Interception of Communications Tribunal, the DPP and the Investigatory Powers Tribunal about what we alleged were unlawful interceptions of our communications. The complaints were dismissed on the basis that there had been no contravention of the Interception of Communications Act 1985 (IOCA). Liberty brought the case before the ECtHR complaining of a breach of Article 8 (right to respect for private life).

18. The ECtHR found there had been a violation of Article 8, holding that the IOCA at the time had not indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications. In particular, it had not set out in a form accessible to the public any indication of the procedure to be followed for examining, sharing, storing and destroying intercepted material.

19. The IOCA has since been replaced by the Regulation of Investigatory Powers Act 2000 (RIPA). RIPA, enacted soon after the HRA, was intended to introduce a more human-rights friendly framework for targeted surveillance. Although it was a step forward, the Act attempted to remain faithful to those that had passed before it<sup>96</sup> and the result is a byzantine piece of legislation that is as confusing as it is insidious. Earlier this year, prompted by some negative media coverage of local authorities' use of RIPA powers the Government published a narrowly framed consultation on the Act. Liberty responded to this consultation<sup>97</sup> urging the Government to consider a much more comprehensive review. In summary our key concerns include; the lack of judicial oversight (particularly for the more intrusive forms of surveillance); the circumstances in which RIPA powers can be granted (which are broad and ill-defined); and the number of bodies that have access to targeted surveillance powers (over 800 public bodies).

#### A AND OTHERS V UNITED KINGDOM<sup>98</sup>

20. A and others was the culmination at Strasbourg of litigation concerning foreign nationals detained pursuant to anti-terrorism legislation. The applicants were foreign nationals living in the UK whom the government suspected of being international terrorists following 9/11. The Government issued a derogation order on the basis of a public emergency threatening the life of the nation pursuant to Article 15(1) and detained the applicants without trial pursuant to the Anti-Terrorism, Crime and Security Act 2001. They complained of breaches of Articles 3, 5(1), 5(4), 13 and 14. The applicants appealed to the Special Immigration Appeals Commission (SIAC) which examined both open and closed material disclosing a case against them. Following a House of Lords decision in which quashed the derogation order and declared the relevant provision of the 2001 Act to be incompatible with Articles 5(1) and 14, the applicants remained in detention until they elected either to leave the UK or were released and made subject to control orders pursuant to the Prevention of Terrorism Act 2005. The ECtHR held that although there was no breach of Article 3, there had been a breach of Article 5(4). The Court held that the procedural requirements of Article 5(4) were not satisfied as, before SIAC, the open material consisted purely of general assertions yet SIAC's decision was based solely or to a decisive degree on closed material.

21. The indefinite detention of foreign nationals without charge or trial was the sinister high-water mark of the legal innovations adopted by this Government in the wake of the tragic events of 9/11. The House of Lords rejection of this approach, now confirmed by Strasbourg, was a critical moment for rights and freedoms in the UK. Also critical is the subsequent and recent decision in *Secretary of State for the Home Department v AF and others*,<sup>99</sup> which concerned the Government's control order policy—the direct legislative response to the Law Lords earlier declaration of incompatibility in the *Belmarsh* litigation. In *AF* the House of Lords found a breach of Article 6 in the case of the three control orders before it, on the basis of the ECtHR judgment in *A and others*. The House of Lords regarded the judgment in *A and others* to have provided a “definitive” resolution to the issue of closed material and Article 6 in control order cases. Their Lordships determined that unless an irreducible minimum of information was provided to “controlees” their control orders could not stand.

22. We believe that this development is significant in that it marks the beginning of the end for the unfair and unsafe control order regime. Control orders were always meant to be a temporary measure. We have however watched with dismay as successive Home Secretaries seem to increasingly lose sight of their

<sup>95</sup> Application No 0058243/00; 1 July 2008.

<sup>96</sup> See for example Mr Straw's comments in introducing the Bill; We start from the regime established by the Interception of Communications Act 1985, and we have been faithful to many of its key tenets. Hansard HC Debs. Vol 345, col 769, 6 March 2000.

<sup>97</sup> Liberty's response is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-the-ripa-consultation.pdf>

<sup>98</sup> Application No 00003455/05; 19 February 2009.

<sup>99</sup> [2009] UKHL 28.

intended interim nature. Unfortunately, as with much “emergency” legislation the longer the measures remain on the statute book the more likely it is that they become part of our permanent legal landscape. What is more, since the creation of control orders in 2005 there have been significant innovations in criminal law and practice (including threshold charging, obligations to hand over encryption keys, etc) which render unsustainable the Government’s claim that control orders remain necessary. We have urged the Government to begin work on dismantling what is now an increasingly unworkable system<sup>100</sup> and to allow the case files for all those currently on control orders to be re-examined by prosecutors to determine whether or not individuals can be dealt with within the rule of law.

#### HIRST V UNITED KINGDOM (No 2)<sup>101</sup>

23. The case of Hirst related to the blanket ban on convicted prisoners voting in elections. The applicant argued that the ban breached his right to free elections under Article 3 of Protocol No. 1 of the ECHR, both on its own terms and in conjunction with Articles 10 (freedom of expression) and 14 (prohibition on discrimination). The ECtHR found a violation of Article 3 of Protocol No 1, holding that although the ban had the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners, enhancing civic responsibility and respect for the rule of law, it was not a proportionate measure to achieve that aim.

24. In reaching its decision, the Court had regard to the fact that the ban (i) applied to a significant number of individuals and encompassed a wider range of offenders and sentences; and (ii) applied to all convicts with custodial sentences, regardless of the nature or gravity of the crime that had been committed. The ban was therefore general, automatic and indiscriminate, and fell outside the UK’s margin of appreciation.

25. Liberty responded to the Government’s December 2006 consultation on prisoners’ voting rights<sup>102</sup> and again<sup>103</sup> to the second consultation<sup>104</sup> launched earlier this year and only recently closed. We have expressed our disappointment with the Government’s response to the ECtHR’s judgment. It has now been more than four years since the ECtHR ruled that UK law was unlawful yet no changes have yet been made. The first consultation paper rejected outright before receiving any responses the enfranchisement of all prisoners. It only proposed more minor reforms, saying explicitly that full enfranchisement was not an option. This position has been maintained in the second stage consultation which merely proposes allowing prisoners sentenced to between one and four years to continue to hold the right to vote. Liberty believes that all prisoners should retain the right to vote and the Government’s failure to implement the ECtHR’s decision reflects a lack of political will manifested in a series of delaying tactics, including a flawed and protracted consultation exercise.<sup>105</sup> We are particularly concerned that prisoners will remain disenfranchised by the time of the next (imminent) General Election.

#### DECLARATIONS OF INCOMPATIBILITY

26. Section 4 of the HRA empowers a court to make a declaration of incompatibility where it believes legislation is incompatible with the rights contained in the HRA. A declaration of incompatibility has no legal effect and does not bind Parliament, contrary to popular belief. This is a peculiar feature of human rights protection in the UK, an innovative compromise between human rights protection by the courts and the maintenance of parliamentary sovereignty. It recognises that it is not only the courts, but also the other two limbs of state that have a responsibility for protecting human rights. If the scheme for human rights protection envisaged by the HRA is to be effective, Parliament and the executive must also respect and protect our rights and freedoms. Section 4 declarations are very important in this regard. They represent a clear indication that the existing law is incompatible with ECHR rights and a clear signal that Parliament must take steps to remove that incompatibility. Below we consider the declaration of incompatibility in *R (Wright) v Secretary of State for Health*<sup>106</sup> and the wider issues raised by the judgment in this case.

#### R (WRIGHT) V SECRETARY OF STATE FOR HEALTH<sup>107</sup>

27. *R (Wright)* involved registered nurses who were placed on a list that prevented them from working with vulnerable adults, without being given the opportunity to first make representations before a decision was taken to include them on the list. The effect of being on the list was to deprive a care worker of employment as a care worker and further to prevent him or her from undertaking any other such employment. The procedure involved an initial reference, a provisional listing and a determination as to

<sup>100</sup> Six control orders were revoked between 11 June and 24 September 2009 <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/6226749/Terrorist-suspect-released-from-control-order.html>

<sup>101</sup> Application No 74025/01, 6 October 2005.

<sup>102</sup> Voting Rights of Convicted Prisoners Detained within the United Kingdom; CP 29/06, December 2006. Liberty’s response can be found at: <http://www.liberty-human-rights.org.uk/pdfs/policy07/prisoners-voting-rights.pdf>

<sup>103</sup> Liberty’s consultation response is available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-the-prisoner-voting-consultation-2.pdf>

<sup>104</sup> Voting Rights of Convicted Prisoners Detained within the United Kingdom, April 2009, Consultation Paper CP06/09

<sup>105</sup> We note that the Government’s stated reason for responding to the decision in *S and Marper* by way of secondary rather than primary legislation is because it needs to respond quickly to Strasbourg judgments. Its slow response to the judgment in *Hirst* completely undermines this argument.

<sup>106</sup> [2009] UKHL 3, 21 January 2009.

<sup>107</sup> *Ibid.*

whether the worker should be confirmed on the list. In the four cases in the appeal, it took between four and six months from the referral to the provisional listing and eight or nine months from the provisional listing to the determination. The appellant argued that Articles 6 (fair trial) and 8 (privacy) were engaged and breached by the lack of a right to an oral hearing before the provisional listing and the low threshold applied to the listing.

28. The House of Lords held that section 82(4)(b) of the Care Standards Act 2000 was incompatible with Articles 6 and 8. The provisional listing amounted to the determination of a civil right within the meaning of Article 6, even though the listed person had the opportunity eventually to bring the case before the Care Standards Tribunal. Since the listed person was deprived of employment, the case represented an exception to the general rule that Article 6 did not apply to provisional measures. The relevant scheme was held to breach Article 6(1) as it was unfair not to allow a care worker the opportunity to answer allegations made against them before imposing possibly irreparable damage to their employment or employment prospects.

29. Liberty welcomes this judgment. We have, for several years, expressed concern at a host of provisions around employment vetting which give insufficient regard to procedural fairness. We accept that vetting is critical for certain sensitive employments. We believe however that this should not be at the expense of fairness to the individual. In particular Liberty has had longstanding concerns about the statutory provisions relating to enhanced criminal record certificates (ECRCs).<sup>108</sup> As hitherto interpreted, the scope and effect of these provisions is extraordinary. In specified circumstances they allow the police to disclose to prospective employers—via the Criminal Records Bureau (“CRB”)—information about prospective employees. There is presently no limit on the type of information that may be disclosed. The information may include allegations of criminal conduct, and where this is so, it does not matter whether the allegations have been tested at trial or have led to a conviction. It does not matter, moreover, whether the information disclosed can be shown to be true, or is believed by the police to be true. The question is whether in the opinion of the police the information might be true, and might be relevant for the employer’s purposes in assessing the employee’s suitability. If information satisfies these minimal conditions then police are not merely permitted to disclose it; save (possibly) in rare circumstances, they are required to do so. There is no right for the employee to make representations before disclosure takes place. Nor is there any right of appeal against the decision to disclose.

30. We believe that the current framework for ECRCs disproportionately interferes with Article 8 of the HRA (right to private life).<sup>109</sup> As with many rights protected under the HRA, Article 8 can be limited where it is shown to be in accordance with law, necessary and proportionate; in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and freedoms of others. Although Article 8 contains no explicit procedural requirements it is well established that there are implicit procedural safeguards.<sup>110</sup> While we accept that vetting in sensitive employments is necessary we do not believe that the current framework for vetting gives necessary regard to the implicit procedural standards required by Article 8.

31. The Independent Safeguarding Authority (ISA)<sup>111</sup> will soon establish another system of vetting. The ISA’s creation was recommended by Sir Michael Bichard in his Inquiry into the murders of Jessica Chapman and Holly Wells by Soham school caretaker Ian Huntley. The ISA is due to come into operation in October 2009, and from July 2010 all people who work with or volunteer with children and vulnerable adults will need to be registered with the ISA.<sup>112</sup> While employers are always likely to err on the side of caution (potentially refusing employment to anyone against whom there is any sort of unsubstantiated allegation) a third party body such as the ISA is able to make a more objective assessment of suitability and allows a person to make representations to the ISA about such allegations before a decision on barring is made. However, bizarrely, despite setting up the ISA, the Government intends to continue to allow employers to obtain ECRCs directly from the Criminal Record Bureau (CRB). Liberty can see no sense in this duplication. The Bichard Report clearly envisaged the current system of sending ECRCs to employers continuing until the ISA came into operation. We agreed that this was the logical short term approach. However, the presumption from Bichard was that once the ISA began work ECRCs need no longer be sent to employers. Certainly the language used indicated that the new system would replace the passing of ECRCs to employers. In the introduction to the Report, Bichard stated that this new system would also avoid information about past convictions being released to prospective employers without reference first to the individual concerned. Later, when setting out plans for the ISA model Bichard identified the problem of unfairness stating:

At present Enhanced Disclosure results are normally provided at the same time to the individual applicant and to the employer or voluntary body (Police Act 1997). Any objections by the job applicant to the provision of certain information could not, therefore, undo any damage done to his/her prospects with that particular employer. This raises important issues about the fair treatment of individuals. There is a risk that careers may be blighted and job prospects lost.<sup>113</sup>

<sup>108</sup> The relevant provisions are in Part V of the Police Act 1997.

<sup>109</sup> Liberty has recently intervened in *L v Commissioner of Police for the Metropolis* in the House of Lords on the issue of ECRCs and Article 8 of the HRA. Judgment has been reserved.

<sup>110</sup> *Tysiac v Poland* (2007) 45 EHRR 42.

<sup>111</sup> The ISA was established under the Safeguarding Vulnerable Groups Act 2006.

<sup>112</sup> The ISA will eventually replace the impugned Care Standards Act system of vetting.

<sup>113</sup> See paragraphs 4.107 and 4.109 of The Bichard Inquiry Report.

32. We believe that an effective vetting system should ensure that those not suitable to work with children or the vulnerable are barred, while ensuring that potential employers remain unaware of unfair, malicious or spurious allegations. It is undeniable that details of allegations (as well as convictions) might be relevant in determining suitability to work with children and the vulnerable. However, it is also an unfortunate truth that many careers have been blighted by unfounded accusations of impropriety. In light of the decision in *R(Wright)* and the recent creation of the ISA Liberty is calling for an end to the unfair ECRC scheme. We have suggested amendments to the *Policing and Crime Bill*<sup>114</sup> to remove the overlap between the operation of the ISA and Enhanced Disclosure.<sup>115</sup>

#### CONCLUSION

33. We welcome the fact that the Government has not, at least to date, simply disregarded any declarations of incompatibility. Disregard for a declaration of incompatibility would have serious consequences for our domestic human rights framework. It would demonstrate not only an unacceptable disregard for rights and freedoms but a similar disregard for the British courts and for the scheme of rights protection that Parliament envisaged in the HRA. In many cases the nature of the response by the elected limbs of the state has been constructive and appropriate, removing the incompatibility.<sup>116</sup> The nature of the response to declarations of incompatibility has not, however, been universally effective with the creation and implementation of the control order regime being the most notorious example. Having been told that the indefinite detention of foreign nationals was discriminatory the Government chose instead to apply control orders to all nationals as well as non nationals. The replacement regime was notable for its “levelling down” approach to rights protection. In responding to both domestic declarations of incompatibility and findings against the UK at Strasbourg we urge the Government to reassess policy in the round and not opt for the minimum believed necessary for compliance. The later approach inevitably leads to further litigation and embarrassment for the executive while leaving dangerous gaps in the level of rights protection in the UK.

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#### **Letter to the Chair of the Committee from Andrew Alexander, Head, Police Powers Team, Policing Powers and Protection Unit, Home Office, dated 3 December 2009**

##### DNA RETENTION—THE GOVERNMENT’S RESPONSE TO THE ECHR CASE OF S AND MARPER

In his letter dated 11 November to Andrew Dismore MP, the Home Secretary made a commitment to provide to the Joint Committee on Human Rights copies of the information submitted to the Council of Europe’s Committee of Ministers.

Please find enclosed the latest update to the Committee of Ministers for their meeting last week in respect of our proposals to implement the ECHR judgment, as well as the Government’s response to the issues raised by the Equalities and Human Rights Commission and the Northern Ireland Human Rights Commission.

If you have any questions on this, please do not hesitate to contact me.

#### **Annex 1**

#### **Submission by the Northern Ireland Human Rights Commission to the Committee of Ministers in relation to proposed UK general measures in response to S and Marper judgment**

##### ISSUES

The Northern Ireland Human Rights Commission was not convinced that the Government’s original proposals issued in May 2009 were necessary in a democratic society, proportionate or compatible with the Judgment and were concerned about the then proposed use of secondary rather than primary legislation which in effect precluded Parliamentary debate. On the current proposals:

- They would welcome clarity around the proposal to introduce the new proposals through primary legislation.
- Further detail is required in relation to the proposed national security category.
- They remain doubtful that the current proposals are compatible with the Judgment or with standards to which the UK is party.

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<sup>114</sup> Due to be brought back to Committee Stage in the House of Lords on 13 October 2009.

<sup>115</sup> Liberty’s proposed amendments are included in our Committee Stage briefing on the Policing and Crime Bill in the House of Lords available at: <http://www.liberty-human-rights.org.uk/pdfs/policy-09/policing-and-crime-committee-stage-lords.pdf>

<sup>116</sup> For example the Gender Recognition Act 2004 which remedied the declaration of incompatibility in *Bellinger v Bellinger* [2003] 2 A C 467.

## RESPONSE

The Government refers to its response to the submission of the Equalities and Human Rights which covers the points raised by the Northern Ireland Human Rights Commission.

## Annex 2

**Submission to the 1072nd Committee of Ministers meeting by the Equalities and Human Rights Commission regarding the execution of S and Marper v the United Kingdom—30562/04**

## ISSUE

The Equalities and Human Rights Commission (“the Commission”) is concerned that the UK Government’s proposals are insufficient to comply with the judgment and are incompatible with the European Convention on Human Rights, although they acknowledge that some of their original concerns have been addressed. Their particular points are :

- The proposal to treat adults arrested but not convicted the same regardless of the seriousness of offence (by retaining the data for six years) is too indiscriminate and lacks the required level of proportionality.
- While shorter retention periods for children and greater differentiation from adults are steps in the right direction, the lack of differentiation between offence types for under 16’s is not proportionate and the treatment of 16 and 17 year olds in the same way as adults is questionable in the light of the Court’s comments on minors.
- Concerns about the continued focus on risk of rearrest in the evidence base in the light of the principle of the presumption of innocence.
- Concerns about the treatment of profiles and samples taken prior to the judgment.
- They question the retention of profiles for as long as fingerprints given the different levels of interference involved.
- Concerns about the proportionality of the proposals in relation to national security given the wide ambit of the offences and the possible disproportionate impact affecting Muslim communities.

## RESPONSE

*Adults arrested but not convicted*

As indicated in its progress report to the Committee of Ministers, the Government is conscious that the European Court of Human Rights (the Court) suggested that the seriousness of the alleged offence should be a factor in determining what length of retention was proportionate. However, the best available evidence indicates that the type of offence a person is first arrested for is not a good indicator of the seriousness of offence he might subsequently be arrested for or convicted of in future. Given that the purpose of retaining data is the facilitation of detection of future crimes, and the justification for a retention period of a particular length is therefore dependent on the period for which it is likely to yield a match against a future crime scene, this has led the Government to propose a six-year retention period for the profiles of unconvicted adults, irrespective of the seriousness of the crime for which they were arrested.

In response to the Commission’s contention that the Government’s proposals fail to address the Committee’s decision of September 2009 that “six years for non-serious offences lacks the required level of proportionality”, the Government notes that the evidence on which its present proposals are based, and the publication of the summary of responses to consultation, has become publicly available since that decision was made. The Government should not be constrained from legislating in accordance with the best available evidence because of a view that was taken before that evidence was available.

Similarly, the Commission cites paragraph 123 of the judgment as requiring the Government to put forward weighty reasons to justify a difference in treatment between the data of persons whose DNA profiles and fingerprints are to be kept for six years and other unconvicted persons. As indicated in its progress report to the Committee of Ministers, the Government considers that its justification for such treatment is based on evidence that shows that people who have been arrested but not convicted have, for a period of six years, a higher propensity to be arrested in the future than the general population.

*Children/juveniles arrested but not convicted*

The Government acknowledges the validity of the particular concerns of the Court in respect of minors. It has set out the reasoning underlying its proposals in respect of juveniles in its progress report. The Government believes that this package represents a proportionate response taking account of the greater risk of offending of juveniles (which would imply a longer period than for adults) balanced by the need to give special consideration to the treatment of minors in the criminal justice system.

*Evidence relied upon to support the existence of the retention periods*

In the research undertaken to support its decision, the Government used the risk of re-arrest, rather than the risk of subsequent conviction, as its measure of offending in the period following an initial arrest where no further action was taken against the arrestee. The Government assessed the rate at which the risk of re-arrest declined to the arrest rate in the general population, and chose as its retention period the point at which those two rates were broadly equalised. Three years worth of arrest data only were available for use from the Police National Computer, because PNC entries for earlier years had been weeded. The use of arrest-to-conviction data would therefore have resulted in a biased dataset for analysis, because convictions for more serious crimes typically take longer to secure, and many convictions would not have been secured by the three-year point. The lack of data beyond three years from initial arrest also means that it was necessary to extrapolate the data forwards in time to judge the point at which the risk of re-arrest declined to the arrest rate in the general population.

In response to the Commission's assertion that reliance on the risk of re-arrest contrasts strongly with the Court's concerns in paragraph 122 about stigmatisation and the voicing of suspicions after a person's acquittal, the Government notes that in that same paragraph the Court acknowledged that "the retention of (unconvicted people's) data cannot be equated with the voicing of suspicions". The Government also notes that the Court's principal concern in paragraph 122 was the fact that "persons in the position of the applicants, who have not been convicted of any offence . . . are treated in the same way as convicted persons." Under the Government's proposals, convicted and non-convicted persons will no longer be treated in the same way.

*Samples and profiles taken prior to the judgment*

In respect of "legacy" profiles (ie those taken before the judgment), the Government is proposing through clause 19 of the Crime and Security Bill to require the Secretary of State to make an order providing for the destruction of material taken prior to the coming into force of relevant provisions of this Bill, if such material would have been destroyed under those provisions had they been in force when the material was taken. Effectively, therefore, it provides for the retention periods for different categories of data that are set out in the Bill to be applied to material that has already been taken. The Government considers that it is appropriate for the timing of the destruction of such material to be set out in secondary legislation because a large amount of material is currently retained and sufficient time needs to be allowed for the exercise of identifying and where appropriate destroying this material. The order-making power will allow the Secretary of State to set a realistic deadline for that destruction date, without delaying the implementation of the new retention and destruction regime in relation to material taken after the coming into force of these provisions.

*Retention of fingerprints*

The Government's proposals have a common approach in terms of retention periods for DNA profiles and fingerprints. The Government has carefully considered the Court's identification of varying levels of interference and the need to ensure that its proposals represent a proportionate balance between the rights of the individual and the wider interests of public protection. It could have proposed a longer period for fingerprints, but on balance considers that the advantages in terms of public protection of such an approach are outweighed by considerations of simplicity and accessibility.

*Retention of DNA and fingerprints on national security grounds*

The Government is also proposing a similar retention regime in relation to material held under section 18 of the Counter-Terrorism Act 2008 (when brought into force), which includes material held on the "CT database" and material held under Schedule 8 to the Terrorism Act 2000, taken from persons arrested as terrorist suspects or persons stopped under the ports and borders powers in that Act.

Where in any case material held under the Police and Criminal Evidence Act 1984, the CT Act or the Terrorism Act 2000 would fall to be destroyed under the new regime, if the chief officer of police determines that it is necessary to retain the material beyond that time limit for purposes of national security, that material may be retained for a further two years. This two year period is renewable. The Government considers that it is proportionate to propose this extension of retention for biometric data where it is necessary in the interests of national security taking into account the facts that national security cases such as terrorism investigations as well as counter-espionage can last considerable periods of time, that issues relating to national security and terrorism frequently have a special status in legislation, and that the harm caused by terrorist activity can be particularly devastating. On concerns about possible disproportionate impact on Muslim communities, national security and counter-terrorism legislation does not target any specific communities. These measures are aimed at any individuals, whatever their background, who pose a national security threat.



**\*30562/04 + S and Marper, judgment of 04/12/2008—Grand Chamber**

## PROGRESS REPORT FROM THE UNITED KINGDOM

This note updates the Committee of Ministers on the progress of the United Kingdom in implementing the judgment of the European Court of Human Rights in the case of S and Marper on 4 December 2008. In doing so it also responds as appropriate to the request for further information on the implementation of various aspects of the Court's judgment in the annotated notes of the 1065th meeting on 15–16 September 2009. As the Committee is aware, the Government published proposals in May 2009 in a Consultation Paper *Keeping the Right People on the DNA Database* which sought to give effect to the judgment. The consultation period ended in August and some 500 responses, the majority from individuals, were received. The Government has considered carefully the results of the public consultation and further research conducted since the original proposals. In the light of this the Government announced on 11 November 2009 proposals for a new retention framework for DNA and fingerprints. The responses to the consultation exercise, the Government's proposals and the research can be viewed at [www.homeoffice.gov.uk/documents/cons-2009-dna-database/](http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/)

## LEGISLATION

2. The Government originally brought forward measures in the Policing and Crime Bill to enable the making of regulations on the retention, use and governance of biometric data. It proposed using secondary legislation in view of the importance of responding to the Court's judgment within a reasonable time frame. However, the Government subsequently considered carefully the views of members of both Houses of Parliament, of Parliamentary Committees and responses to the Government's Consultation document. While the Government remains committed to implementing the judgment of the Court at the earliest opportunity, it has accepted the concerns raised about the use of secondary rather than primary legislation. It has therefore supported amendments to withdraw these measures from the Policing and Crime Bill (which has now been enacted as the Policing and Crime Act 2009). In their place it has brought forward proposals in the Crime and Security Bill (published on 20 November) to place the retention regime on the face of primary legislation.

The Crime and Security Bill can be viewed at <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/10003.i-ii.html>. Explanatory Notes, explaining the effect of the Bill to assist the reader and help inform debate on it, have also been published. The Explanatory Notes also contain an analysis of why the Government believes the Bill, including the provisions on DNA retention, are compatible with the Convention rights. The Explanatory Notes can be viewed at <http://www.publications.parliament.uk/pa/cm200910/cmbills/003/en/10003x--.htm>.

## RESEARCH

3. Since the publication of the Consultation Paper the Government has reinforced its evidence base through additional research. The research lends support to the public protection case for retaining the DNA of some people who have been arrested for but not convicted of criminal offences. While supporting some reduction of the retention periods originally proposed without compromising public protection, the research does indicate that the chance of re-arrest, following an arrest with no further action, of individuals with no previous convictions remains higher than the chance of arrest in the general population for six years following the initial arrest.

4. The Government used the risk of re-arrest, rather than the risk of subsequent conviction, as its measure of offending in the period following an initial arrest where no further action was taken against the arrestee. The Government assessed the rate at which the risk of re-arrest declined to the arrest rate in the general population, and chose as its retention period the point at which those two rates were broadly equalised. Three years worth of arrest data only were available for use from the Police National Computer, because PNC entries for earlier years had been weeded. The use of arrest-to-conviction data would therefore have resulted in a biased dataset for analysis, because convictions for more serious crimes typically take longer to secure, and many convictions would not have been secured by the three-year point. The lack of data beyond three years from initial arrest also means that it was necessary to extrapolate the data forwards in time to judge the point at which the risk of re-arrest declined to the arrest rate in the general population.

## PROPOSALS

*DNA Samples*

5. The Government continues to believe that there is scope for destroying samples, not only of those arrested but not convicted, but also of those who have been convicted. It therefore proposes that samples should not be retained beyond a six-month maximum, which is needed to ensure satisfactory loading of the profile onto the National DNA Database (NDNAD). Given that the European Court's judgment highlighted the particular sensitivity of retaining DNA samples, as distinct from the profiles taken from them which are held on the NDNAD, the Government believes that the proposal to delete all DNA samples as soon as a profile has been obtained should go a long way to allaying concerns about excessive retention. The

Government is, however, including a power in the Crime and Security Bill for the police to take a further sample should the defence of an accused person challenge the authenticity of the results of the analysis of the destroyed sample.

#### *The Retention Framework*

6. The proposed retention periods depend on a number of factors including the age of the individual concerned, the seriousness of the offence or alleged offence, whether the individual has been convicted, and, if so, whether it is a first conviction. A different regime is proposed for biometric data which it is necessary to retain for the purposes of national security or for the purposes of a terrorism investigation, reflecting the facts that national security, including terrorism, investigations can last considerable periods of time, that issues relating to national security and terrorism frequently have a special status in legislation, and that the harm caused by terrorist activity can be particularly devastating.

The different categories can be summarised as follows:

- Adults—convicted: indefinite retention of fingerprints and DNA profile.
- Adults—arrested but unconvicted: retention of fingerprints and DNA profile for six years.
- Under 18 year olds—convicted of serious offence or more than one minor offence: indefinite retention of fingerprints and DNA profile.
- Under 18 year olds—convicted of single minor offence: retention of fingerprints and DNA profile for five years.
- 16 and 17 year olds—arrested for but unconvicted of serious offence: retention of fingerprints and DNA profile for six years.
- All other under 18 year olds—arrested but unconvicted: retention of fingerprints, and DNA profile for three years.
- All DNA samples: retained until profile loaded onto database, but no more than six months.
- Control order—fingerprints and DNA profiles will be destroyed two years after the person ceases to be subject to a control order.
- *Terrorism and National Security*—material taken under the Police and Criminal Evidence Act 1984, Police and Criminal Evidence (Northern Ireland) Order 1989, the Terrorism Act 2000 and material retained under section 18 of the Counter-Terrorism Act 2008 will be able to be retained beyond the deadline for destruction where it is necessary to do so for the purposes of national security. This would require a review by a chief officer of police every two years—although data would be deleted if it became clear between reviews that its retention would no longer be necessary. (Data held under the 2000 Act or section 18 of the 2008 Act will otherwise be subject to similar retention time limits to those described above for adults and juveniles.)

(For the purposes of these provisions, the concept of “qualifying offence” is used to distinguish between serious and minor offences. Qualifying offence is defined in clause 7 of the Crime and Security Bill) (clause 13 for Northern Ireland).

7. In setting a proportionate retention period for the DNA profiles of unconvicted adults, while at the same time safeguarding public protection, the Government has taken account of the improved evidence base, responses to the proposals in the original Consultation Paper as well as the views expressed by the Secretariat. The Government has also taken into account the comments of the European Court that the regime in Scotland which it described as providing for retention of DNA for unconvicted adults only in cases of serious offences and then only for three years, was in accordance with Committee of Ministers Recommendation Rec(92)1. In fact the regime in Scotland provides for the retention of data from those unconvicted of serious crimes for an initial period of three years but that this is renewable for one or more further periods of two years with the approval of a sheriff. The Government is conscious that the European Court suggested that the seriousness of the alleged offence should be a factor in determining what length of retention was proportionate. The Government carefully considered the Scottish approach in the light of that. However, the best available evidence indicates that the type of offence a person is first arrested for is not a good indicator of the seriousness of offence he might subsequently be arrested for or convicted of in future. This has led the Government to propose a six-year retention period for the profiles of unconvicted adults, irrespective of the seriousness of the crime for which they were arrested.

8. Given that juveniles are statistically among the most prolific offenders and given that the primary purpose of retaining DNA profiles is to facilitate the detection of future crimes, the Government considers that the evidence base does not support shorter retention periods for juveniles. Nevertheless, the Government has, in setting a retention regime for juveniles, whether convicted or unconvicted, given weight to the comments in the European Court judgment on juveniles, the United Nations Convention on the Rights of the Child and the responses to the Consultation Paper. The proposal to delete biometric data from juveniles convicted of a first minor offence after five years recognises that for many young people involvement in crime in their teenage years is often an isolated and minor incident. However, the Government also recognises that, for some young people, involvement in crime in their teenage years is a strong indicator of risk of further criminal activity into adulthood. It believes, therefore, that a limited

retention period for a single conviction, with indefinite retention in the case of any further conviction, strikes the appropriate balance. The proposal that where 16- and 17-year-olds are arrested for, but not subsequently convicted of a serious offence, their DNA profile would be retained for six years (as for adults), takes account of the ages at which peak offending occurs.

9. The Government is also proposing a similar retention regime in relation to material held under section 18 of the Counter-Terrorism Act 2008 (when brought into force), which includes material held on the “CT database” and material held under Schedule 8 to the Terrorism Act 2000, taken from persons arrested as terrorist suspects or persons stopped under the ports and borders powers in that Act.

10. Where in any case material held under the Police and Criminal Evidence Act 1984, the Counter Terrorism Act or the Terrorism Act 2000 would fall to be destroyed under the new regime, if the chief officer of police determines that it is necessary to retain the material beyond that time limit for purposes of national security, that material may be retained for a further two years. This two year period is renewable. The Government considers that it is proportionate to propose this extension of retention for biometric data where it is necessary in the interests of national security taking into account the facts that national security cases such as terrorism investigations as well as counter-espionage can last considerable periods of time, that issues relating to national security and terrorism frequently have a special status in legislation, and that the harm caused by terrorist activity can be particularly devastating.

11. On the review mechanism for the destruction of profiles and fingerprints before the end of the retention period, as the Committee is aware, currently, Chief Officers may consider the exceptional destruction of DNA and fingerprints under the exceptional case procedure. The Government proposes to introduce greater transparency by setting out in statute more clearly defined criteria where deletion would be appropriate. This should bring greater clarity to the public and also the police. The Government notes the European Court’s comments on whether there is a need for independent review. However this was in the context of the current regime of blanket and indefinite retention where a chief officer has discretion to destroy fingerprints samples and profiles in unspecified exceptional circumstances. The Government submits that the preference for independent review should be considered in the light of the proposed retention periods, the fact that Parliament will have approved that regime and the duty on a chief officer to destroy material in specified circumstances as well as the ability of a person to seek judicial review of such a decision.

12. In respect of “legacy” profiles (ie those taken before the judgment), the Government is proposing through clause 19 of the Crime and Security Bill to require the Secretary of State to make an order providing for the destruction of material taken prior to the coming into force of relevant provisions of this Bill, if such material would have been destroyed under those provisions had they been in force when the material was taken. Effectively, therefore, it provides for the retention periods for different categories of data that are set out in the Bill to be applied to material that has already been taken. The Government considers that it is appropriate for the timing of the destruction of such material to be set out in secondary legislation because a large amount of material is currently retained and sufficient time needs to be allowed for the exercise of identifying and where appropriate destroying this material. The order-making power will allow the Secretary of State to set a realistic deadline for that destruction date, without delaying the implementation of the new retention and destruction regime in relation to material taken after the coming into force of these provisions.

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**Letter to the Chair of the Committee from Rt Hon Michael Wills MP, Minister of State, Ministry of Justice, dated 22 January 2010**

EVIDENCE SESSION ON THE WORK OF THE HUMAN RIGHTS MINISTER

At the recent evidence session I attended to discuss my work as the Minister responsible for human rights, your Committee raised a number of points to which I undertook to provide a fuller response after further investigation. MoJ officials have consulted other departments as appropriate on these areas and I am now able to provide you with the following information.

Firstly, you requested feedback from the deliberative events recently held on values, rights and responsibilities. We expect to receive a report from the independent research company delivering the public events shortly after the final national event summarising their findings. Current plans are for this event to take place towards the end of next month and I intend to lay a copy of the final report in the library of both Houses as soon after that as practicably possible. I will ensure a copy of this is sent to your Committee.

I also undertook to study again your most recent Bill on the meaning of public authority under the Human Rights Act, and the issues it gives rise to. As you are aware, the Government opposed the Bill at its Second Reading debate on 3 July 2009 as we felt it would have an uncertain legal effect and had the potential to encompass functions that were never envisaged would fall within the scope of the HRA.

The Bill would require the interpretation of section 6 to begin again from scratch and without any guarantee that it would achieve the desired effect. The factors listed are already taken into account by the courts. Without any guidance as to the weight and effect that should be accorded to each factor, the way they are balanced and extent to which each is taken into consideration remains a matter of judicial

discretion. Without the confidence that a new legal framework such as this would work at least as well as the current one, it would be irresponsible to wipe out the detailed case law that has built up and the legal certainty that goes with it.

In addition, I believe that the second clause of the Bill, which specifies that: “For the avoidance of doubt . . . a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expense” could have far-reaching and undesirable consequences.

There are potentially a large number of functions that are publicly funded in this way, including those where the Government believes that there was no intention they would fall within the scope of the Human Rights Act. One example might be construction companies working on Government infrastructure projects. You suggested in your evidence that Baroness Hale has “pointed the way” towards approaching this issue. I would add that, in her dissenting judgment in *YL*, she also stated that: “Not everything for which the state pays is a public function.”

I believe there is a balance to be struck and where the observance of human rights is a key part of the performance of a function that can reasonably be considered public, the legal obligation under the Human Rights Act is non-negotiable. But where it is not, and where a specific legal obligation under the Act would add little or nothing in terms of the protection of human rights, we have to be aware of the compliance costs.

For these reasons, I do not believe that the Bill represents a workable legislative solution to this issue. Moreover, I believe it is a good example of precisely why this issue is a complex one and why it is necessary to ensure any action does not have perverse consequences.

You also asked about two points concerning the case of *London and Quadrant Housing Trust v Weaver*.

Firstly, you queried whether there were any plans to issue new guidance to Registered Social Landlords (RSLs) in light of the Court of Appeal’s judgement in *Weaver*. The Government currently has no plans to do so. Existing regulatory guidance is already designed to ensure that tenants are treated fairly by their landlords, and the Housing and Regeneration Act 2008 gives the Tenant Services Authority (the social housing regulator) a statutory objective to ensure that actual or potential tenants have an appropriate degree of protection.

In considering the need for new guidance, the Government takes account of the fact that the judgment of the Court of Appeal does not mean that every RSL providing social housing will necessarily be in the same position as the RSL in *Weaver* and that the determination of the public status of a body for the purposes of the Human Rights Act will be fact sensitive. In addition, the Government also notes the order issued by the Supreme Court when refusing permission to appeal, which acknowledges that the issues raised in *Weaver* are clearly ones the Court wishes to consider if a suitable case can be identified.

Secondly, the Committee asked when and how the Supreme Court indicated that it intended to look at the meaning of public authority issue at the “earliest opportunity” and requested a transcript of any hearing relating to this. On 19 November the Supreme Court issued an order, setting out the reasons why, on 6 November, it had declined to hear a further appeal in *Weaver v London and Quadrant*. The order noted that: “The point is clearly one for the Supreme Court but this is not a suitable case on its facts. If a suitable case can be identified consideration should be given to applying for a leap-frog appeal to the Supreme Court.” Copies of the order can be obtained on request from the Supreme Court Registry.

Turning to the issue of the Ministry of Justice’s role in the implementation of adverse human rights judgments, I can confirm what Edward Adams and I understood to be the case at the time of the hearing, that no new formal guidance has been issued to Government departments on the Human Rights Act (including on the issue of implementing adverse human rights judgments) since the matter was last discussed with the Joint Committee. However, I should stress that officials in Human Rights Division continue to provide support and guidance to Government departments responsible for implementing such judgments, and continue to monitor implementation progress in relation to both domestic and European Court of Human Rights judgments. However, we are considering whether and how to develop further and formalise the guidance and support that is given to departments.

#### *S & Marper v UK (Marper)*

You asked a number of specific questions on the Government’s proposals for implementing the judgment in this case. Following consultation between MoJ officials and their counterparts at the Home Office, who lead on this area, I am able to provide the following information.

##### (i) *Compatibility of the proposals with the presumption of innocence and the right to respect for private and family life*

The Government considers that the retention of an unconvicted individual’s DNA profile on the National DNA Database (NDNAD) is entirely compatible with the presumption of innocence under Article 6 of the Convention. Given that the taking of DNA is merely a consequence of a person being arrested, the presence or absence of a profile on the NDNAD is not in any way determinative of an individual’s guilt or innocence and has no overt impact on that individual beyond the profile being searched against as part of a routine criminal investigation procedure.

The Government further considers that the judgment of the European Court of Human Rights in *Marper* does not say that any proposals which permit the retention of biometric data of people not convicted of a criminal offence are incompatible with the presumption of innocence under Article 6. Paragraph 122 of the judgment acknowledges that the retention of data “cannot be equated with the voicing of suspicions”. It is true that that paragraph also indicates that a system which allowed the data of innocent people to be retained “in the same way as the data of convicted persons” would cause concern. However, the Government believes the legislative proposals that we have put forward do substantially differentiate between those two categories of cases, and thus meet the court’s concerns.

Following the decision in *Marper*, we accept that the mere storage and retention of fingerprints and DNA samples and profiles constitutes an interference with the right to private life under ECHR Article 8.

For a number of reasons, therefore, the Government considers that the retention regime which is established by the Crime and Security Bill is proportionate and compatible with Article 8 and fully implements the *Marper* judgment. In balancing the competing public and private interests, the Government notes that the Strasbourg Court, in its apparent approval of the corresponding Scottish legislation, seems to have accepted the principle that retaining the DNA of unconvicted people is in some cases proportionate.

The Government further notes that *Marper* held that the greatest interference with private life was caused by the retention of DNA samples (ie the actual genetic material taken rather than the profile derived from it, which is merely a sequence of numbers). Since it is now proposed to delete all samples as soon as a profile has been obtained, we consider that this should go a long way to meeting concerns as to excessive retention.

The Government’s proposed six-year retention period for adults arrested but not convicted of an offence is based on the best available research, which suggests that a person who has been arrested is at a higher risk of re-arrest than the general population for a period of six years.<sup>117</sup> This in turn suggests that the detection of some future suspects would be lost if the data relating to arrested persons were not retained for that period.

In proposing a single retention period, irrespective of the seriousness of the offence for which an adult is arrested, the Government is acting on research which points strongly to the heterogeneity of criminality—in other words, the type of offence a person is first arrested for or convicted of is not a good indicator of the type or seriousness of offence he is likely to be arrested for or convicted of in future. As the retention of biometric data of innocent people is emphatically not a punishment but rather a measure to facilitate the investigation of future offences, it therefore seems appropriate to have a single retention period. Although this approach runs counter to the steer in *Marper* that the seriousness of the offence is material in determining whether retention is proportionate, the Government considers that this approach is supported by the best available evidence.

(ii) *Access to an independent appeal process*

The Government notes that, while the Strasbourg Court in *Marper* did mention (at paragraph 119) the lack of provision for an “independent review” of retention decisions, this was in the context of a blanket and indefinite retention policy where there were no defined statutory criteria for early deletion of data. In addition to defined retention periods, clause 14 of the Crime and Security Bill sets out (in a new section 64ZI to be inserted into the Police & Criminal Evidence Act 1984) a number of specific instances where the police will be required to destroy DNA profiles, where:

- the arrest was unlawful (for example, if the arresting officer did not have a reasonable suspicion at the time of arrest, or if excessive force was used in making the arrest);
- the taking of DNA was itself unlawful (for example, because the individual was arrested for a non-recordable offence);
- the arrest was lawful but is subsequently shown to have been carried out on the basis of mistaken identity; or
- some other exceptional circumstances exist as a result of which the data should be destroyed (for example if a person was arrested as a result of malicious or wholly false allegations).

This introduces greater transparency by setting out in legislation for the first time clearly defined criteria where deletion would be appropriate, thereby bringing greater clarity to the public and also the police.

In light of the proposed retention periods, the fact that Parliament will have approved this regime for it to be introduced, the duty on a chief officer to destroy the material in specified circumstances and the ability of a person to judicially review such a decision, the Government does not consider that an independent appeals procedure is necessary for the DNA retention regime as a whole to be compliant with the Convention.

<sup>117</sup> <http://www.homeoffice.gov.uk/documents/cons-2009-dna-database/dna-retention-evidence-paper2835.pdf?view=Binary>.

(iii) *Removal of children's records from the DNA database*

The DNA of all children under 10 years of age has already been removed from the NDNAD.

In proposing generally shorter retention periods for children, the Government has again acted on the basis of evidence that shows the earlier a criminal career starts, the longer it is likely to last, while having regard to the sensitive position of children set out in the Strasbourg ruling and the results of the consultation exercise, which supported a more liberal policy for those aged under 18. The retention period for children aged 16 or 17 who are arrested for, but not convicted of, a serious offence will, however, be the same as for adults (namely six years), reflecting the fact that peak offending occurs at this age.

However, having put forward these proposals, the Government does not consider it appropriate to pre-judge the consideration by Parliament of these proposals, and as such has determined that it would be inappropriate to remove from the NDNAD a significant number of DNA profiles relating to individuals that Parliament may subsequently decide should be retained.

*Baiai v Secretary of State for the Home Department*

In response to your request for a timetable for the laying on a remedial order to remedying the incompatibility identified in this case, the Home Office, who again lead on this case, have begun preparations for the remedial order and intend to lay it before Parliament as soon as possible. However, it is unlikely that the order will come into effect before the end of 2010 due to the interruption of the forthcoming General Election in the Parliamentary timetable.

I hope that you find this information helpful.

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**Letter from the Chair of the Committee to Rt Hon Michael Wills MP, Minister of State,  
Ministry of Justice, dated 3 March 2010**

*Security of Tenure for Gypsies and Travellers (Connors v UK)*

The Joint Committee on Human Rights is continuing its practice of reviewing the Government's response to the implementation of judgments of the European Court of Human Rights.

In our past three reports on this issue, we considered the Government's response to the decision in *Connors v UK* that the lack of security of tenure offered to gypsy and traveller communities in England and Wales was incompatible with right to respect for home, private and family life guaranteed by Article 8 ECHR. In our first two reports, we regretted the Government's delay in respect of this judgment, which was delivered in 2004. In our last report, and in our report on the Housing and Regeneration Bill, we welcomed the introduction of Section 319, Housing and Regeneration Act 2008, which would extend the application of the Mobile Homes Act 1984 to gypsy and traveller sites, as an effective remedy.

In your letter to us dated 30 September 2009 you said that this provision will "complete the implementation of this judgment" and that "the order bringing this provision into force in England is expected to be laid before Parliament in the autumn."

It has been drawn to our attention that Section 318 has not yet been brought into force and that the Government has indicated that it will not now be brought into force before the General Election because there is insufficient parliamentary time.

I would be grateful if you could explain:

- (a) Whether the Government intends to bring Section 318, Housing and Regeneration Act 2008 into force before the end of this Parliament?
  - (b) If so, when the Government intends to introduce the relevant order.
  - (c) If not, please provide a full explanation of the Government's reasons for delay in this case, including why a statutory instrument which is necessary in order to complete the implementation of a judgment of the European Court of Human Rights is not regarded by the Government as a priority.
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