



Britain and the ECHR

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About the author

Dr Lee Rotherham is a graduate of the University of London and holds an MPhil and PhD from the University of Birmingham. Dr Rotherham is one of the most experienced analysts of EU issues working in British politics, having been a researcher for the “Westminster Group of Eight” Eurorebels and an adviser to three successive Shadow Foreign Secretaries, a role part based within the European Parliament. This expertise led to his appointment as Chief of Staff to the Rt Hon David Heathcoat-Amory MP, British parliamentary delegate to the Convention on the Future of Europe. Dr Rotherham played a central role assisting delegates opposing the European Constitution, and the drafters of the Minority Report. A reservist with service in both Iraq and Afghanistan, he has been extensively published internationally – most recently with *Ten Years On: Britain Without the European Union*.

Executive Summary

The European Convention on Human Rights (ECHR) remains controversial as it forces changes in legislation that the British public and politicians do not want, such as allowing prisoners to vote. This new research, based on a detailed investigation of cases that the British Government has lost, provides new insight into the cost of complying with the court's decisions:

- The UK has to date lost three quarters (331 out of 418) of the rulings that have progressed to the top Strasbourg court, a trend that has increased despite the Human Rights Act (HRA) 1998.
- 80 per cent of all judgments (246 out of 331) Britain has ever lost under the ECHR have been reached since we signed the HRA.
- About one third of all judgments ever made involving the UK were actually referred to Strasbourg after the HRA entered into law, rather than concluded by British courts.
- The cost of complying with judgements under the ECHR is £2.1 billion a year, with an additional £1.8 billion in one off costs. The total cost to date is £17.3 billion.
- The growth of a "compensation culture" fostered by the Court costs a further £7.1 billion a year, £25 billion to date.
- True reform can only take place by the United Kingdom withdrawing from the European Convention on Human Rights, or the European Court changing its stance to respect a new British Bill of Rights.

Some of the changes made in response to court decisions may, in time, have been made anyway. But many would not and the Government is clearly being pushed into decisions that have significant costs for taxpayers by the ECHR.

A full list of cases involving the UK, including an outline of the issues and any compensation or costs that resulted, is available in Appendix 1.

Introduction

In the summer of 2009, the Ministry of Justice advertised for the position of British judge at the European Court of Human Rights. It explained that:

“Members of the Court are elected by the Parliamentary Assembly of the Council of Europe (PACE) from lists of three candidates proposed by each State party to the European Convention on Human Rights (ECHR). Elections to the Court will be for a fixed 6-year term, and judges will be eligible for re-election – though these and some other terms of office will change if Protocol 14 to the ECHR comes into force.

The Government invites applications from candidates possessing the necessary qualifications and expertise for this senior judicial appointment. The ECHR stipulates that judges must be of high moral character and must possess the qualifications required for appointment to high judicial office, or be jurists (e.g. practitioners and academic lawyers) of recognised competence. The Government will be looking for candidates with all the qualities for high judicial office together with achievement and experience relevant to this post. Candidates should also have a working knowledge of French. Appointment as judge with respect to the United Kingdom is not restricted to British nationals, but all candidates must demonstrate a close current connection with the United Kingdom and familiarity with one or more of its legal systems.”

The advert ended with the bold strap line “Making Justice work”. Sadly, as this paper examines, the UK’s new judge will inevitably find out that the tangled British justice system is far from fully coherent and operational – and that Strasbourg itself is at fault.

Examples of problems caused by the ECHR

The heart of the objection to the ECHR is not an objection to the legal protection of people's legitimate rights. The Court and the Convention were set up as the response to horrible and extreme injustices over the early and mid 20th century. The problem is that the interpretation has expanded well beyond its original intent.

The cases affected by human rights rulings today are varied. Leaving aside some recent, very public, attempts to remedy the problem of repeated lost cases, made by the British Government in a special act in 1998 (on which more later), some of the more recent examples include:

- In 2005, the British Government lost a High Court battle to order a civilian enquiry into the death of an Iraqi civilian, confirming the expansion of the Convention into military situations overseas.¹ Soldiers are increasingly required to apply ECHR rulings in the way they operate in a war zone; or, worse, anticipate possible rulings and go beyond them in order to be legally secure. The cost is one of operational effectiveness, and putting soldiers' lives at risk.²
- A transsexual serving time for manslaughter and attempted rape while a man was required to be moved to a women's prison.³ As a ruling dating from September 2009, this is a clear example of a controversial case now being made in British courts masking the role of Strasbourg as the source. The Home Office was quoted as being "disappointed".
- High profile cases have stopped the deportations of suspects to face very serious criminal charges overseas. In addition to Islamic terror suspects, the deportations of genocide suspects to face trial in Rwanda have been halted.⁴
- The policy of deporting illegal immigrants requiring medical assistance has also been compromised, placing the National Health and Immigration services under additional pressure from 'health tourism'.
- There have been suggestions that faith obligations in prisons have assisted the propagation of religious extremism.

¹ <http://www.independent.co.uk/news/uk/crime/landmark-ruling-as-government-loses-appeal-on-iraqi-death-520310.html>

² For example, this author was instructed during training prior to deployment to Iraq that it was lawful to shoot an insurgent throwing a hand grenade only up to the point where the grenade was in his hand: the instant it was out of his grip and in the air, he was unarmed.

³ <http://www.guardian.co.uk/society/2009/sep/04/transsexual-prisoner-moved-womens-prison>

⁴ http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent_bajinya_611.html. The decision was made by a UK court, but acting directly on ECHR principles: a Swedish court has in parallel recently faced a halt order from Strasbourg.

- Deportations of foreign nationals found guilty in the national courts of serious offences such as armed robbery or drug trafficking have also been halted. For that reason, the ECHR may have contributed to the chaos in 2006 that led to hundreds of foreign nationals not being deported automatically after being released from jail, some of whom were consequently able to reoffend in Britain.
- The deportation of an illegal immigrant was reportedly halted in part as he had formed a bond with a pet.⁵
- After a ruling by the Court that innocent people should have their fingerprints and DNA removed from the Home Office database, the Association of Chief Police Officers reportedly wrote to members telling them to ignore the ruling, while ministers made plans to bypass it using Statutory Instruments. An exception was made for Damian Green MP, whose parliamentary office was famously raided over a whistleblower. The official legal position was muddled: HMG resolved to act contrary to Convention law and on an ad hoc basis, accepting a loss of further cases at Strasbourg.
- In May 2007, the Home Secretary, Dr John Reid MP, responded to reports that 6 out of 17 terror suspects subject to control orders (since they couldn't be locked up) had absconded. Three were feared en route abroad to kill British soldiers. His response was to threaten to declare a state of emergency to override his Government's own Human Rights legislation.⁶
- A measure of the influence the ECHR now has can be seen in the example of the Queen's Trinity Cross honour. An honour established by the monarch in 1969, the Trinity Cross of the Order of Trinity, which had been set up to pay tribute to outstanding citizens of Trinidad and Tobago, had to be suspended. Despite the obvious link between the name of the honour and the name of the island, the Privy Council ruled that the decoration was unconstitutional on the grounds that it discriminated against non-Christians. That suggests the ECHR's influence now stretches outside of the UK to its relationships with former dependencies; while the decision was based on the island's constitution, that itself was rooted on ECHR principles.⁷ Lawyers in the Cabinet Office meanwhile have acknowledged that other decorations could be at risk of a challenge, which would include both the Victoria Cross and the George Cross.
- Britain's condition has through case law precedent subsequently affected the Common Law world.

⁵ <http://www.dailymail.co.uk/news/article-1221353/Youve-got-cat-OK-stay-Britain-officials-tell-Bolivian-immigrant.html>

⁶ <http://www.guardian.co.uk/politics/2007/may/25/uk.topstories3>

⁷ Another clear example is the steady erosion of the death penalty through Privy Council rulings, based on the relevant constitution but specifically on the Strasbourg-proven basis of "inhuman and degrading punishment" for death row internees.

History

The Introductory Background from the Treasury Solicitors' Office describes the scale of the legal revolution:⁸

"In the past 20 years, an explosion in the amount of public law litigation, and in particular judicial review, has led to an increase in the amount of litigation conducted by the Treasury Solicitor's Department. The enactment of the Human Rights Act, devolution in Scotland and Wales, and the ever increasing importance of Community law, as well as the continuing development of judicial review, means that lawyers in the Treasury Solicitor's Department, be they litigators or advisors, find themselves at the centre of a rapidly changing legal world."

The European Court of Human Rights has made a profound impact upon Britain's law courts. Looking at just the cases involving the UK, from the Strasbourg Court's inception to the end of 2009:⁹

- It had been invited to make 2,106 Decisions over whether it should hear a case, and pursued one in six.
- It passed 418 Judgments, around one quarter of which overturned UK court rulings outright. The vast majority found against the United Kingdom in some degree or element of the case.
- It had issued 288 Reports under the pre-1999 system (rulings are now more closely incorporated into the judicial procedure).
- It produced 217 Resolutions at Committee of Ministers level, reviewing whether or not the UK had fulfilled its obligations after losing a case.

The following is a brief timeline of some of the key dates associated with controversies from the Strasbourg Court. The cases themselves are analysed in greater depth in Appendix 1.

⁸ http://www.tsol.gov.uk/Publications/scheme_publications/department_organisation/Agency_History.pdf

⁹ Known as "the Court" for the rest of this report.

Table 1: ECHR Timeline

Year	Event
1948	Universal Declaration of Human Rights
1950	Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
1959	Strasbourg Court established
1975	First occasion where the British judge offers a divergent opinion or caveat, in the first case the UK loses at Strasbourg.
1978	First lost case over corporal punishment foreshadows its end.
1980	First major award of damages against the UK. British judge calls one claim "quite gratuitous and uncalled for."
1983	First case lost over defining prisoners' rights.
1985	First case lost limiting Home Office's powers to control immigration
1987	First of many lost cases over the management of life sentences, parole, and the parole board, leading to the first of many failed changes to attempt to keep within Strasbourg case law.
1988	First case lost due to the lack of promptness in the legal system and the delivery of rights.
1989	Data protection/access costs arise from <i>Gaskin v United Kingdom</i> . First judgement blocking extradition/expulsion of a criminal overseas (<i>Soering v United Kingdom</i>).
1991	<i>Spycatcher</i> .
1995	First problems emerge over attempts to seize criminal assets (<i>Welch v United Kingdom</i>). SAS Gibraltar shootings case.
1996	<i>Goodwin v United Kingdom</i> endorses leaks to journalists with criminal or industrial sabotage intent. Seven judges, including the British one, dissent. <i>Hussain v United Kingdom</i> demonstrates that incorporating Strasbourg rulings into UK law does not necessarily solve core dichotomies; lesson not learned for the HRA. First cases relating to Right to Silence. First Poll Tax cases. Guinness trial.
1997	First gender equality case.

Year	Event
1998	<p>Changes shift more powers to the Court over initial screening of cases, and ending Council's adjudicative role.</p> <p>Human Rights Act passed.</p> <p><i>Bowman v United Kingdom</i> causes legal complications over third party campaign literature during elections.</p> <p><i>A v United Kingdom</i> awards significant damages from the taxpayer as compensation for domestic corporal punishment.</p>
1999	<p>First of many judgements relating to gays in the military.</p> <p>First of many cases judged relating to widower pensions and benefits rights and male equality with widows.</p> <p>Tariff reviewed of killers of Jamie Bulger.</p>
2000	<p>First case involving police surveillance, which the Government responds to by failed legislative change and by accepting automatic future defeat; domestic judgements will be allowed to stand but a small compensation payment is expected to the criminal. Binary trend confirmed in <i>Wood v United Kingdom (2004)</i>.</p>
2001	<p>First case centred on "mental anguish" (<i>Keenan v United Kingdom</i>).</p> <p>A number of Northern Ireland cases of debate.</p> <p><i>Z and Others v United Kingdom</i>; possible trigger for the HRA judged. Major pay out (£100,000) over lack of a domestic remedy.</p> <p>First major disability rights case takes rights beyond what is "reasonable" under Common Law.</p> <p>Heathrow night flights case: Strasbourg overrules domestic authorities. Major split amidst judges.</p> <p><i>Sutherland v United Kingdom</i> judged. It has already been the spur in lowering the age of homosexual consent.</p>
2002	<p>Strasbourg confirms signatory states do not need to pursue the HRA route (<i>Christine Goodwin v. the United Kingdom</i>).</p> <p><i>Paul and Audrey Edwards v United Kingdom</i> and <i>McShane v United Kingdom</i> separately rule that the HRA has not been sufficient protection under the Convention.</p>

Year	Event
2003	<p>Clearance date for pre-HRA cases. Cases now before the Strasbourg Court post-date the Act.</p> <p><i>Perry v United Kingdom</i> finds that the police were wrong to have used a video of a prisoner who refused to attend a line up.</p> <p><i>Wynne v United Kingdom (no 2)</i>; a murderer who killed again while on parole successfully challenges a mandatory sentence.</p> <p><i>Price and Lowe v United Kingdom</i> finds the state at fault for delays actually caused by the parties.</p> <p><i>Von Bulow v United Kingdom</i>; man who murdered a policeman awarded damages for “feelings of frustration, uncertainty and anxiety” over a fixed life sentence.</p>
2004	<p><i>Glass v United Kingdom</i>; medical profession now faced with uncertainty over ‘do not resuscitates’.</p> <p>Axe killer wins the right to vote.</p> <p>[UPDATE: THERE WAS PREVIOUSLY AN ERROR IN THIS ITEM; THE CONVICTION WAS ACTUALLY FOR MANSLAUGHTER. WE SINCERELY REGRET IF ANYONE WAS MISLED]</p> <p>First case lost by the Government because the HRA could not retroactively apply to cases before 1998.</p> <p><i>Connors v United Kingdom</i> creates major upheaval over housing rights.</p> <p><i>Hooper v United Kingdom</i> demonstrates that application of the HRA and of the ECHR extends to every level of the legal system.</p> <p>National courts’ interpretation of the HRA overturned by Strasbourg in <i>Eastaway v United Kingdom</i>.</p> <p>Inland Revenue’s procedures under the HRA overturned by Strasbourg in <i>King v United Kingdom</i>.</p>
2006	<p><i>Tsfayo v United Kingdom</i>; astonishing criticism of legal bills from one judge.</p> <p><i>Singh and Others v United Kingdom</i> reveals HRA not halting legal challenges, and accelerating damages.</p>

Year	Event
2007	<p><i>ASLEF v United Kingdom</i>; recognising the failures of the HRA, Government lawyers consider a “creative interpretation” of British law that puts it directly subservient to Strasbourg.</p> <p><i>Copland v United Kingdom</i> introduces what is possibly the first introduction of the Napoleonic legal system into British law (failure to provide permission).</p> <p>EU Fundamental Rights Agency opens (expanding upon the previous EU Monitoring Centre on Racism and Xenophobia).</p> <p><i>c. v United Kingdom</i> settlement overturns a judgement made under the HRA provisions.</p> <p>Large number of widower rights cases.</p>
2009	<p><i>A. and others v United Kingdom</i>; notwithstanding UK moves to derogate from the Convention in order to deport terror suspects, Strasbourg rules that many individuals have been illegally detained and should not be deported owing to the threat of torture from their home security forces.</p> <p><i>Al-Khawaji and Tahery v United Kingdom</i> puts Strasbourg interpretation of right to hear written evidence from absent witnesses at variance from the Court of Appeal's at <i>Horncastle and Others v R</i>.</p> <p>Passage of the Lisbon Treaty incorporates Fundamental Rights directly into EU treaty law. The Czechs finally agree, with an opt out over one aspect.</p>

Before we look at the consequences, we need first to understand a little of how the mechanism functions.

Establishment

The basis for the Court lies within the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up under the aegis of the Council of Europe in 1950. The Court itself was set up in 1959. Conceptually, both drew heavily from the 1948 Universal Declaration of Human Rights.

Consequently, the Court was built on the bedrock of the Second World War and pre-war authoritarianism, designed in reaction to genocide, systemic torture, deportation, forced labour, arbitrary punishment, and the debasement of the judicial system in Occupied Europe.



However, even from the very issuing of the Declaration, British diplomats expected difficulties in putting aspirations into practice.¹⁰ That problem became very real with the establishment of a judiciary.

Changing Principles

There are two types of application under the Convention, inter-State and individual. Inter-State cases have been very rare. The right of individual complaint, on the other hand, has been used very frequently. Originally, only three of the original ten Contracting States recognised this right. By 1990, all Contracting States had recognised the right under Protocol No.9.

Since the Convention's entry into force fourteen Protocols have been adopted. No. 11 radically transformed the supervisory system, creating a single, full-time judiciary. Protocols 9 and 11 have correspondingly allowed the Court a hugely expanded role and capability.

In the early years of the Convention, the number of applications lodged with the Commission was comparatively small, and the number of cases decided by the Court was much lower again.¹¹ By the 1980s, a steady growth in the number of cases meant that court cases were taking much longer to process, particularly with the increase in the number of signatory states. The number of applications registered annually increased from 404 in 1981 to 4,750 in 1997. At that point the mechanism was changed. The number of provisional files by that stage had risen to over 12,000.

The Court's capacity to handle cases has correspondingly increased. In 2005, it handed down 958 final judgments and disposed of more than 27,600 applications. The increase in workload continues. By the end of 2005, there were 81,000 applications pending before the Court, approximately one-third of which had yet to be allocated to the appropriate judicial body.

The sheer volume of the applications, and the number which fail to make it to a full hearing for a ruling, shows the extent to which appeals are being made under national legal systems in the hope or expectation that national law is overruled by this international court. There is often vexatious use of the system. In 2005, some 14,300

¹⁰ As revealed in the British Library's exhibition *Taking Liberties*, in the section detailing Foreign and Colonial officers discussing the legal ramifications. In some cases, there was a conscious decision by colonial administrators to play down publicising the UN agreement in order to avoid contentious and uncertain legal challenges like those that would emerge under the Strasbourg Convention.

¹¹ The historical development is detailed in greater depth at http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85 /0/ENG_Infodoc.pdf



applications were disposed of simply by the plaintiff failing to follow up on the initial complaint.

Functionality

It is not the purpose of this paper to detail a complex flowchart showing how the Court operates, not least as the process is in the process of changing under Protocol 14. However, a couple of salient points are worth underlining.

Since 1998, the Court has adopted the lead role in initial screenings of applications, and has removed the adjudicative role of the Council of Ministers. This crucially has ended the last key ministerial brake on controversial court decisions.

The Court is composed of a judge from each contracting state (currently 45). Most do not have a Common Law tradition. The most that can be expected in a case is that a Common Law judge will be one of those sitting on the tribunal. Judges are elected by the Parliamentary Assembly of the Council of Europe, which votes on a shortlist of three candidates put forward by governments. The term of office is six years, and judges may be re-elected. Judges sit on the Court in their individual capacity and do not represent any state.

The procedure before the European Court of Human Rights is adversarial and public, with heavy reliance on submissions in print. Chambers decide by a majority vote, with the right of appeal to the Grand Chamber. All final judgments of the Court are binding on the states concerned, and indeed by extension other states' judiciaries are intended to take note of rulings that might affect their own legal decisions as precedent.

The responsibility for supervising the execution of judgements lies with the Committee of Ministers of the Council of Europe. It is this body that ultimately decides on whether a government is in breach of treaty obligations over individual cases.

The European Court of Justice

At this point, it is perhaps worth a brief aside to remove a potential source of confusion. The ECJ is sometimes confused with its Strasbourg cousin. This is not altogether surprising. This Luxembourg-based court is an adjunct of the European Union. However, its founding principles are very much in line with those of the ECHR, and the rulings, although premised upon interpreting EU legislation and rights conferred under



the treaties, are very much of the same mould. Case rulings have led to Strasbourg rulings being considered as part of EU case law.¹²

The role and significance of the ECJ falls into another paper, however, other than nothing the influence of the ECHR on a court that is increasingly concerned with broader issues of personal rights. The Charter of Fundamental Rights, incorporated into the Lisbon Treaty and thus directly 'constitutional law' for interpreting the legality of EU actions, draws heavily on references to the ECHR.

As a result, the Strasbourg court might be described as an outrider for some of the more controversial decisions also being made at Luxembourg, directly affecting spending and legislation via Brussels.

¹² *Rutili* [1975] ECR 1219, *Hauer v Land-Rheinland-Pfalz* [1979], and material connected with the corporate accession of the European Community to the ECHR itself – a further complication for British courts

Costs

The following is a table compiling known or assessable costs that have emerged from ECHR rulings, and the Government's legislative response to them to keep within the law. Some of the estimates may include hidden factors other than the ECHR, so it is important to look at each case. In the following cases it appears that the main motivation for the legal changes was the Strasbourg Court, though.

By the same token, for many cases a consequential cost has been identified but cannot be given a figure, and for these we have noted an impact in the case summary without including it here.

Table 2: Implementation costs arising from Strasbourg Court rulings, in £ millions

Year	Case	Estimated annual cost, £ million	Number of years annual bill applied or has applied, to 2009	Estimated one off or time limited cost, £ million	Total cost
1981	X v United Kingdom	12.3	15.0		184.5
1987	B v United Kingdom	40.0	26.0		1,040.0
1989	Gaskin v United Kingdom	742.0	11.0	1,150.0	9,312.0
1993	Lamguidaz v United Kingdom	10.0	13.0		130.0
1994	Boner v United Kingdom	64.5	14.0		903.0
					0.0
1995	McMichael v United Kingdom			27.0	27.0
1995	Welch v United Kingdom			115.0	115.0
1996	Chahal v United Kingdom			1.5	1.5
1996	Saunders v United Kingdom			110.0	110.0
1997	Findlay v United Kingdom	9.0	13.0		117.0
1997	D v United Kingdom	60.0	12.0		720.0
1998	Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom	0.2	10.0		2.0
1998	Osman v United Kingdom			44.0	44.0

Year	Case	Estimated annual cost, £ million	Number of years annual bill applied or has applied, to 2009	Estimated one off or time limited cost, £ million	Total cost
1999	Lustig-Prean and Beckett v United Kingdom	3.3	9.0		29.7
1999	Smith and Grady v United Kingdom			0.2	0.2
1999	Hood v United Kingdom	6.5	9.0	1.5	60.0
1999	Cable and Others v United Kingdom			0.2	0.2
1999	Crosland v United Kingdom			180.0	180.0
1999	Faulkner v United Kingdom	0.7	10.0		7.0
2000	Smith and Grady v United Kingdom			4.0	4.0
2001	Hilal v United Kingdom	600.0	4.0		2,400.0
2001	Atlan v United Kingdom	19.0	9.0		171.0
2001	Price v United Kingdom			100.0	100.0
2001	Hirst v United Kingdom	5.0	4.0		20.0
2002	Willis v United Kingdom	350.0	0.0		0.0
2002	Wilson, National Union of Journalists and Others v United Kingdom	60.0	10.0		600.0
2002	Cuscani v United Kingdom	5.0	10.0		50.0
2002	Michael Matthews v United Kingdom	65.0	10.0		650.0
2004	Glass v United Kingdom	27.2	5.0	27.3	163.3
2004	Hirst v United Kingdom (No. 2)	0.0	1.0		0.0
2005	P.M. v United Kingdom	5.0	4.0	3.3	23.3
2005	J.A. Pye (Oxford) v United Kingdom			12.5	12.5
2006	Grant v United Kingdom	0.0	5.0	0.5	0.6
2007	Copland v United Kingdom	13.0	9.0		117.0
2007	Runkee and White v United Kingdom	1.0	5.0		5.0

Year	Case	Estimated annual cost, £ million	Number of years annual bill applied or has applied, to 2009	Estimated one off or time limited cost, £ million	Total cost
2008	McCann v United Kingdom	0.4	14.0		5.6
2009	A. and others v United Kingdom	5.5	5.0		27.5
	Total				17,332.8

Further to this, after the passage of the HRA, £5 million was assigned by the Home Office for legal training.¹³ There are also other direct costs like the Human Rights agencies and units operating across Government.

In addition to the costs of the legal cases above, there is also the compensation culture that the Convention has played a part in developing.¹⁴

2001	Keenan v United Kingdom (et al.)	£5,000 million		£25,000 million	
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Although we have separated it out, we believe this is an additional cost of the ECHR. In the development of ‘celebrity law cases’, the ECHR is being used as the basis to develop civil law.¹⁵ A letter from solicitors that threatened Fleet Street editors with a law suit over two celebrities playing tennis claimed as a breach of the right to privacy. “Reputation management” is a growing market for law firms dealing with litigation:

“The two sentences that comprise Article 8 of the ECHR have created a multi-million-pound bonanza for a small group of solicitors and the barristers they instruct.”

Legal costs also dissuade newspapers from contesting increasingly aggressive litigation, and by extension may reduce their willingness to print public interest stories.

That cost is but a tiny proportion of the broader bill for the emerging compensation culture, reaching out across many types of injury and across many ECHR articles.

¹³ <http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo981021/debtext/81021-45.htm>

¹⁴ The positive and very notable exception in the broad trend being the Strasbourg case of *Tolstoy Miloslavsky v. the United Kingdom*

¹⁵ *Sunday Times Magazine*, 22 March 2009

It could be argued that the changes to the law that have created the costs described above would have been made anyway, without the action of the Strasbourg Courts, and that the costs would have been incurred anyway. But, there are a number of reasons that is not the case:

- We do not include the cost of legislation instigated at Westminster evidently not in direct response to the Strasbourg Courts, but which is stated and intended to be in compliance with the ECHR.
- We have not attempted to review legislation to include additional costs that emerged from case law affecting other countries, where the UK was not a party.
- The cases that went to the courts at Strasbourg did so because they were contested by HMG (hence the '*v UK Government*'), suggesting something of an unwillingness to support the final Strasbourg ruling.
- The manner of the British Government's legislative response to lost cases was circumscribed by the ECHR, by the need to avoid further lost cases, and not a free ministerial choice.

Failed attempts at reform

The 1998 Act

The solution reached by the Blair Government in the Human Rights Act 1998 was to provide a mechanism that they hoped would incorporate the processes of the ECHR directly into domestic law.

Government officials were already describing the changes in the language of a “constitutional giant” capable of shifting the “tectonic plates” of government, pushing the “Human Rights culture” across all of government.¹⁶ According to the Head of the Human Rights Unit, this would come to include “a new ethical language for policy making and dispute resolution”, “extra help for the ‘victims of democracy’”, “judges and politicians working in partnership”, and a UK Bill of Rights. In turn, this required public officials to push this agenda to elected politicians (“walk the talk”) and in delivering their front line services.¹⁷

The Act itself required all public authorities to comply with the provisions of the Convention, and allowed individuals to appeal under ECHR principles in British courts, which were then obliged to apply Strasbourg principles to the case. In other words, British judges had to ‘put a Strasbourg head on’.

Judges were also authorised not to strike down Acts of Parliament that conflicted with their interpretation of ECHR law, but instead to issue a ‘Declaration of Incompatibility’ that would trigger a move to amend the law accordingly. As a consequence, the fig leaf of Parliamentary supremacy was retained.

Even at the time of the passage of the Bill, future problems were already being highlighted. These included:

- The need for a major training programme for the legal profession.
- The Canadian example of courts overriding federal and provincial law on abortion under Human Rights principles.
- The Government admitting in response that there were issues on which a court to the contrary might refer legislation back to Parliament as incompatible under the HRA, but the Government decide to ignore the judges.

¹⁶ *Whitehall and the Human Rights Act 1998: The First Year*, Jeremy Croft, UCL/Joseph Rowntree Trust

¹⁷ Given that one of the two aims of this little-known Unit has been assessed to be to support the 1998 Act and counter criticisms about the ‘damage’ it might cause to the legal system, its continuing value to the body politic in its current form may be questioned.

- The politicising of the judiciary.
- Extra burdens for local councils and service providers to avoid court cases because action wasn't taken, or was.¹⁸
- Difficulties in defining what bodies count as a “public authority” under the legislation, and therefore particularly subject to Human Rights commitments.
- The rushed Parliamentary review process.
- Impingements upon the churches.
- The ministerial statement of HRA compliance for new legislation being a formality rather than reasoned, and therefore subject to shock reversals.
- The loss of the death penalty in times of war.¹⁹
- The expectation that the HRA would affect the legal system as far down as Magistrates Courts, justices clerks, county courts and Crown courts, perhaps through deliberate exploitation by lawyers in front of benches lacking the requisite knowledge.

What difference did the HRA make?

On one very basic level, the Human Rights Act made absolutely no difference to the realities of Human Rights law. Common Law principles continued to be secondary to ECHR case law. What did change was that the courts often recognised this earlier in proceedings rather than at the end of a lengthy appeal process.

This can be said to have been the principle success of the HRA. Yet even this was of limited standing, since Article 13 had already been interpreted by the Court as applying only to Human Rights cases considered “arguable” in terms of the Convention, an opinion set out in the Heathrow case.

The appeal process itself notably did not end, and cases continue to progress to Strasbourg. So it could be argued that the real change is that ministers have thrown in the towel, and found a solution where the real impact of Human Rights law is both better hidden from the public, and where the UK courts are more complicit.

It is worth noting that the HRA was not a response to an obligation but a policy choice. Under *Fox, Campbell and Hartley v UK* (1990):

“The applicants contended that, as the Convention had not been incorporated into United Kingdom law, they had been unable to challenge

¹⁸ At least one of the warned observations, relating to confusion in the NHS over duty of care to patients, has clearly followed

¹⁹ Nuremberg punishments notwithstanding

the lawfulness of their detention before the domestic courts in accordance with Article 5 § 4 (art. 5-4), which provides: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.""

However, the Court specifically declared that it was not necessary to incorporate the ECHR directly into national legal systems to make it enforceable.

In this respect, the stated intent sometimes given – that the HRA provides a more direct access to justice for the plaintiff – was a fig leaf.

The reality clearly was that the HRA was meant in the main to cover the many cases where the Strasbourg Court had found against the British Government in cases brought under Article 13. These were cases lost because of the lack of remedies through domestic courts, that is to say the absence of a review mechanism, and not the substance of the cases themselves.

In other words, the HRA tackled the fact that British courts ignored the ECHR rather than the extent or relevance of the ECHR to the case. Indeed, under *Z and Others v UK* (2001) it was expressly stated that the British court system would be empowered to review cases under Article 13 (and so there would no longer be any future need for Strasbourg appeals).

Moreover, certain of the caveats within the Act yet remain to be challenged, and so its effectiveness remains uncertain. In particular, Section 6 states that:

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

These attempts to absolve government departments and agencies of guilt in cases of faulty legislation remain questionable defences on appeal to Strasbourg itself. The twin poles of the HRA, the acknowledged supremacy of Parliament faced with the acknowledged insurmountability of the ECHR, rest as the unstable unstoppable force and immovable object at the heart of a shaky buried reality.

The Human Rights Act did not answer the main problems with the ECHR:

- Cases previously not appealed against under ECHR law automatically now take Strasbourg into account, widening as well as deepening the impact of Human Rights law.
- Cases are still going to Strasbourg in some numbers.
- Cases won in UK Courts and lost at Strasbourg are now lost before they get to Strasbourg, rather than reliant upon a commitment to a further appeal.
- The UK is continuing to lose cases at Strasbourg despite the HRA.
- No mechanism exists in UK law to retrospectively apply rulings to anything that happened before 1998 and the introduction of the HRA. By this necessary legal quirk, the UK will continue to automatically lose cases concerning the absence of the HRA before that date. This will only rectify itself with the passage of time, which could take decades.
- There are an increasing number of compensation claims, but without the restraining tendency of Strasbourg Judges, who have historically tended towards lower payments than domestic courts.
- The final legal bill to the taxpayer does not seem to have been materially affected.

The point that the HRA has not had the desired effect of limiting appeals to Strasbourg can perhaps be best viewed by the following table.

Table 3: Share of cases where the UK Government has lost the case or settled out of court, as a proportion of judgments in which the UK was the Respondent State, by year reached²⁰

1959	0/0								
1960	0/0	1970	0/0	1980	1/1	1990	4/6	2000	26/30
1961	0/0	1971	0/0	1981	3/3	1991	3/4	2001	21/33
1962	0/0	1972	0/0	1982	3/3	1992	2/3	2002	36/40
1963	0/0	1973	0/0	1983	4/4	1993	3/6	2003	21/25
1964	0/0	1974	0/0	1984	2/2	1994	3/7	2004	22/23
1965	0/0	1975	1/1	1985	1/3	1995	4/8	2005	18/18
1966	0/0	1976	0/1	1986	1/5	1996	8/12	2006	14/23
1967	0/0	1977	0/0	1987	7/8	1997	6/10	2007	40/50
1968	0/0	1978	2/2	1988	8/8	1998	6/10	2008	30/36
1969	0/0	1979	1/1	1989	2/4	1999	14/14	2009 ²¹	14/15

²⁰ Source: HUDOC database.

This comprises a total of 331 out of 417 cases. Even allowing for the infamous delays (the trickle-through date for the last cases referred before the HRA was enacted in 1998 meaning they were settled at Strasbourg over 2002-3), the number of appeals to the Court actually *went up* after the Human Rights Act.

Roughly *four fifths* (246/331) of all lost judgments ever made by Strasbourg about a British case have been reached since the HRA was signed.

About *one third* of all judgments ever made involving the UK were actually referred to Strasbourg after the HRA entered into law, rather than concluded by British courts.

To these we add data showing the number of minority statements or contrary rulings issued by the sitting British judge, where he disagreed with the majority decision.

Table 4: Number of cases annually where the British ECHR Judge has dissented from his colleagues

1959									
1960		1970		1980	1	1990	1	2000	2
1961		1971		1981		1991		2001	3
1962		1972		1982	1	1992	1	2002	1
1963		1973		1983		1993		2003	2
1964		1974		1984	1	1994		2004	
1965		1975	1	1985		1995	2	2005	
1966		1976		1986		1996	3	2006	
1967		1977		1987	1	1997		2007	
1968		1978	2	1988	1	1998	2	2008	
1969		1979	1	1989	1	1999	1	2009	

From this we note a regular trickle of decisions where the British judge – informed by Common Law practice, even with a Strasbourg hat on, objects to part or all of a decision reached by his colleagues. No fewer than 28 cases – or just under one in ten – lost by the British Government found more support from the Common Law judge interpreting the case from his background than from his colleagues hailing from a continental law tradition. It is also striking, and perhaps a concern, that, for whatever reason, this dissent has dropped away since the introduction of the HRA.

²¹ It appears that this year's dip has been the result in part of a major backlog of cases emerging from Turkey. An alternate explanation is that the UK's own backlog of cases on widower rights is now clearing, and that 2003-2005 trends will be the standard average rate in the future.

Failure of the 1998 Act

Attempts to remedy the clash between the courts have merely confirmed the existence of a higher legal authority than that of the British courts, or more importantly than of Parliament. It is not simply an issue of the higher authority emerging from the rulings of one European Court, but instead of a set of interpretations past and future. These legal decisions crucially cannot be amended by any mandated government.

Since the Convention can be interpreted in different ways by different judges, the right of appeal to Strasbourg and the possibility of cases being overturned has not been removed.

At the same time, a decision reached at Strasbourg involving, for example, a Slovakian judging a Swede can still generate case precedent untouched by British legal minds.

The immediate failure was intimated within the Court's ruling in *Burden v The United Kingdom* in 2005:

"As at 30 July 2007, since the Human Rights Act came into force on 2 October 2000 there had been 24 declarations of incompatibility. Of these, six had been overturned on appeal and three remained subject to appeal in whole or in part. Of the 15 declarations which had become final, three related to provisions that had already been remedied by primary legislation at the time of the declaration; seven had been remedied by subsequent primary legislation; one had been remedied by a remedial order under section 10 of the Act; one was being remedied by primary legislation in the course of being implemented; one was the subject of public consultation; and two (relating to the same issue) would be the subject of remedial measures which the Government intended to lay before Parliament in the autumn of 2007. In one case, A v. Secretary of State for the Home Department [2005] 2 AC 68, the House of Lords made a declaration of incompatibility concerning section 23 of the Anti-Terrorism, Crime and Security Act 2001, which gave the Secretary of State power to detain suspected international terrorists in certain circumstances. The Government responded immediately by repealing the offending provision by section 16 of the Prevention of Terrorism Act 2005."

The 1998 Act has therefore resolved one set of problems by creating a new set.

Monitoring failures of application

The mechanisms within the Convention apparatus to monitor the application of Strasbourg decisions demonstrate the failure of UK policy. The Committee of Ministers is responsible for reviewing the extent to which signatory states are following the law, and produce an annual report on the subject.

Parliament's Joint Committee (on which more later), reports that:

"At the end of 2007, there were 30 UK cases subject to the supervision of the Committee of Ministers (excluding those which had been closed, pending a final resolution). Although this represents a tiny proportion of the work of the Committee of Ministers (0.55% of its current workload), half of these are leading cases that raise new systemic issues. In those 15 cases, the Government may need to reform domestic law, practice or policy to remove a breach of the Convention that has a continuing effect on the rights of people in the United Kingdom."²²

Significantly, the UK is ranked in the top ten for delays in implementing such changes; it ranks highest for resolutions lasting over five years; and comes third (behind Turkey and Italy) in terms of outstanding cases over five years in duration. Northern Irish case review, Travellers' rights, and corporal punishment proved to have generated particular legal problems in attempting to implement rulings.

²² *Monitoring the Government's Response to Human Rights Judgements: Annual Report 2008*, 31 October 2008

Consequences

Influence on policy formation

A major difficulty in assessing the impact of the ECHR lies in the reality that many decisions are made based on its provisions, but where the source is not accredited.

Some examples of this include:

- Reports that prisoners should not be obliged to wear handcuffs in public, as it would be humiliating.
- Suggestions that prisoners should not be allowed to be seen exiting a court room in public.
- Rejection of Government policy proposals that prisoners should wear uniforms when in public, particularly when carrying out community service-style activity.
- Police forces having to advertise that they have a vehicle in a high-crime neighbourhood that has cameras recording who is stealing it.
- Employees successfully suing for 'hurt feelings' over dress codes.²³
- Faith institutions being obliged to employ people of contrary personal beliefs.
- Restrictions on Church-run adoption agencies.
- Certain health and safety rules involving a duty of care: ECHR rights provide one cog in the motor that drives playground closures and laying gravestones flat based on a risk assessment culture.
- Threats to ban jokes referencing minorities on incitement grounds, notably the legislation criticised by Rowan Atkinson.²⁴
- Politically correct name changes.

There is a specific example in the decision of the Court of Appeal in *Tabernacle v Secretary of State for Defence* (2009). The court held that byelaws prohibiting camping on Ministry of Defence land adjacent to the Atomic Weapons Establishment at

²³ <http://www.dailymail.co.uk/news/article-1193100/Muslim-cocktail-waitress-gets-3-000-sexual-harassment-bar-ordered-wear-indecent-dress.html> and

<http://news.bbc.co.uk/1/hi/england/london/7457794.stm> over headscarves. *Dunnachie v Kingston Upon Hull City Council* was resolved in 2004 by the House of Lords overturning the earlier decision allowing a very large sum in compensation for 'hurt feelings', though this controversy has yet to be revisited at Strasbourg and may end badly for businesses.

²⁴ <http://www.independent.co.uk/news/uk/home-news/rowan-atkinson-attacks-proposed-terrorism-law-631693.html>

Aldermaston, Berkshire violated the human rights of women peace protestors under Articles 10 and 11 of the ECHR. The case did not need to get to Strasbourg.

This hybrid condition, lying somewhere between Common Law and Human Rights-driven case law, has contributed in part towards the current malaise in UK libel law.

A unique mixture of tort law on the individual's good name, the development of no-win no-fee claims, London's position as a vibrant world hub of press and literature, and to a small extent a weakened grip on legal fees have combined with the motor of Human Rights provisions to turn London into the world capital of suing, even – and especially – where the perceived libel was mostly conducted in another country.

The cultural damage that will inevitably follow will be felt over the longer term, as publishers block access to publications and sites to subscribers with UK addresses.

Other criticism

The ECHR's faults have not gone unnoticed. Most significant of the recent criticisms of the system were the remarks made in April 2009 by Lord Hoffmann, one of the country's senior judges.²⁵ The second most senior law lord – himself noted for his human rights record – observed that after the Second World War, the American model of individual rights and freedoms from state interference shifted. What was originally intended as a mission statement based on French philosophy became interpreted and imposed by judges from other legal traditions. Member states were not being given enough leeway to interpret rights according to their own, slightly different, traditions. He commented that:

"In practice, the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe."

In particular, he criticised decisions such as those over the right to silence in bankruptcy cases, a position that had evolved over 150 years. The reaction of the Strasbourg Court had been unmeasured:

"One would imagine from the language of the Court that the inspectors had used thumb screws to obtain the information."

²⁵http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc

The crude terms in which the Strasbourg court held the privilege applicable encouraged other applicants."

Other cases involved such a *reductio ad absurdum* that they should have been thrown out as "manifestly unfounded". Then there was the enthusiasm for hearsay evidence, in England "generally thought irrational and an obstacle to justice" but since 2003 seen at Strasbourg as a fundamental human right.

Lord Hoffmann drew particular attention to comments made by the current President of the Strasbourg Court:

"It is true that the original text of the Convention does not yet disclose an awareness of the need for the protection of environmental human rights. In the 1950s, the universal need for environmental protection was not yet apparent...[But] as the Court has often underlined: "The Convention is a living instrument, to be interpreted in the light of present-day conditions"...This "evolutive" interpretation by the Commission and the Court of various Convention requirements has generally been "progressive", in the sense that they have gradually extended and raised the level of protection afforded to the rights and freedoms guaranteed by the Convention to develop the "European public order". In the field of environmental human rights, which was practically unknown in 1950, the Commission and the Court have increasingly taken the view that Article 8 embraces the right to a healthy environment, and therefore to protection against pollution and nuisances caused by harmful chemicals, offensive smells, agents which precipitate respiratory ailments, noise and so on."

This triggered a strong rebuttal:

"I would entirely accept that the practical expression of concepts employed in a treaty or constitutional document may change. To take a common example, the practical application of the concept of a cruel punishment may not be the same today as it was even 50 years ago. But that does not entitle a judicial body to introduce wholly new concepts, such as the protection of the environment, into an international treaty which makes no mention of them, simply because it would be more in accordance with the spirit of the times.²⁶ It cannot be right that the balance we in this country strike between freedom of the press and

²⁶ See *Birmingham City Council v Oakley* [2001] 1 AC617, 631-632.



privacy should be decided by a Slovenian judge saying of a decision of the German Constitutional Court —

I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press...It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded.²⁷

What grandeur, Bentham would have said. What legislative power the judicial representative of Slovenia can wield from his chambers in Strasbourg. Out with this pernicious American influence. What do their courts or Founding Fathers know of human rights? It is we in Strasbourg who decree the European public order. Let the balance be struck differently, I say, and all the courts of Europe must jump to attention."

²⁷ Judge Zupančič concurring in *Von Hannover v Germany* (24 June 2004).

Solutions

Option 1: Scrap the HRA, and replace it with a 'Bill of Rights' while retaining the current ECHR arrangements.

The flaw with this response is that the Strasbourg Court retains jurisdictional supremacy over anything the UK courts decide and, as it keeps its position as place of final appeal, also continues to have the last say. Any attempt to create a competing legal system internal to the UK would simply generate a competing legal authority, and ultimately a legal crisis that could only be settled either by recognising that Strasbourg was in fact supreme, or by ending Strasbourg's jurisdiction – both conclusions the new Bill of Rights is intended to circumvent.²⁸

Supporters of this approach say that part of the problem has been that UK Courts have gone beyond Strasbourg rulings, and that the solution is simply to redress the recent imbalances in the Human Rights Act.²⁹

This does hold true of litigation cases, where the Strasbourg Court has found vastly smaller payments to be appropriate rather than the ludicrous levels awarded by UK courts. Avoiding that is at least one benefit that appears to flow automatically from repealing the HRA by itself

However, the supporters of this response to the ECHR problem tend not to use this argument, but look at other cases. An example given is over deportation, where case law has prohibited individuals being deported to countries where they may face torture. The suggestion is that UK courts are to blame for interpreting the HRA to block deportation where it may also infringe upon family life, and that such is a step too far and not the fault of the Strasbourg Court.

But this is a misrepresentation, because it remains at root the fault of the Convention. The fact that a UK court has interpreted the law this way does not mean that the Strasbourg courts would not have equally done so once invited, which they could have

²⁸ A proof of this lies in a judgment from Lord Scarman from 1980, which stressed the importance of the rule of Parliament: "This House's decision, even though the European Court has held the rule it declares to be an infringement of the Convention, is the law. Our courts must continue to look, not to the European Court's decision but to the House of Lords' decision."

²⁹ Notably Dominic Grieve, <http://conservativehome.blogs.com/platform/2009/04/dominic-grieve-.html>. Especially peculiar is his defence that governments do not have to abide by Strasbourg rulings since they are not legally enforceable, having earlier indicated how important it was to be seen to following rulings under fair play principles. There is also a self-denying observation that withdrawal from the Convention has limited effect upon vexing issues of the day because countries such as the USA are bound by other international conventions against torture, which indeed strengthens the argument supporting seeking alternative arrangements in the first place, since key civic defences can remain.

done on appeal. Unlike with litigation cases, it is a matter of a track record that is simply not at play.

Dominic Grieve (see footnote) observes that, “By enacting a well-drafted Bill of Rights compatible with the rights in the text of the ECHR it will be far less likely that our domestic court’s interpretation of it will be faulted by the Strasbourg Court which has shown itself respectful of countries constitutional laws.”

As the annexes show, that is wishful thinking. It is, however, possible to concur with his conclusion, on the ongoing quest for a serious policy shift: “If we do it with a vigorous but rational debate we can achieve an outcome that will be good for our country and the rule of law.”

What is clear is that there is no legal need for either a HRA or such a Bill of Rights as an incorporated counterpoise to Strasbourg. In *Christine Goodwin v. the United Kingdom* (2002), the Grand Chamber held that “Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting States a requirement to incorporate the Convention”. Consequently, it is up to the UK to decide its own mechanism for compliance with the ECHR.

The HRA is a flag of convenience to hide an embarrassing reality; simply creating a Bill of Rights does not resolve the internal frictions between two competing legal engines.

Option 2: withdraw from the Convention, agree opt-outs, and rejoin

This has one key disadvantage, namely that it relies upon other states being willing to accept such an event. However, the Convention is a treaty, entered into willingly by states. It is also an old and dated treaty that deserves revisiting. Consequently, it is perfectly within the bounds of reasonability that a country – particularly a clearly democratic and rights-aware country such as the UK – could readjust its present terms of association.

What would such changes entail?

In broad terms, they could highlight that:

- With rights come responsibilities.
- Parliament and the UK law courts combined make up the standard interpreter of what may be called social rights.
- The Strasbourg Courts are there to judge in cases of significant human rights abuse (which we might style “liberty, life and limb”).

- The Common Law tradition makes the UK (and one or two other states) a legal exception to Strasbourg's *modus operandi* that needs to be recognised.

One partial solution in respect to the last point may be to widen the definition of both Strasbourg and UK (and Irish, and possibly Cypriot and Maltese) judges' "margin of appreciation" in interpreting ECHR rights to suit the Common Law tradition.

Option 3: withdraw from the Convention and establish a stand-alone 'Bill of Rights'

The objection to this proposal is predominantly that it would "send a bad signal" to other states and encourage countries in Eastern Europe to themselves withdraw from the ECHR, and go on to commit atrocities. This argument overplays the importance of the Convention as opposed to the power politics of modern Europe and the realities of trade. In reality, this objection is primarily targeted at fears regarding human rights in Turkey and Russia under future governments, and Belarus under the present one.

By extension, there seems to be a misplaced lack of self-confidence about the ability of the UK law courts to protect individual rights.

A stand-alone system would have the advantage of underlining that a move away from the ECHR system was not a rejection of the need to protect people from state repression, and would go some way to rebutting the above criticisms. Examples of states which have adopted such an approach include Canada and New Zealand, demonstrating ECHR membership is not a prerequisite to humane government.

Option 4: withdraw from the Convention and rely on existing protections under Common Law

Another option would be to use the 60th anniversary of the Convention to point to the inappropriateness of the ECHR for a judicially liberated democracy today, and end UK participation on the grounds of the incompatibility of Strasbourg and Common Law case law.

This might or might not be accompanied by a renewed commitment to the Hague Court as an arbiter in cases of genuine human rights suppression. As Lord Hoffmann (cited earlier) observed, that is already an International Criminal Court looking after human rights. He also went further:

"One might, I suppose, have an international tribunal which declared in general terms that the practices of a Member State were plainly not in accordance with human rights, declaring, for example, that Italy does not have an efficient court system or Russia does not have a fair one. But these



are political rather than judicial statements. One does not need a court to pronounce upon them."

The Convention and the EU

Supporters of the Convention have reportedly threatened that withdrawal from the Convention might lead to consequences in the EU, in terms of disqualifying the member state from participation and membership.³⁰

That threat does not make sense. Article 6 of the Lisbon Treaty now sees the EU accede to the ECHR in its own right: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." It is hard to see how any member state or member of the Commission could argue that the United Kingdom would, merely by the act of withdrawing from the ECHR, be in breach of its obligations regarding civic and personal rights, whichever option it took to allow them to flourish in the future.

In fact, the real problem is that as long as the UK remains within the EU under the existing terms, ECHR principles will continue to affect the UK through the institutions of Brussels and Luxembourg instead of Strasbourg.

Consequently, any meaningful settlement of the UK's Strasbourg problem would also need to address Britain's relationship with the three key EU motors for 'Human Rights':

- The EU's Fundamental Rights Agency, which has a budget of €17 million (and increasing annually) and exists seemingly simply to duplicate Strasbourg from within the EU structures. Staffing levels are planned to reach 100.
- The Charter of Fundamental Rights, now incorporated fully into the treaties under Lisbon and impacting directly into EU law and operations.
- Primary legislation and European Court of Justice cases that use ECHR principles as an 'inspiration', and not far short of a legal base.

³⁰ We leave entirely to one side in this paper the pros and cons of EU membership.

Appendix 1

The following provides a summary of all the cases brought against the United Kingdom at Strasbourg that have led to an adverse decision in part or whole.

We also provide a brief analysis of the financial and broader legal consequences as appropriate.

1975

Case: **Golder v United Kingdom**³¹

Year Judged: **1975**
Year Referred: **1970**

Summary: The Home Secretary adjudged wrong to have refused a prisoner the right of access to a solicitor to bring a libel charge against a warden, who had identified the plaintiff as a participant in an assault.

Particular consequences: UK attempts to hide behind the “prior ventilation rule”, ie use of existing channels. This will inevitably be challenged.

UK Judge dissenting opinion: Agreed but “with some misgivings”; “I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle”

1978

Case: **Ireland v United Kingdom**

Year Judged: **1978**
Year Referred: **1971**

Summary: Ruled that the interrogation techniques of stress positioning, hooding, noise subjection, and sleep and food deprivation as used in Ulster against the IRA were not torture but did make up inhuman and degrading treatment.

Particular consequences: The practice had been stopped in 1971 – around the time the Irish Government first brought the case to the ECHR. Ramifications continue with interrogation techniques against terrorist suspects today.

UK Judge dissenting opinion: Caveat on definitions of ‘inhumane’

Case: **Tyrer v United Kingdom**

Year Judged: **1978**
Year Referred: **1972**

Summary: A 15 year old in the Isle of Man was birched with three strokes for assaulting a boy. The case was continued with despite an attempt by the plaintiff to withdraw the case on reaching maturity. Corporal judicial punishment is judged to be degrading. The British judge Sir Gerald Fitzmaurice dissented, expressing concern over trend of Court interpretations over ‘degrading punishments’.

Particular consequences: A clear democratic override. The Tynwald had voted to retain the

³¹ These judgments are online at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

birch as recently as the year before, albeit removing the charge in question from the offences so punishable. However, popular opinion was said not be enough; there had to be conclusive proof of a deterrence factor. Even the existence of a review of corporal judicial punishment was indicative of an alternative: an unhelpful precedent was therefore set allowing debate to justify judicial obligation for change.

Cost impact: Whatever your position on the merits and demerits, corporal punishment is less expensive than incarceration, so there is a cost impact. However, we pass over an analysis of these relative costs and principles in this paper. A Tynwald insider today observes, "it would be fair to say that both the Isle of Man Government and the Legislature have learned a painful and expensive lesson with the Tyrer judgment."

UK Judge dissenting opinion: Yes

1979

Case: **Sunday Times v United Kingdom**

Year Judged: **1979**

Year Referred: **1974**

Summary: The thalidomide case. The Sunday Times had published articles that were deemed to be prejudicial to an ongoing damages case and had been injuncted. After a lengthy legal battle in the UK, the Court ruled by a narrow margin that the paper was entitled to run with the story under Freedom of Expression grounds.

Particular consequences: First chink in the power of the state to injunct newspapers for human rights issues.

UK Judge dissenting opinion: Yes. Joined nine colleagues in stating that freedom of expression should not permit contempt of court, which was the intent. Ironically, "It should be noted that it was clearly with a view to covering this institution, which is peculiar to the legal traditions of the common-law countries, that the restriction on freedom of expression aimed at maintaining the authority and impartiality of the judiciary was introduced into the Convention. A similar restriction is unknown in the law of most of the member States; absent in the original draft of the Convention, it was inserted on the proposal of the British delegation." Also stated that the national judge was better placed to make the call.

1980

Case: **Sunday Times v United Kingdom (Article 50)**

Year Judged: **1980**

Year Referred: **1974**

Summary: Awarded £22,000 in costs to the paper in respect to the above case.

Particular consequences: Confirms the ECHR as a legal milch cow.

UK Judge dissenting opinion: Yes. Called in particular one of the claims "quite gratuitous and uncalled for".

1981

Case: **Dudgeon v United Kingdom**

Year Judged: **1981**

Year Referred: **1976**

Summary: Buggery was still on the books in Northern Ireland as an illegal act. A gay rights

campaigner had been questioned about his lifestyle after a raid by police which uncovered personal diaries. The Director of Prosecutions dropped the case in 1977. The Court ruled that the activity and legislation had been in breach of the right for respect for his private life.

Particular consequences: The tendency by the authorities in NI not to enforce the law was again taken as a counter argument against retaining it, notwithstanding public opinion (see *Tyler v UK* above). This reinforced liberalisation.

UK Judge dissenting opinion: No

Case: X v United Kingdom

Year Judged: 1981
Year Referred: 1975

Summary: Related to a Broadmoor patient, who had been recalled there after being discharged. The Court found that his case should have been reviewed more speedily, and less reliant on the basis of his former committal.

Particular consequences: Mental Health Act was modified.

Cost impact: £12.3 million per year due to increased numbers of tribunals.³²

UK Judge dissenting opinion: No

Case: Young, James and Webster v United Kingdom

Year Judged: 1981
Year Referred: 1976, 1977

Summary: Three BR employees were sacked after refusing, for different reasons, to join a trades union under a closed shop agreement. The Court found this restricted their freedom of expression. This case was famously supported by the McWhirters.

Particular consequences: A very positive one, not least given the large number of state-run industries this judgment immediately affected.

UK Judge dissenting opinion: No

1982

Case: Campbell and Cosans v United Kingdom

Year Judged: 1982
Year Referred: 1976

Summary: Found that uniform corporal punishment in Scottish schools was in breach of parental right for their children to be taught according to their own philosophical beliefs. Parents who withheld their son to avoid the possibility of corporal punishment had seen his right to education further breached.

Particular consequences: Undermined corporal punishment system, as caning was a feature in four fifths of UK schools. Two thirds of secondary school parents are noted during the debate as in favour of retention. In 1982, HMG began a review to abolish it, leading to the Education (Corporal Punishment) Bill 1985. Attempts to provide choice to parents over schools which did and did not have such punishment were dismissed on practical cost grounds, but as it did remain a legal option an exemptions scheme was selected. However, as this created two sets of standards, the implication was to undermine the administration of the punishment. Some MPs already question whether withdrawal from the ECHR is the solution.

³² <http://pb.rcpsych.org/cgi/reprint/18/5/274.pdf>, a paper costing the changes which appeared in 1994 in the *Psychiatric Bulletin*

Cost impact: Reported to have generated out of court settlements where pupils were suspended after refusing to be caned.

UK Judge dissenting opinion: Yes, recalling the UK's reservation on the issue on signing.

Case: X v United Kingdom (Article 50³³)

Year Judged: 1982
Year Referred: 1975

Summary: Awarded some costs but no compensation in respect to the above case.

UK Judge dissenting opinion: No

Case: Young, James and Webster v United Kingdom (Article 50)

Year Judged: 1982
Year Referred: 1976, 1977

Summary: With respect to the case above, awarded costs, and damages of £65,000

Cost impact: Minimal

UK Judge dissenting opinion: No

1983

Case: Campbell and Cosans v United Kingdom (Article 50)

Year Judged: 1983
Year Referred: 1976

Summary: Awarded damages for the earlier case, and £3,000 for the individual who had missed a year's schooling (but who had declined alternative offers and had ended up unemployed).

Particular consequences: Confirmed that damages were due to truants due corporal punishment.

Cost impact: Minimal but did establish the principle of compensation available for children whose parents pull them out of education on similar grounds.

UK Judge dissenting opinion: No

Case: Dudgeon v United Kingdom (Article 50)

Year Judged: 1983
Year Referred: 1976

Summary: Awarded costs that the Northern Ireland Gay Rights Association had covered.

Particular consequences: Confirmed that third parties could underwrite litigation at Strasbourg.

Cost impact: Minimal initially. Significant over the long term in that it encouraged campaign groups to back test cases, as if they won they would recoup losses.

UK Judge dissenting opinion: No

Case: Silver and Others v United Kingdom

Year Judged: 1983
Year Referred: 1972,

³³ Article 50 refers to appropriate measures for costs, and compensation. Typically, where they are disputed (ie in Article 50 cases here listed) this concerns the level of legal fees the solicitors have put in for, expenditure such as travel costs typically not awarded in English courts, and damages where the Crown lawyers argue that redress is compensation enough.

1973, 1975

Summary: Challenged power of prison governors to confiscate prisoners' letters, for instance if they involved lobbying over their prison sentence, bad language, material for publication, and complaints. Perceived as a breach of the freedom of expression.

Particular consequences: The system had already been changed by 1981, likely in part as a consequence of these cases.

If there were any doubt, this case confirmed that a right expressly granted in accordance with the due processes of Parliament was inferior to a right as interpreted under the ECHR.

Cost impact: There is likely to have been a number of out of court settlements that followed.

UK Judge dissenting opinion: No

Case: **Silver and Others v United Kingdom (Article 50)**

Year Judged: **1983**
Year Referred: **1972, 1973, 1975**

Summary: Determined costs for the above.

UK Judge dissenting opinion: No

1984

Case: **Campbell and Fell v United Kingdom**

Year Judged: **1984**
Year Referred: **1977**

Summary: Two people convicted of IRA terrorism, one a priest, had been involved in what developed into a serious prison brawl. The Court judged that the internal punishment system administering remission penalties, particularly the way the Board of Visitors operated, violated several elements of the Charter. £13,000 was awarded in costs.

Particular consequences: Fillip for IRA sympathizers.

Since the 1970s, the UK Courts have increasingly become involved in prisoner rights issues, especially disciplinary adjudications, sentence calculation, prison transfers and security classification.

Ultimately, the Board of Visitors ceases reviewing serious charges and the level of punishments available is reduced. The process is slow and drawn out by further ECHR rulings. The Woolf report eventually recommends introduction of visiting magistrates and a Prison Ombudsman also follows.

Cost impact: Significantly increased paper trail providing written evidence for all decisions. Changes to procedure and structure will have involved cost over the years, though this is difficult to quantify.

UK Judge dissenting opinion: Yes. Disagreed over the Board of Visitors, on the bases that the penalties were disciplinary rather than new criminal ones.

Case: **Malone v United Kingdom**

Year Judged: **1984**
Year Referred: **1979**

Summary: Challenge of a police phone intercept in a criminal case. The Court upheld the view

that it was illegal.

Particular consequences: Severe blow to police surveillance powers.

More crucially, this case revolutionised the principles underpinning Common Law. Previously, an action was lawful where it was not specifically prohibited by law. Following this judgment, for something to be lawful it must be in accordance with the ECHR concept of law, and requiring a law to confirm rights where they did not expressly exist.

Despite the Interception of Communications Act 1985 addressing issues raised in this case, and setting up an ombudsman, many other lost intercept cases will follow.

UK Judge dissenting opinion: No

1985

Case: **Abdulaziz, Cabales and Balkandali v United Kingdom**

Year Judged: **1985**

Year Referred: **1980, 1981**

Summary: This related to immigration Rules, which prohibited the husbands of the plaintiffs from settling in the UK as they had arrived after the Rules had changed. The Court found that it was easier for wives to be allowed in than husbands, which meant sex discrimination, and that the appeal system fell short. Costs awarded.

Particular consequences: A hidden element of background to this case lies in the 1973 Commission ruling *East African Asians v United Kingdom*. The UK Government only granted right of publication in 1994. It related to the politically highly sensitive issue of the award of passports to stateless East African Asians. The case was resolved by the Government before it was referred to Strasbourg. This provides an astonishing insight into the perception Government had of public and legal consequences of lost high profile court cases.

Cost impact: Assessed by the Government to cover 5,700 entrants per year. By extrapolation, since 1985, an extra 131,000 immigrants would have been permitted UK residence under this ruling. This sum obviously assumes regular rates and no amendment of any set quotas in compensation. Given current rates of immigration, however, it seems fair to assume neither caveat applies. According to research undertaken by Migrationwatch, the overall economic benefits of immigration are largely neutral. However, there are clear impacts upon the housing market and on the provision of social services, including health, due to increased per capita pressures. As we cannot confidently contrast net economic gains with social costs, we leave this as a neutral cost impact.

UK Judge dissenting opinion: No.

1986

Case: **Gillow v United Kingdom**

Year Judged: **1986**

Year Referred: **1980**

Summary: A couple returned to their house on Guernsey to retire, but were refused permission to stay there by the authorities on time-based residency grounds. An extension of temporary residency was also declined while the house was sold. The Court ruled that in this case, the right to a home had been breached, but that restrictive residency laws per se were not illegal.

Particular consequences: Crack in the independence of the Channel Islands, albeit over a

meritorious case that should be been handled more sensibly.

UK Judge dissenting opinion: No

1987

Case: **B v United Kingdom**

Year Judged: **1987**

Year Referred: **1982**

Summary: A woman whose child was in care was given reduced access rights to the child on the grounds that contact was irregular and harmful. The Court found that the appeal system was too limited and breached issues relating to the right to a family life.

Particular consequences: Led (with other care cases) to a change in UK law in the Health and Social Services and Social Security Adjudications Act 1983, resulting in a Central Council for Education and Training in Social Work (abolished in 2002 when superseded by more judgments and by the Care Standards Act 2002), and Registered Homes Tribunals.

Cost impact: Around £40 million per year.

UK Judge dissenting opinion: No

Case: **Gillow v United Kingdom (Article 50)**

Year Judged: **1987**

Year Referred: **1980**

Summary: With respect to the above case, awarded costs and £10,000 damages.

UK Judge dissenting opinion: No

Case: **H v United Kingdom**

Year Judged: **1987**

Year Referred: **1981**

Summary: The Court ruled that in an adoption case, the local authority had failed to uphold the rights of the mother.

Particular consequences: Minimal, as the case specifics were unique.

UK Judge dissenting opinion: No

Case: **O v United Kingdom**

Year Judged: **1987**

Year Referred: **1981**

Summary: Children had been put into care after the father assaulted one of them. He attempted to appeal but found the court system focused on legality rather than review. The Court found his rights had been breached.

Particular consequences: Led (with other care cases) to a change in UK law in the Health and Social Services and Social Security Adjudications Act 1983

Cost impact: See above.

UK Judge dissenting opinion: No

Case: **Weeks v United Kingdom**

Year Judged: **1987**

Year Referred: **1982**

Summary: A prisoner on parole for a life offence was sent back inside three times for subsequently re-offending. The Court judged that the Home Secretary could properly do this,

but that there existed no legal redress to appeal against it.

Particular consequences: Generated precedent for convicts to litigate despite a procedure that was 'correct'.

UK Judge dissenting opinion: Yes, viewing that the original verdict prior to release had been subject to such appeals.

Case: **W v United Kingdom**

Year Judged: **1987**

Year Referred: **1982**

Summary: Related to a "tragic" case of maladministration where a mother had pulled herself out of alcoholism, but administrative delays by the adoption people led to a decision to leave the foster child where it was and deny access. The Court found the parents had been kept out of the loop on plans relating to fostering, and that the appeal system did not allow a full review.

Particular consequences: Clearly rebutted the Government's defence distinguishing between "rhetorical" rights and actual 'legal' ones: in other words, that the ECHR meant what it said and superseded conceptual principles set out in national laws.

UK Judge dissenting opinion: No

Case: **R v United Kingdom**

Year Judged: **1987**

Year Referred: **1983**

Summary: Children had been put into care because of a disruptive father. The decision was made after time to keep them with a foster family, despite the initial placement having being made by error. The Court found the appeal system in the courts was limited and in breach of the ECHR provisions.

UK Judge dissenting opinion: No

1988

Case: **Boyle and Rice v United Kingdom**

Year Judged: **1988**

Year Referred: **1982**

Summary: Related to prisoners' rights. HMG had already admitted error in intercepting one prison letter, sent to a journalist but actually in a private capacity. The Court recognized that this claim proved a breach of the ECHR while rejecting the others presented.

Particular consequences: Further complications for prison managers.

UK Judge dissenting opinion: No

Case: **Brogan and Others v United Kingdom**

Year Judged: **1988**

Year Referred: **1984, 1985**

Summary: Four people were detained and questioned as PIRA suspects. They claimed that they should have gone before a judge or judicial officer reasonably promptly. The Court agreed, and also concurred that there should be compensation.

Particular consequences: This is the first UK case raising 'promptness' in the delivery of rights, one that would continue to vex for the next thirty years, for instance when drafting legislation on the provision of prompt legal support for deployed soldiers who might be in the field (actually already here flagged up in a minority report). A media victory for PIRA.

UK Judge dissenting opinion: Yes. He held that the law allowed for a review that was

sufficiently prompt.

Case: **B v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1982**

Summary: Awarded costs and £12,000 damages

UK Judge dissenting opinion: No

Case: **H v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1981**

Summary: Awarded £12,000 damages.

UK Judge dissenting opinion: No

Case: **O v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1981**

Summary: Awarded £5,000 damages.

UK Judge dissenting opinion: No

Case: **R v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1983**

Summary: Awarded £8,000 damages.

UK Judge dissenting opinion: No

Case: **Weeks v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1982**

Summary: Awarded £8,000 damages.

UK Judge dissenting opinion: No

Case: **W v United Kingdom (Article 50)**

Year Judged: **1988**

Year Referred: **1982**

Summary: Awarded £12,000 damages

UK Judge dissenting opinion: No

1989

Case: **Gaskin v United Kingdom**

Year Judged: **1989**

Year Referred: **1983**

Summary: Related to the right of an adopted individual to access his records, with an intent to sue. The Government argued that documents in the file had been written in the expectation of confidentiality. The Court found that the files comprised highly personal information about the identity of the individual, and that therefore in cases where a contributor was not accessible or withheld consent unduly, the documents should be released, with £5,000 compensation.

Particular consequences: An early inroad into freedom of information complications and

costs. Led to the Access to Personal Files Act 1987, Access to Personal Files Regulation of 1989, and subsequently the Data Protection Act 1998.

Cost impact: The high point for the ECHR freedom of information principles came with the implementation of the Data Protection Directive, based in no small part on the 1981 Council of Europe Convention. This was transcribed into UK law in the 1998 Act. Although as a result it is a cost arising from the EU, by the same token it is hard to envisage its creation in the absence of the ECHR.

Official government cost estimates ran as follows³⁴:

Sector	Start-up costs	Recurring annual costs (£ m)
Central government	£90million	£46million
Local government	£104million	£29million
Charities/voluntary sector	£120million	£37million
Business	£836million	£630million
Total	£1.15billion	£742million

UK Judge dissenting opinion: Yes. The authorities had acted with “fair balance”. No compensation should have been paid.

Case: **Soering v United Kingdom**

Year Judged: **1989**

Year Referred: **1988**

Summary: Referred to the Haysom murders in Virginia. The applicant was fighting extradition there on the grounds that he believed that the death penalty would be sought by the State; HMG argued that it would be dropped with Federal assistance in order to allow further extraditions in the future. The Court found that HMG could not guarantee he would not be found guilty of a capital offence, and agreed with the indictee that conditions on Death Row amounted to “torture or to inhuman or degrading treatment or punishment” as prohibited under the ECHR (though the US Supreme Court had itself never reviewed this defence).

Particular consequences: This was a novel defence and set the tone for subsequent appeals of this nature. The issue even made one episode of *The West Wing*.

Amnesty International expanded upon the claims of the extraditee to challenge deporting suspects for trial where the death penalty applied, attacking capital punishment itself as “cruel and degrading.” The Court recognized that this was an evolving legal area. In time, this would lead to generic issues with extraditions to countries with the death penalty, or the prospect (whether real or slight) of torture.

Also of note in that HMG recognized there was a ECHR issue at play and deferred extradition while itself referring the issue for adjudication (hence the comparatively speedy resolution.)

UK Judge dissenting opinion: No

1990

Case: **Granger v United Kingdom**

Year Judged: **1990**

³⁴ <http://www.parliament.uk/Commons/lib/research/rp98/rp98-048.pdf>. The figures were challenged, but they were the Government’s own, and we here do not include compliance costs for the 1980s.

Year Referred: **1986**

Summary: The applicant had revoked his testimony in the box at a Scottish arson trial, and had been tried for perjury as a result. He claimed the police forced him to sign, but was convicted. The issue related to his request for legal aid. The Court found in his favour, seemingly in part because of a legal failure here by the Crown's lawyers in presenting their case (estoppel).

Particular consequences: Legal aid was reformed in 1988, again after a case was referred and before it was heard. As a further consequence of the Granger judgment, a Practice Note was issued by the Lord Justice General so that, in any appeal where legal aid was refused, such aid is automatically granted where the court has reached the conclusion that, prima facie, an appellant may have substantial grounds for taking the appeal and that it is in the interests of justice that he should have legal representation in arguing these grounds.

Cost impact: Not readily identifiable.

UK Judge dissenting opinion: No

Case: **McCallum v United Kingdom**

Year Judged: **1990**

Year Referred: **1981**

Summary: Again related to prison mail, this time relating to a violent inmate. The Court resolved some costs issues that had not been resolved.

Particular consequences: Ongoing backload from the old letters regime (see above). It demonstrates that the right to administrative appeal had now been changed in UK law as a consequence.

UK Judge dissenting opinion: No

Case: **Thynne, Wilson and Gunnell v United Kingdom**

Year Judged: **1990**

Year Referred: **1985, 1986**

Summary: Related to rapists and child offenders who had been sentenced to discretionary life sentences for shocking crimes. They had been recommitted after time outside, and complained that as their original sentence had recognized the need for medical aid such as drugs or lobotomisation, they had served the punitive side of their original punishment and should not also (at least without appeal) serve the discretionary part too. In other words, having been found a menace to society and given a discretionary life sentence, then released, they were no longer paroled subject to the original life sentence.

Particular consequences: A major blow to law enforcement and public confidence in the courts, and security. Law changed in the Criminal Justice Act 1991.

UK Judge dissenting opinion: No.

Case: **Fox, Campbell and Hartley v United Kingdom**

Year Judged: **1990**

Year Referred: **1986**

Summary: Two PIRA suspects were held for questioning, one of whom had already served time for explosives offences. Another was held for questioning in relation to a PIRA kidnapping of a man and woman to force the woman to retract evidence in a rape case. The Court found that, possible intelligence notwithstanding, the police had no "reasonable" evidence to link the applicants to a particular crime. Distinction, therefore, established between a policeman having a genuine suspicion and having a reasonable suspicion. Recognizes the right for compensation.

Particular consequences: Fillip to PIRA.

UK Judge dissenting opinion: Yes, in a case decided 4-3. Believed that the genuine suspicion was reasonable in a terrorist environment.

1991

Case: **Observer and Guardian v United Kingdom**

Year Judged: **1991**

Year Referred: **1988**

Summary: The Spycatcher Affair. Ruled that once material was in the public domain, newspapers could not be stopped from publishing it on the grounds of state confidentiality.

Particular consequences: Serious blow to confidentiality of serving personnel. Led to a spate of such books, and subsequently to an increased awareness of, for instance, intelligence-gathering and SAS capabilities by hostile forces. Examples include Richard Tomlinson, David Shaylor, Stella Rimington, George Blake (see below), Mike Coburn, Chris Ryan, Andy McNab, Sir Peter de la Billiere and others. Newspaper reports suggested Moscow was behind one print run.

Cost impact: Very expensive fees awarded for the first time, repeated below.

UK Judge dissenting opinion: No.

Case: **Sunday Times v United Kingdom (Number 2)**

Year Judged: **1991**

Year Referred: **1987**

Summary: Spycatcher again, relating to the serialization rights and the context of the book ban in the UK.

Particular consequences: See above. The issue of what law is “necessary” “in a democratic society” is becoming subjective.

UK Judge dissenting opinion: No.

Case: **Fox, Campbell and Hartley v United Kingdom (Article 50)**

Year Judged: **1991**

Year Referred: **1986**

Summary: Awarded costs and damages in the earlier case.

UK Judge dissenting opinion: No.

1992

Case: **Campbell v United Kingdom**

Year Judged: **1992**

Year Referred: **1988**

Summary: Related to a murderer who had killed six family members in a Glasgow fire. The warden agreed to leave legal correspondence over the ECHR unread, but some clearly were read. The Court resolved that such letters could be opened but not read: an impossible means of determining whether there are improper written enclosures.

Particular consequences: This ruling allowed hardened criminals a loophole access to their criminal contacts in the outside world via their lawyers, or abuse via misappropriated stationary.

UK Judge dissenting opinion: Yes. Believed the claimant was too vague and that the Court had found against the State on the basis of generalizations. Also found that the decision “would in my view be to underestimate the practical risks, to which the Government have drawn attention, of creating a privileged channel of communication so wide in scope as virtually to

invite abuse.”

Case: **Y v United Kingdom**

Year Judged: **1992**

Year Referred: **1991**

Summary: Not properly a lost judgment, but a in which a settlement had been reached with damages given. The case related to corporal punishment at a school. The Commission had agreed, and it seems HMG wanted to cut its losses without admitting guilt by offering compensation. The reaction of the Commission Secretary was disappointment: “I am instructed by the Delegate to inform you that it is with some surprise and regret that he learns that Y is contemplating a mere financial settlement of his case at such a late stage in the proceedings. Y’s case is the more impressive of the two applications concerning private school corporal punishment and clearly demonstrates the inadequacy of the civil remedy for treatment which, in the Commission’s view, was in breach of Article 3 (art. 3) of the Convention.”

Particular consequences: Pre-emptive recognition by the Government that corporal punishment was under threat under ECHR law even at private schools. In the event, the case of Costello-Roberts v the United Kingdom in 1993 saw a case critical of slipping at a boarding school narrowly rejected, though it was clear that the Court was not supportive of the practice.

UK Judge dissenting opinion: N/A

1993

Case: **Darnell v United Kingdom**

Year Judged: **1993**

Year Referred: **1989**

Summary: The case related to delays in an appeal over a sacking, and which the Minister himself had identified as badly handled.

UK Judge dissenting opinion: No.

Case: **Colman v United Kingdom**

Year Judged: **1993**

Year Referred: **1990**

Summary: Settled before it reached the Court. A practitioner of holistic medicine objected to a ban on advertising based on General Medical Council guidelines.

Particular consequences: The initial case probably triggered the White Paper in 1987. By the time of the appeal to the Commission in 1990, the GMC had revised its rules. The Government settled before it reached the Court after a narrow win.

UK Judge dissenting opinion: N/A

Case: **Lamguidaz v United Kingdom**

Year Judged: **1993**

Year Referred: **1990**

Summary: Settled before it reached the Court. An immigration issue: a Moroccan was in the process of being deported after a conviction for wounding. The subject claimed that his rights were being breached as his family were in the UK and he spoke no Arabic. The Commission had agreed. In the face of a possible loss at Court level, the Home Office granted him a UK passport provided the case were dropped. The original deportation order had said his departure was “conducive to the public good.”

Particular consequences: Demonstrates that the issue of the courts having problems with

deporting individuals is not a recent phenomenon, even if disgracefully side stepped here.

The problem would later be demonstrated by repeated failures to deport the Italian-born killer of the headmaster Stephen Lawrence (an issue complicated by EU freedom of movement principles).

Cost impact: In May 2007, failure to deport foreign former criminals reached national headlines. 13 per cent of the country's 80,000 prison population were reportedly foreign nationals, costing more than £398 million a year.³⁵ Some 4,000 were being released every year, most not being deported, and some simply slipping through the system. Avoidable recidivism was costing £10 million.³⁶ We attribute confusion arising from ECHR rulings as a main cause of this.

UK Judge dissenting opinion: N/A

1994

Case: **Boner v United Kingdom**

Year Judged: **1994**

Year Referred: **1991**

Summary: Related to a decision not to grant legal aid to an appeal in a Scots case of violent robbery. A witness had been seen speaking to a key figure on the day of the trial, but it was adjudged in cross-examination in the court not to have affected the case. Under Scottish law, advocates will not pursue forlorn cases, and the legal aid system (caveated after *Granger v United Kingdom*, above) vets them to decide on whether to award funds.

Particular consequences: Put at risk the Scots law automatic right of appeal.

Cost impact: Increased the pressure on the Scottish Legal Aid Board to fund appeals, in turn increasing the likelihood that unreasonable appeals will be made, therewith pointless legal costs.

Between 1990/1 and 1994/5, Scottish legal aid rose by 95 per cent, from £67.6 million to £132.1 million. There were a number of factors involved, including some lawyers abusing the system, but these ECHR-destined cases will have contributed. Changes to the structure resulted in a brief levelling off of expenditure in 1995.³⁷

We include this figure in the end total for ECHR costs subject to this caveat.

UK Judge dissenting opinion: No, but he approved the judgment on different grounds: the possibility of injustice rather than actual failure to secure it.

Case: **Maxwell v United Kingdom**

Year Judged: **1994**

Year Referred: **1991**

Summary: Another case involving a decision not to grant legal aid for an appeal in Scotland in an assault case.

Particular consequences: Similar to *Boner v United Kingdom* above.

Cost impact: Similar to *Boner v United Kingdom* above.

³⁵ <http://www.dailyexpress.co.uk/posts/view/14596>;

<http://www.telegraph.co.uk/news/uknews/1573291/Foreign-criminals-wont-be-deported.html>

³⁶ [http://www.inthenews.co.uk/news/politics/foreign-criminals-cost-taxpayers-10-million--\\$1264862.htm](http://www.inthenews.co.uk/news/politics/foreign-criminals-cost-taxpayers-10-million--$1264862.htm)

³⁷ See the *Scottish Legal Aid Annual Reports* over this period.

UK Judge dissenting opinion: No, but as with *Boner v United Kingdom* above he declared that while he saw no evidence of injustice, the principle of funding for appeals relating to technicalities should have been there.

Case: **Boyle v United Kingdom**

Year Judged: **1994**

Year Referred: **1990**

Summary: Settled before it reached the Court. It related to an appeal for access by an uncle whose nephew was being put into care, but who had questioned the allegations that had found him there.

Particular consequences: A Section of the Children Act 1989 covered circumstances raised in this case (introduced while the case was in transit to Strasbourg). Other elements incorporated emerging case law principles.

UK Judge dissenting opinion: N/A

1995

Case: **McMichael v United Kingdom**

Year Judged: **1995**

Year Referred: **1990**

Summary: The father of an illegitimate child and the child's mentally disturbed mother objected to not having seen key documents during adoption hearings. Awarded £8,000 damages.

Particular consequences: Called into question the specialist procedures used for reviewing adoption cases in Scotland, as opposed to having reviews operate through the courts in an adversarial way. The lawyer on the day pushed for the Government to state how it intended to change the law. The Children (Scotland) Act followed in 1995. Rules changed so that no information at all could be withheld from parents, moving to the other extreme. Ultimately led to a Scottish Commissioner for Children and Young People (2003), and the Children's Services (Scotland) Bill 2007.

Cost impact: £27million, according to a Parliamentary Question.³⁸

UK Judge dissenting opinion: Yes, relating to the rights of the man to sensitive documents. The Scottish Commissioner would himself much later reiterate this dissenting view.

Case: **Welch v United Kingdom**

Year Judged: **1995**

Year Referred: **1990**

Summary: Related to an imprisoned drug trafficker who then had assets seized under a subsequent law. The Court agreed that in this instance, it was a retrospective and therefore illegal act. This is to be contrasted with the position reached by the US Supreme Court in *US v Ursery*.

Particular consequences: By 2003, the need had been identified to establish an Assets Recovery Agency. In 2005, it was able to freeze £120 million in assets, but obtained only £4million at the cost of £15million. The Director expressly blamed the Human Rights Act. While it was subsequently merged into SOCA, the case of Raymond May from August 2009

³⁸ <http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo970723/text/70723w09.htm>

demonstrates the continuing flaws in the system, over a £3million continuing asset challenge and a reported legal aid bill of £400,000.³⁹

Cost impact: Sources confirm ongoing problems, with delays under the HRA leading to assets continuing to be hidden away. On that basis, we can assume an ongoing failure costing £115million, not including the indirect cost of encouraging major criminals to believe they can get away with their activities and lifestyles. That makes a total of £1.61billion to date.

UK Judge dissenting opinion: No.

Case: **McCann and Others v United Kingdom**

Year Judged: **1995**

Year Referred: **1991**

Summary: Attracted the involvement of Amnesty International. This was the Gibraltar Shootings case, where PIRA bombers on a reconnaissance were killed by the SAS. The Court found that had been excessive use of force, but dismissed damages as inappropriate "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb."

Particular consequences: Political victory for PIRA. Increased legal pressures on serving soldiers and the possibility of adding to their reaction time in dangerous situations.

UK Judge dissenting opinion: Yes, with no less than eight other judges, calling the action regrettable but absolutely necessary. They believed the Court decision was too much based on the benefit of hindsight in a terrorist situation. "In these circumstances, for the authorities to have proceeded otherwise than on the basis of a worst-case scenario that the car contained a bomb which was capable of being detonated by the suspects during their presence in the territory would have been to show a reckless failure of concern for public safety."

Case: **Tolstoy Miloslavsky v United Kingdom**

Year Judged: **1995**

Year Referred: **1990**

Summary: The celebrated war crimes libel case involving Count Nikolai Tolstoy and Lord Aldington, relating to the surrender of Russian Cossack prisoners after WWII. The Court held that the award of £1.5 million was excessive.

Particular consequences: For once, the Court made a valuable contribution to countering the compensation gravy train. However, only effective in practice for individuals.

UK Judge dissenting opinion: No.

1996

Case: **Goodwin v United Kingdom**

Year Judged: **1996**

Year Referred: **1990**

Summary: A journalist was tipped off about a company's confidential corporate plan, which had apparently been stolen. The journalist refused to disclose his source. The Court found his refusal legitimate, and the fine levied against him unjustified. Two human rights lobby groups contributed to the hearings.

Particular consequences: Supported whistle-blowing but at the expense of endorsing the protection of criminality in the process. Weakened the principle of confidentiality, of concern

³⁹ <http://www.thisislondon.co.uk/standard/article-23728961-details/Crime+boss+keeps+3million+in+courts+fiasco/article.do>

both commercially and in sensitive law enforcement areas, since it supposed serious leaks carried impunity. As the first such case in international law, set a strong international precedent.

UK Judge dissenting opinion: Yes, with six other judges, who concluded that the protection of a journalist's source must be where disclosure has been in the public interest and not in cases of gross breach of confidentiality.

Case: **Hussain v United Kingdom**

Year Judged: **1996**

Year Referred: **1993**

Summary: A sixteen year old had been convicted of murdering his two year old brother, subsequently showing no remorse. Notwithstanding the changes in the law following *Thynne, Wilson and Gunnell v United Kingdom* (see above), the Court found that the system again at fault in its appeals procedure in discretionary tariffs, in this case relating to "at Her Majesty's pleasure" and the format of Parole Board hearings.

Particular consequences: Demonstrated clearly that incorporating ECHR elements (in this case translating the Court's findings) directly into UK law does not necessarily by itself obviate the problems raised.

UK Judge dissenting opinion: No.

Case: **John Murray v United Kingdom**

Year Judged: **1996**

Year Referred: **1991**

Summary: Related to a Northern Ireland arrest, following a raid on a house where an informer was being interrogated by PIRA. Access to a solicitor was delayed "on the basis that the detective superintendent had reasonable grounds to believe that the exercise of the right of access would, inter alia, interfere with the gathering of information about the commission of acts of terrorism or make it more difficult to prevent an act of terrorism." The Court found that given the inference of guilt could emerge from staying silent, the delay was not proper. Submissions were accepted from lobby groups Amnesty and Justice.

Particular consequences: Called into question the effectiveness of counter-terrorism procedures; either suspects could stay silent and be initially interrogated without a lawyer; or they could have their silence suggestive in court of something to hide, but the lawyer would have to be there from the beginning. An issue as the possible presumption of concealment arising from silence had been a legal change implemented to help increase convictions.

UK Judge dissenting opinion: Yes, with six others. Considered "the focus here to be misdirected", as the withholding of initial access to a solicitor had already been judged, where there were reasonable grounds, to be acceptable in the conditions of Ulster. Furthermore, he had been cautioned on arrest. Moreover, the trial judge had drawn no inferences at all from the silence; the applicant had been seen at the scene of the crime. At no stage had he argued in the appeal he could or would have supplied an innocent explanation of his presence at the crime scene.

Case: **Singh v United Kingdom**

Year Judged: **1996**

Year Referred: **1994**

Summary: A case involving a 15 year old who had raped and murdered an OAP. He was later released; then rearrested and detained, though not on the grounds of public menace. The Parole Board changed its mind after an appeal, but the Home Secretary overruled it. This in turn was overruled by the Divisional Court. The Strasbourg Court found that the UK's solution to having lost *Thynne, Wilson and Gunnell v United Kingdom*, namely the 1991 Act, still fell short of

fulfilling ECHR obligations in that the Parole Board could not overturn decisions by itself.

Particular consequences: New interim arrangements were set up shortly afterwards.

UK Judge dissenting opinion: No.

Case: **Welch v United Kingdom (Article 50)**

Year Judged: **1996**

Year Referred: **1990**

Summary: Awarded costs in the case of a drug trafficker whose assets had been seized. The Court declined to award compensation for lost rent on his villa in Portugal, however.

UK Judge dissenting opinion: No.

Case: **Benham v United Kingdom**

Year Judged: **1996**

Year Referred: **1991**

Summary: Non-payment of the Poll Tax by someone who was deemed to be voluntarily unemployed, sent to prison for a month as a result. This was subsequently overturned, as the judge both considered that assessment to be an assumption and that the individual had no means of payment even if he wanted to. The applicant claimed for false imprisonment. The Court found rather that he should have received legal aid.

Particular consequences: Demonstrated the impact of the ECHR even in Magistrates Courts. Encouraged future work dodgers to try to avoid paying council tax and claiming off the taxpayer for legal aid. The law was changed to allow free legal aid in such cases.

UK Judge dissenting opinion: No

Case: **Chahal v United Kingdom**

Year Judged: **1996**

Year Referred: **1993**

Summary: Relates to an Indian national, an erstwhile illegal immigrant (granted leave to remain in the 1974 amnesty) who was in prison, and his wife. A Sikh activist, he was associated by the Police with the terrorist element and the Government wanted to deport him. He claimed he would be liable to torture if he returned to India, notwithstanding a commitment given by the Indian authorities, an offer of a flight to any major Indian airport outwith the Punjab, and the end of the emergency. The Court resolved, "untested, but no doubt bona fide" objections of terrorism notwithstanding, that an individual could not be so deported and there were also issue of his lengthy detention. It also challenged to appeals system. Several human rights and immigration groups contributed.

Particular consequences: Gravely weakened the ability of the Government to deport terrorists. Added extra delay to the appeals structure, to public and international ridicule. Triggered changes to the handling of classified material during advocacy by specialist lawyers. The Government responded by introducing "special counsels" under the Special Immigration Appeals Commission Act 1997. The Anti-Terrorism, Crime and Security Act 2001 also incorporated elements, though subsequently this was later impacted upon by another ECHR ruling in 2009.

Cost impact: This ruling set the tone for future costs. The eight years of the Abu Qataba case reportedly cost £1.5million by 2005.⁴⁰ This was £50,000 prison costs annually, £50,000 for family benefits (despite family living in an £800,000 house), and legal fees.

⁴⁰ <http://www.dailymail.co.uk/debate/article-1149045/JAMES-SLACK-Finally-Law-Lords-say-deport-Bin-Ladens-ambassador-hell-STILL-stay--STILL-pay.html>

UK Judge dissenting opinion: Yes, with six others. Believed that there should be a sliding scale whereby the greater the risk of ill-treatment, the less weight should be given to national security considerations. Contrasted with the *Soering* case (above) by saying the level of risk was actually unquantifiable, ie guesswork.

Case: **Saunders v United Kingdom**

Year Judged: **1996**

Year Referred: **1988**

Summary: The Guinness trial, over allegations of insider dealing. The use of transcripts made by the DTI during the initial investigation was questioned over the grounds of self-incrimination. The Court agreed that it had been a breach.

The campaign group Liberty contributed.

Particular consequences: 1986 Roskill Report. Criminal Justice Act 1987 pre-empts the ruling. Serious Fraud Office set up. The SFO for some time remains uncertain as to its exact remit. Initial years are not an overwhelming success thanks to several high profile lost cases. Financial Services and Markets Act 2000 picks up some of the pieces.

Cost impact: It is quite possible that an SFO would have been set up sooner or later. However, a longer lead in time (less driven by ECHR pressures) may have led to the organisation not ending up as the institution – “demoralised and underperforming” - as audited by Jessica de Grazia in 2007.⁴¹ A measure of standards came in the up-to-triple-standard payoffs reportedly being authorised to remove dozens of “mediocre” personnel.

Estimated costs for the four largest investigations leading to lost cases over this period (Regan/Maxwells/Walker/Blue Arrow) run to around £110million. We do not solely lay this and more daily aspects of SFO financial waste at the door of the Strasbourg Court. However, once again it was a trigger, without which other emerging role models in other countries could have been examined and lessons learned.

UK Judge dissenting opinion: No.

1997

Case: **Findlay v United Kingdom**

Year Judged: **1997**

Year Referred: **1993**

Summary: A soldier with PTSD was court martialled after shooting a television, and thrown out of the army. He sued for a back injury and got a settlement of £100,000. He appealed on the court martial, and the Strasbourg Court agreed that their independence and impartiality were under question given their structure.

Particular consequences: Armed Forces Act 1996 changed how courts martial operated, also allowing complaints under equal pay provisions.

Cost impact: The figure of £9million a year was raised during the parliamentary debate.

UK Judge dissenting opinion: No.

Case: **D v United Kingdom**

Year Judged: **1997**

Year Referred: **1996**

⁴¹ <http://business.timesonline.co.uk/tol/business/economics/article5627453.ece>

Summary: The applicant was a cocaine smuggler facing deportation on release from jail. In prison, he was found to be HIV positive, having caught it in his home country. He appealed against the deportation on the grounds that it would deprive him of medical care. The Court decided that there would be a causal link between deportation and an earlier death, notwithstanding if he were fit to travel, and so he should stay.

Particular consequences: A step towards turning the National Health Service into the World Health Service, with ill people travelling to the UK for free treatment.

Cost impact: Has been estimated at £60million per year.⁴²

UK Judge dissenting opinion: No.

Case: **Halford v United Kingdom**

Year Judged: **1997**

Year Referred: **1992**

Summary: A senior police woman, known for women's rights interests, was not promoted. She claimed discrimination. A formal investigation and a review by the Police Complaints Commission resulted in her suspension and the pressing of charges. The case was settled with her retiring with compensation, and the Government indicating it would enact various equal rights provisions. She subsequently discovered her work phones had been listened to, but that there was no legal remedy. The Court found these to be illegal, and also awarded £10,000 in damages. The campaigning group Liberty contributed to the debate.

UK Judge dissenting opinion: No

Case: **Johnson v United Kingdom**

Year Judged: **1997**

Year Referred: **1993**

Summary: A schizophrenic was institutionalised after a random attack on a pregnant woman. The Court found that the delay in giving him provisional first stage release placement in a hostel after deeming him recovered was excessive. Notwithstanding the fact that the applicant himself had made it substantially harder to place him, he was awarded £10,000.

Particular consequences: Encouraged placement of individuals in inappropriate locations in order to shorten delays, even where delays were appropriate.

UK Judge dissenting opinion: No.

Case: **Robins v United Kingdom**

Year Judged: **1997**

Year Referred: **1993**

Summary: The applicants had lost a court case brought by their neighbours over sewerage seepage. A variety of mistakes had led to the case dragging on. The Court found the delay unreasonable.

UK Judge dissenting opinion: No

Case: **Coyne v United Kingdom**

Year Judged: **1997**

Year Referred: **1994**

Summary: An RAF court martial case. The procedures mirrored the *Findlay v United Kingdom* case, above. HMG requested the Court treat this case as comparable.

Particular consequences: Courts-Martial (Air Force) Rules 1997

⁴² <http://www.dailymail.co.uk/news/article-559099/Now-failed-asylum-seeker-deport-given-free-NHS.html>

Cost impact: See above.

UK Judge dissenting opinion: No.

1998

Case: **Bowman v United Kingdom**

Year Judged: 1998

Year Referred: 1994

Summary: Related to the distribution of leaflets by an anti-abortion campaigner during the 1992 General Election. The Court found that, although she had been acquitted in the UK court after time lapse, the principle remained that she should have been allowed to distribute her leaflets as a freedom of speech measure.

Particular consequences: *Political Parties, Elections and Referendums Act 2000* and *Local Electoral Administration and Registration Services (Scotland) Act 2006* reset third party expenditure in elections at £500. Rethink of candidate funding declaration principles required; extra complexity and new scope for abuse in campaign expenses.

UK Judge dissenting opinion: Yes.

Case: **Tinnelly & Sons Ltd and Others and McElduff and Others v United Kingdom**

Year Judged: 1998

Year Referred: 1992

Summary: Related to a dispute over whether security concerns or sectarianism had affected contract awarding. The Court found the appeals system to fall short of providing the opportunity for due review.

Particular consequences: A further complication for officials attempting to balance confidential security concerns with the prospect of being taken to court if a contract is not awarded. The Northern Ireland Act 1998 led to the introduction of "special counsels" as a consequence. Notwithstanding, and possibly as a direct consequence, there has been an increase in litigation over public contracts.

Cost impact: Difficult to ascribe. The fact that there is such a high level of public sector spending in Northern Ireland means that the amounts on offer encourage challenge.

A Northern Ireland employer relates privately to us of a very recent case in which two employees – from Scotland – threatened to take the business to court on discrimination grounds after being laid off when work dried up. A settlement was reached purely in order to save costs going to the Tribunal. Reportedly this method of working the system is par for the course, since there is no dissuasive element for plaintiffs who have no financial risks to bear if they lose a case.

In the absence of data and on the basis of oral case reporting, a cost assessment is set at a marker rate of £200,000 until further case studies emerge.

UK Judge dissenting opinion: No.

Case: **A v United Kingdom**

Year Judged: 1998

Year Referred: 1994

Summary: A stepfather caned his boy as a matter of policy. The child complained that he was not being protected by the State. The Court found that the law did not protect children enough. £10,000 in damages was awarded.

Particular consequences: Quite an astonishing case, not least the award of damages against a third party (the taxpayer). Paradoxically, the Court refused to examine whether the right to a family life contradicted the right for the state to intervene in family discipline. This was at the Government's behest, as it wished to avoid setting a generic precedent on all domestic corporal punishment. The Government in any event set about changing the law.

Cost impact: Impossible to judge the impact upon public morals.

UK Judge dissenting opinion: No.

Case: **Steel and Others v United Kingdom**

Year Judged: **1998**

Year Referred: **1994**

Summary: Related to five protestors arrested for breaches of the peace on three separate demos. The Court upheld that in one instance, as the dropping of the charges showed, the protestors had been illegally arrested, and they were awarded £500 each for seven hours illegally detained.

Particular consequences: Narrowed down the traditionally vague principle of breach of the peace to exclude cases in the absence of obstruction or the incitement to violence.

UK Judge dissenting opinion: No.

Case: **McLeod v United Kingdom**

Year Judged: **1998**

Year Referred: **1994**

Summary: Concerned police officers who attended a bailiff action suspected of escalating. The Court ruled that their entry in the absence of the subject of concern was illegal as it could not have been in order to avoid a breach of the peace, and that they should have taken more care to ensure that the action they were attending was itself legal.

Particular consequences: Induces extra hesitation of Police in cases of entry even when intervening to prevent possible harm.

UK Judge dissenting opinion: Yes. Considered the police to have acted proportionately.

Case: **Osman v United Kingdom**

Year Judged: **1998**

Year Referred: **1993**

Summary: An obsessive teacher killed a parent and the headmaster's son, and wounded two others. The Court ruled that the Police were not culpable in the circumstances, but that the widow had not had sufficient systemic means to attempt to hold them to account because of public-policy exemption arising from existing case law, and awarded £20,000 damages.

Particular consequences: Overturned existing case law and increased the liability of police officers for their actions. Meritorious on one level, but at the cost of helping to induce a paper-driven risk-averse culture. *Police Reform Act 2002* and further successful court cases for police malfeasance follow.⁴³

Cost impact: Within ten years, high five figure compensation claims are becoming more regular. FOI campaigner Heather Brooke has uncovered that over the period 2002-2007, Police Forces paid out over £44million in compensation (often out of court) in response to 31,000 claims.⁴⁴

UK Judge dissenting opinion: No. He approved reversing the trend in making police immune

⁴³ A useful summary can be found here: <http://www.bhattmurphy.co.uk/bhatt-murphy-90.html>

⁴⁴ <http://www.jamesrb.co.uk/?p=144>

from being sued.

1999

Case: **Scarth v United Kingdom**

Year Judged: **1999**

Year Referred: **1996**

Summary: Related to a small claims case in which the applicant had requested a public hearing. The Court found that he had been within his rights to request one.

Particular consequences: Civil Procedure Rules were changed to end small claims arbitration at County Court level. *Financial Services and Markets Act 2000* establishes Financial Ombudsman Service in 2001.

Cost impact: Seemingly affects a small number of cases.

UK Judge dissenting opinion: No.

Case: **Hashman and Harrup v United Kingdom**

Year Judged: **1999**

Year Referred: **1994**

Summary: Another Breach of the Peace case, this time involving hunting sabs who had blown their own horn, in a hunt where a hound had been run over by a lorry. They were bound over to prevent acts *contra bonos mores*, ie within the grounds of what the majority would find reasonable. The Court found the concept an impingement on their rights as too vague to predict.

Particular consequences: Weakens a tenet of Common Law that allowed judicial discretion and common sense.

UK Judge dissenting opinion: No.

Case: **Lustig-Prean and Beckett v United Kingdom**

Year Judged: **1999**

Year Referred: **1996**

Summary: Two Royal Navy personnel had been discharged for being homosexual. The Court found both that the policy was wrong, and that the specifics of the investigations of the cases in question had been intrusive as they had already admitted being gay.

Particular consequences: A UK judge had earlier already commented that, given Convention case law, MOD policy would likely not last long. A new policy was officially adopted in 2000.

Since 2000, all armed forces service personnel are expected to be aware of "Values and Standards", including annual training on personal do's and don'ts covering a number of liability and good employer issues. This had previously been assumed rather than taught. An hour of presentational material can be ascribed to covering principles that the services may well have chosen to uphold in themselves, but where the obligation for including them as lessons appears to be through the ECHR under broad human rights provisions, in small part including cases such as this one.

Cost impact: £3.3million annually.

UK Judge dissenting opinion: No.

Case: **Smith and Grady v United Kingdom**

Year Judged: **1999**

Year Referred: **1996**

Summary: Two RAF personnel had been discharged on the grounds of homosexuality. The Court rejected the mechanics and findings of the Government survey on the subject, as well as validity of the defence even if there was a recognized in-service hostility to gays serving. Both the nature of the investigations and the dismissals were found illegal.

Particular consequences: *Armed Forces Act 2001* recognised issues in this and several parallel cases.

Cost impact: £195,000 for changes to investigatory procedure.

UK Judge dissenting opinion: No.

Case: **T v United Kingdom**

Year Judged: **1999**

Year Referred: **1994**

Summary: The Bulger Case, where two ten year olds had abducted and murdered a two year old. One objected to the trial, and the Court found that “the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant’s sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and public.” The Court also found that the system at fault in that it allowed the Home Secretary (after receiving a 300,000-strong petition organised by the *Sun*) to set an extended tariff, rather than an independent process.

Particular consequences: A bewildering find in favour of someone who was supposedly suffering post-traumatic stress disorder, despite actually being the person who inflicted it on others. This, despite efforts deliberately made to make the courtroom and proceedings more accessible to the defendants. The extended tariff in any event was quashed by the Lords, and modified to become one of review. Following the ECHR judgment, the killers’ tariffs were reviewed on instruction from the Home Secretary.

An element in determining remote access for child witnesses. Changes were made in part through the *Crime and Disorder Act 1998* and the *Criminal Justice and Police Act 2001*. There were 69 juvenile killers serving sentences that this ruling potentially affected.

UK Judge dissenting opinion: No, despite defending the non-use of juvenile courts in such serious cases, and indicating that T’s trauma was in part self-inflicted.

Case: **V v United Kingdom**

Year Judged: **1999**

Year Referred: **1994**

Summary: This was the other child murderer in the Bulger case. “It took him twelve months to get over the trial itself. He still thought of it every night. He had been most scared when in the magistrates’ court on the first occasion. After the first three days at the Crown Court he had felt all right because he played with his hands and stopped listening. He had to stop listening because they played the police interviews with him and T. in front of everyone as if they were shouting it out. The press were laughing at him and he could tell from the faces of the jury that they would find him guilty. He still did not understand why the trial had been so long” (psychiatrist.) The Court found that this restricted his ability even to whisper to his lawyers and that he had not received a fair trial. As in the case of his colleague, it was also found that his tariff had been extended unlawfully.

Particular consequences: See above.

UK Judge dissenting opinion: No, though again describing the basic court process as

legitimate, and at some length.

Case: Matthews v United Kingdom

Year Judged: **1999**

Year Referred: **1994**

Summary: Gibraltar lacked representation at the European Parliament. The Court, after ruling it had jurisdiction, found that democratic rights were being impinged.

Particular consequences: Gibraltar added to the South West Euro-constituency. Demonstrated a flaw at EU level.

Cost impact: Estimated, on a UK average cost per vote basis, in the region of £30,000, albeit long overdue.

UK Judge dissenting opinion: Yes, based on a heavy restraint about ruling on an EU issue, and reservations over whether the remit applied to a territory and an assembly.

Case: Hood v United Kingdom

Year Judged: **1999**

Year Referred: **1995**

Summary: A soldier was court martialled for desertion. The Court agreed that the initial appearance, before his CO, leading to pre-trial detention should have been with someone more demonstrably impartial. Furthermore, the court martial itself had not been comprised in an independent and impartial manner.

Particular consequences: *Armed Forces Discipline Act 2000*.

Cost impact: The establishment of a summary appeal court, additional lawyers and other staff, costs, fees and expenses arising from the Act was assessed to run to £6.5 million per year, with £1.5million start up costs.

UK Judge dissenting opinion: No.

Case: Cable and Others v United Kingdom

Year Judged: **1999**

Year Referred: **1994-1996**

Summary: 35 cases involving courts martial.

Particular consequences: Demonstrated how a judgment could open the litigation floodgates. The applicants were after compensation, facilitated by lawyers who claimed £229,000 in costs and expenses (they got £40,000, and no compensation). The Army Prosecuting Authority would be merged with those of the other services under the *Armed Forces Act 2006*.

Cost impact: "Modest additional costs" were incurred, but no figure was given for the one-off administrative burden of merging separate entities. On analogy, with considerable caveats, we assess a ballpark figure of £200,000, but if relocating personnel and their families was involved in addition to a major set of office moves, the figure could be many times higher.

UK Judge dissenting opinion: No.

Case: Perks and Others v United Kingdom

Year Judged: **1999**

Year Referred: **1994, 1995**

Summary: Eight cases involving non-payment of the Poll Tax, following on from *Benham v United Kingdom* (1996, above). The Government acknowledged that the magistrates courts had overstepped the mark in being too ready to imprison rather than try again with finding a financial remedy. The changes made after *Benham* had not yet come into force, and the absence of legal aid was again here found fault with.

UK Judge dissenting opinion: No.

Case: **Crosland v United Kingdom**

Year Judged: 1999

Year Referred: 1997

Summary: Actually struck out through a compromise agreement rather than a decision in court. A widower complained that he was illegible for the bereavement tax allowance, whereas a widow in his situation would not have been.

Particular consequences: The allowance was ended in 2000.

Cost impact: The cost of retrospective allowance covering the previous five years was estimated to run to a total of around £180 million by the government department.⁴⁵

UK Judge dissenting opinion: N/A

Case: **Faulkner v United Kingdom**

Year Judged: 1999

Year Referred: 1996

Summary: Struck out after a compromise agreement was reached. The individual had not had access to civil legal aid in Guernsey (a fee system existed).

Particular consequences: The Government began one.

Cost impact: Variable year on year, but seemingly in the order of £700,000 judging by recent billets d'état.

UK Judge dissenting opinion: N/A

Case: **Moore and Gordon v United Kingdom**

Year Judged: 1999

Year Referred: 1997

Summary: Two courts martial in the RAF. The Court again deemed these to be lacking in impartiality.

UK Judge dissenting opinion: No.

Case: **Smith and Ford v United Kingdom**

Year Judged: 1999

Year Referred: 1997

Summary: Two courts martial in the army. The Court again deemed these to be lacking in impartiality.

UK Judge dissenting opinion: No

2000

Case: **Caballero v United Kingdom**

Year Judged: 2000

Year Referred: 1996

Summary: An individual accused of rape, with a previous conviction of manslaughter after sexual interference, was denied bail under the law. The Government conceded the rejection should not have been automatic.

Particular consequences: The law was changed in 1998 to allow the court some latitude.

⁴⁵ <http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo001116/text/01116w12.htm>

UK Judge dissenting opinion: No – the government had already conceded the point – but regretted that a new form of judgment seemed now to have emerged whereby the Court *recognized the recognition* of a violation of the Convention, but did not in fact actually decide on whether the violation had in fact actually occurred.

Case: **McGonnell v United Kingdom**

Year Judged: **2000**

Year Referred: **1995**

Summary: Planning permission in Guernsey had been refused. The applicant's point, that the same person presided both over the specific case and the original development plan, was upheld.

Particular consequences: The principle is the same which has led to the removal of the Law Lords from the House of Lords and the establishment of the UK Supreme Court, to the detriment of British law making.

UK Judge dissenting opinion: No, while underlining it was the principle of the individual rather than the position of Bailiff that was critiqued.

Case: **Rowe and Davis v United Kingdom**

Year Judged: **2000**

Year Referred: **1995**

Summary: Non-disclosure of sensitive material was challenged as a factor in the trials of two individuals convicted for a murder/assault/robbery spree. They had been subsequently released as the case was considered unsound. The Court concurred that the confidential evidence had not been handled fairly. The campaign group Liberty funded most of the case.

Particular consequences: Criminal Investigations and Procedure Act 1996.

Cost impact: Deemed minimal at the time.

UK Judge dissenting opinion: No.

Case: **Stephen Jordan (No 1) v United Kingdom**

Year Judged: **2000**

Year Referred: **1996**

Summary: Another court martial case centring on the impartiality of the CO and his role in ordering a pre-trial detention.

UK Judge dissenting opinion: No.

Case: **Curley v United Kingdom**

Year Judged: **2000**

Year Referred: **1996**

Summary: A Parole Board decision recommending the release of a murderer who had served his tariff but was still on discretionary time was rejected by the Home Secretary, for review in a year. The Court found that the arrangements set up on an interim basis after *Singh and Hussain v United Kingdom* (1996, above) still had fallen short.

Particular consequences: Changes made after a previous lost Strasbourg case were still found wanting.

UK Judge dissenting opinion: No.

Case: **Condron v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: Two heroin addicts had been arrested for selling drugs. In court, they provided explanations for activity that they had not provided at the time of their arrest. The judge allowed the jury to draw inference from their earlier failure to provide an explanation. The Court of Appeal said the judge should have been more specific in his direction, but that given the weight of evidence there had been no mistrial. The Strasbourg Court disagreed.

UK Judge dissenting opinion: No.

Case: **I.J.L and Others v United Kingdom**

Year Judged: **2000**

Year Referred: **1995, 1996**

Summary: The Guinness insider trading case was here again revisited on behalf of other applicants, as per the *Saunders* case above. The DTI Inspectors transcripts again came under question as admissible in court owing to a lack of any form of Caution or associated legal procedure.

UK Judge dissenting opinion: No.

Case: **Oldham v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: Another case of a life prisoner on parole, recalled to jail and objecting to the Parole Board decision based on the original tariff. The applicant committed manslaughter through a mental abnormality triggered by drink. He was released after a third spell for attacking his wife after at least eight cans of lager. He claimed that the two year delay in deciding to release him was in breach of his rights. The Court agreed that there had not been a speedy resolution of whether he should be detained.

UK Judge dissenting opinion: No.

Case: **Sander v United Kingdom**

Year Judged: **2000**

Year Referred: **1996**

Summary: A juror in a trial advised the judge he had heard colleagues making racist jokes, which he thought might indicate prejudice against the accused. The jury was challenged, and expressed indignation; one juror in question apologized; all stated that race was not an issue in their deliberations. As the incident was admitted, the Court found that the jury had not been impartial.

Particular consequences: Raised broader issues of the consequences of political incorrectness.

UK Judge dissenting opinion: Yes. Believed that the judge's remedial steps reminded the jury of its legal obligations and the collective response of the jury assured the judge of proper process. Furthermore, a co-defendant of the same ethnic background was acquitted.

Case: **Averill v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: A man had been arrested in Ulster and forensics clearly connected him to a murder scene. Very strong adverse inference was drawn by his refusing on initial questioning to answer how this link had come about. The Court resolved that, though the judge was right to interpret the silence in that way, the accused should have had the assistance of a solicitor to explain the possible consequences.

UK Judge dissenting opinion: No.

Case: *Magee v United Kingdom*

Year Judged: 2000

Year Referred: 1995

Summary: The applicant signed a confession that he was a PIRA bomber. He claimed at the time he was beaten, though there was no medical evidence. At trial, the judge observed that the interrogation was being monitored remotely, the applicant had repeatedly lied to the court, the detectives had not been shaken in cross-questioning, and the confession fitted the patterns of others convicted for the same crime. The Strasbourg Court found that a solicitor should have been present in relation to the right of silence issue.

UK Judge dissenting opinion: No.

Case: *Foxley v United Kingdom*

Year Judged: 2000

Year Referred: 1996

Summary: The plaintiff was convicted of corruption in relation to MOD ammunition. Attempts were made under proceeds of crime legislation to confiscate £1.5 million. When he was declared bankrupt, relevant post was ordered to be redirected to the Trustee, which were copied to file and then forwarded. As this continued after the expiration of the mandated period, this constituted in the Court's view an infringement. Furthermore, as all his post was opened to look for relevant documents, this was a breach of privacy, not least as the Trustee was also the Receiver and he was reading his legal advice.

Particular consequences: Time limited the postal provisions of the Insolvency Rules 1986, requiring administrative changes so that mail forwarding would be reviewed on a case by case basis. Came out as the Insolvency (Amendment) Rules 2005.

Cost impact: No regulatory impact assessment was made as no significant costs were predicted to business. Some administration costs must have arisen. Further changes in 2009, seemingly part motivated by slow processing (also an ECHR issue) changed the fees.

UK Judge dissenting opinion: No.

Case: *Khan v United Kingdom*

Year Judged: 2000

Year Referred: 1997

Summary: The applicant was arrested as being involved in heroin smuggling after admitting it while in a house that was bugged by the Police. During the trial, the Crown admitted that installation of the device had necessitated trespass and some damage to the property. The judge ruled the evidence admissible and he was convicted. The House of Lords subsequently resolved that there was no right to privacy in English law (and even were there to be, intrusion by surveillance devices was admissible), but that it was astonishing that there was no statutory system regulating the use of surveillance devices, just guidelines. The Court found that as there was no law, the intrusion could not be definition have been lawful, though the material itself was admissible. It also found that the Police Complaints Authority was not sufficiently independent to investigate.

Particular consequences: The Police Act 1997 was meant in part to address the lacuna, setting up the National Criminal Intelligence Service.

Cost impact: The establishment of an agency such as NCIS would likely have occurred whatever the ECHR judgment, so we do not lay that cost at its door.

UK Judge dissenting opinion: No.

Case: **A.D.T. v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: During a search, police found a video of consensual gay group sex. As there were more than two people involved, although it was within his home it was not considered done in private. The applicant was convicted of gross indecency and conditionally discharged. The Court considered to the contrary that it was an issue relating to his private life, and also discriminatory.

Particular consequences: Affected established Common Law definitions of public activity based on number of witnesses rather than location.

UK Judge dissenting opinion: No.

Case: **Smith and Grady v United Kingdom (Article 41)**

Year Judged: **2000**

Year Referred: **1996**

Summary: Provided a cost assessment of the ban on homosexuals in the armed forces by looking at two cases. £38,000 was awarded for the intrusiveness and emotional impact, and £99,000 for loss of earnings due to removal from career.

Particular consequences: Significant payouts now on the table for human rights complaints in this area.

Cost impact: £4 million by 2008, in 65 cases, averaging £61,500 per case.⁴⁶

UK Judge dissenting opinion: No, though a colleague did consider the award to be excessive given prior warning by the MOD of its policy.

Case: **Kingsley v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: The applicant claimed that he had not received a fair hearing by the Gaming Board in relation to how a casino was run. The Court ruled that this was valid as some of the people on it had been involved in a previous judgment that had ruled he was not fit to run a casino.

Particular consequences: The Council on Tribunals recommended changes to rules for all tribunals.

Cost impact: While on a different theme, this also case continued to expand the threat of a given right to expensive legal review of all tribunal or arbitration decisions, particularly costly in social security cases.

UK Judge dissenting opinion: No.

Case: **M.C and Others v United Kingdom**

Year Judged: **2000**

Year Referred: **1994, 1995**

Summary: Resolved before it actually reached the Court. These related to prison sentences relating to non-payment of poll tax charges. As with other cases (see above), the objection related to imprisonment *ultra vires* by the magistrates court, and the lack of legal aid. It seems the cases were dropped as the point had already now been made.

Particular consequences: The prospect of additional costs in connection with Poll Tax collection would have been a feature in the decision over whether or not to bin it.

⁴⁶ <http://news.bbc.co.uk/1/hi/uk/7716802.stm>

Cost impact: Not known. Over 1,000 people were sentenced to jail in 1994 alone, but the end figure could in other circumstances have been massive. One council of itself was reported as applying for 1,000 jail convictions. The end sum could have proved catastrophic in the face of ongoing refusals to pay across the country, an ECHR bill of tens of millions.

UK Judge dissenting opinion: N/A

Case: **J.T. v United Kingdom**

Year Judged: **2000**
Year Referred: **1995**

Summary: Resolved before it actually reached the Court. A mental inpatient wanted to change the listing of her nearest relative, naming a social worker instead.

Particular consequences: HMG changed the legislation so this could be done where there was a reasonable objection.

UK Judge dissenting opinion: N/A

Case: **Paul Walsh v United Kingdom**

Year Judged: **2000**
Year Referred: **1996**

Summary: Resolved before it actually reached the Court. It related to Parole reviews and was effectively superseded by changes made as a result of earlier cases.

UK Judge dissenting opinion: N/A

Case: **Cornwell v United Kingdom**

Year Judged: **2000**
Year Referred: **1997**

Summary: Resolved before it actually reached the Court. It related to widower benefits and was effectively superseded by changes made as a result of earlier cases.

UK Judge dissenting opinion: N/A

Case: **Leary v United Kingdom**

Year Judged: **2000**
Year Referred: **1997**

Summary: Resolved before it actually reached the Court. It related to widower benefits and was effectively superseded by changes made as a result of earlier cases.

UK Judge dissenting opinion: N/A

Case: **Downing v United Kingdom**

Year Judged: **2000**
Year Referred: **1997**

Summary: Resolved before it actually reached the Court. It related to Parole reviews and was effectively superseded by changes made as a result of earlier cases.

UK Judge dissenting opinion: N/A

Case: **Howarth v United Kingdom**

Year Judged: **2000**
Year Referred: **1997**

Summary: Related to a complex fraud case that took four years. The Court assessed that there had been an excessive delay in the proceedings of the appeal.

UK Judge dissenting opinion: No.

Case: **McDaid and Others v United Kingdom**

Year Judged: **2000**

Year Referred: **1997**

Summary: Resolved before it actually reached the Court. It related to the level of compensation due to issues with their courts martial, resolved by the findings of earlier cases.

UK Judge dissenting opinion: N/A

Case: **Lustig-Prean and Beckett v United Kingdom (Article 41)**

Year Judged: **2000**

Year Referred: **1996**

Summary: Resolved the financial settlement of these cases relating to homosexuals in the armed forces. One applicant additionally wanted to rejoin. The Court awarded £114,000 and £74,000

Particular consequences: It is understood that one person was allowed to rejoin the Navy.

UK Judge dissenting opinion: No.

Case: **Varey v United Kingdom**

Year Judged: **2000**

Year Referred: **1995**

Summary: A retrospectively proposed gypsy site in a Green Belt area was rejected, and appealed against. The Government settled for £60,000 provided the case was dropped. It was, before it reached the Court.

Particular consequences: Appears to be a move to buy off a complaint before the Court judged on it and established a precedent.

Cost impact: Weakened legal provisions against squatting and unpermitted rural development.

UK Judge dissenting opinion: N/A

2001

Case: **Hilal v United Kingdom**

Year Judged: **2001**

Year Referred: **1999**

FIRST CASE AFTER THE HUMAN RIGHTS ACT

Summary: A Zanzibari asylum seeker claimed he would be tortured if returned. HMG doubted if he had been in the first place, and that mainland Tanzania had a good human rights reputation and no interest in the applicant. The Court found that there was a real risk in both Zanzibar and Tanzania.

Particular consequences: Made it more difficult for governments to apply the 'internal flight' solution, ie that asylum seekers are genuine if they could not first flee to another, safer, part of the home country – ie increased chance of asylum appeals. Increased confusion in the system results in longer cases in breach of the ECHR (averaging 403 days in 2005), and has been the key factor in recent reports of a potential amnesty for 154,000 who have developed an affinity during the delays in their appeal. This trend is confirmed by confirming return rates in 2000 approaching 50 per cent with rates six years later approaching one in three.

Cost impact: A backlog of 450,000 'legacy cases' required a concentration of manpower to clear. The whole policy was estimated to be costing £600million a year in 2008.⁴⁷

UK Judge dissenting opinion: No.

Case: **Keenan v United Kingdom**

Year Judged: **2001**

Year Referred: **1995**

Summary: A paranoid schizophrenic in prison committed suicide. The Court found that the prison, in failing to fully acknowledge this (by lack of psychiatric input, and through his reaction to discipline), had failed to look after him. Furthermore, the six week appeal process for internal discipline was not sufficiently speedy.

Particular consequences: Opens up compensation claims on the basis of "anguish" and "fear". Yet to be determined as the case law is exploited. This is an important loophole expanding cases of 'mental anguish' along vexatious US litigation lines.

Cost impact: The broader cost impact is likely to be through higher insurance premiums, as well as generating highly controversial and excessive claims, not least where lifestyle choices are pushed onto those with conflicting personal opinions who would otherwise be prepared to let such matters be a matter of personal conviction in private. Faith issues are a particular flashpoint.

It is worth here observing that ECHR principles underlie much of the costs arising from our compensation culture. In an article for the Spectator, Former Shadow Home Secretary David Davis quoted a number of cases, including a prisoner who fell off a roof trying to escape, which on closer examination are overwhelmingly rooted in ECHR Rights.⁴⁸ A report from the Institute of Actuaries placed the total bill at £10 billion a year, increasing at a rate of ten per cent a year. Clearly, many of these payments will have been grounded in fair claims. However, payments by schools and hospitals had doubled between 1997-2004 to total £680 million a year – a figure since dwarfed. Another report proved that over the 1990s, the frequency of £5,000-15,000 claims rose by 150 per cent, though clearly much of this was the result of no win, no fee legal support, and aggressive 'claims farming' in the media.⁴⁹

The end result is a culture of risk aversion, such as not having school trips, or excessive spending on pointless courses in order to tick boxes.

We assess a return to 1995 levels could save the economy a ball park figure of £5 billion annually, if coupled with legal reform.

UK Judge dissenting opinion: Some reservations, and opposed a compensation payment.

Case: **Hugh Jordan v United Kingdom**

Year Judged: **2001**

Year Referred: **1994**

Summary: A PIRA member was killed after a car chase, while believed to be transporting weapons. He turned out to be unarmed. Most peculiar in that the Northern Ireland Human

⁴⁷ <http://news.bbc.co.uk/1/hi/uk/7846140.stm>

⁴⁸ 21 August, 2004

⁴⁹ http://docs.google.com/gview?a=v&q=cache:9YlaDRAJzQ4J:www.actuaries.org.uk/_data/assets/pdf_file/0016/20068/CompCult_resp.pdf+Institute+of+Actuaries+compensation+culture&hl=en&gl=uk&sig=AFOjCNGUtKNBbkBOKera6BE-wR7pLaD-tw

Rights Commission supported the criticisms of general failings in the inquest system. Consequently, a state-funded quango, in this and the cases below, effectively turned witness against the state. The Court agreed that the inquest procedure was not independent enough, too limited in its powers and too closed. The terrorist's father was awarded £10,000 in damages.

Particular consequences: Collectively, bolstered PIRA; bad PR in fight against terrorism; some threat to efficiency of security services over concerns raised about determining appropriate use of force in a split second.

Cost impact: Part of a series of such claims (see below).

UK Judge dissenting opinion: No.

Case: McKerr v United Kingdom

Year Judged: **2001**

Year Referred: **1995**

Summary: Three Irish terrorists, two of them on the run for multiple murders, were killed in a hail of bullets. The incident featured in the Stalker enquiry. As the inquest covered the deaths but did not address allegations of a cover up, as the case preceded changes in rules on advance disclosure of witness statements, and with the investigative procedures the same as those in the *Hugh Jordan v United Kingdom* case above, the Court found that the investigation had fallen short, not least given the RUC's role in investigating itself. £10,000 damages was awarded.

Particular consequences: See above.

UK Judge dissenting opinion: No.

Case: Shanaghan v United Kingdom

Year Judged: **2001**

Year Referred: **1997**

Summary: A Sinn Fein activist was murdered by loyalist terrorists. There were claims of collusion by the security forces, and a complaint that these claims were not properly investigated. The Court upheld that the investigation system was not independent enough. £10,000 was awarded (in addition to £25,000 already awarded under the Criminal Injuries Compensation Scheme).

Particular consequences: See above.

UK Judge dissenting opinion: No.

Case: Kelly and Others v United Kingdom

Year Judged: **2001**

Year Referred: **1996**

Summary: Related to eight PIRA members, and a bystander, killed in an ambush as they attacked a police station. The applicants were each awarded £10,000 for failings in the inquest procedures.

Particular consequences: See above.

UK Judge dissenting opinion: No.

Case: Z and Others v United Kingdom

Year Judged: **2001**

Year Referred: **1995**

Summary: Three neglected children took their social services to court for failing to look after them. The Court found that firstly that the children had been subjected to inhuman treatment; secondly, there was a legal gap in the UK for determining whether their human rights had been violated, and left open the question whether the Human Rights Act would provide sufficient

protection in the future. It awarded £100,000 in damages.

Particular consequences: This case seems to be the trigger that encouraged the UK to introduce the Human Rights Act, not least given the size of the damages ultimately awarded. But from something designed to void Article 13 cases to do with introducing a mechanism handling ECHR complaints domestically (which was turning into something approaching an automatic fine), the Act was spun into something larger than it was capable of delivering.

Cost impact: No cost impact was conducted on implementing the HRA.

UK Judge dissenting opinion: No.

Case: **T.P. and K.M. v United Kingdom**

Year Judged: **2001**

Year Referred: **1995**

Summary: Social Services took a child into care after incorrectly identifying the partner of the mother rather than a past partner as abusing a child. As the evidence had not been disclosed and the review was slow coming, the Court found that since there was no mechanism to see the video interview of the child with the allegations on, there had been a breach of family rights. £20,000 in damages was awarded.

UK Judge dissenting opinion: Would have awarded lower damages.

Case: **Atlan v United Kingdom**

Year Judged: **2001**

Year Referred: **1997**

Summary: Two people were arrested for trying to import a large quantity of cocaine using the 'mistaken suitcase drop' technique. The Court found that evidence relating to the status of a witness as a possible informer should have been laid before the judge.

Particular consequences: Extra difficulties relating to source handling and protection. Cases such as this forced the development of the Regulation of Investigatory Powers Act 2000 (RIPA), a massive administrative burden on agencies obtaining covert criminal or other intelligence.

Cost impact: Costs relating to other aspects of RIPA (provision of data and checks on new agencies now given excessive powers) are excluded from our calculations. We have to extrapolate from anecdotal evidence, pending ongoing research at Oxford University. This suggests that across the whole of government, the equivalent of 750 man work years are lost annually in filling out these multiple forms. A ballpark figure of £19 million in this context seems reasonable as a best estimate for lost man hours.

UK Judge dissenting opinion: No.

Case: **S.B.C. v United Kingdom**

Year Judged: **2001**

Year Referred: **1998**

Summary: A man on parole for manslaughter was arrested charged with raping his daughters. He was subsequently found not guilty. The Government conceded that the automatic denial of bail without the prospect of appeal was a breach of his rights.

Particular consequences: Possibility of prisoners being let out on bail who were a grave threat to society, who would otherwise have been safely detained.

Cost impact: Not possible to cost the crimes committed by people released on parole who wouldn't have been, subsequent to this ruling.

UK Judge dissenting opinion: No.

Case: **Price v United Kingdom**

Year Judged: **2001**

Year Referred: **1996**

Summary: A limbless prisoner overnigheted in a cell that was not fitted out for the disabled. She also had problems at the prison. Legal aid was ended after an initial examination, as a test case had shown that damages would likely be under the £3,000 threshold. In the event, though finding the treatment to have been degrading, the Court awarded £4,500 in damages.

Particular consequences: Disability Discrimination Acts 1995 and 2005, Prison Service Order 2885, Prison Service Instruction 21/2001. Costly refitting of police and prison cells to accommodate a variety of special needs prisoners put on the agenda. There are currently record numbers of disabled prisoners. Most prisons do not cater for them, for example by having education centres not on the ground floor, restricted access to sites of telephones, limited recreational activity or inappropriate showers. The prisons that do may be located far from the prisoner's home town. The scope for ongoing cases is considerable.

Cost impact: If changes to access are made during standard refits, many costs can be absorbed into budgets. However, if changes have to be accelerated to comply with the HRA, costs will be higher. Suggested improvements from just one survey have included, for instance, improved lighting, improved signage, use of colour contrast, improved acoustics, bath hoists, stairlifts, access to special carers and use of different floor coverings.

Current regulations instruct the governor that "Reasonable adjustments are made to ensure that prisoners with difficulties in accessing services and facilities by reason of disability are able to take a full part in the prison regime." However, the issue of what is "reasonable", while appropriate in Common Law, does not stand up to ECHR scrutiny.

The Government will thus be obliged to try to hold the line in much the same way as it has over widower rights, but that a barrage of cases and media attention will wear it down and accelerate spending in advance of normal replacement and refurbishment dates. In the absence of public data, we set a ball park additional cost of such a policy, assuming one third of prisons meet minimum standards, in the order of £100 million over the coming years, while welcoming up to date official statistics.

UK Judge dissenting opinion: No (though blamed the legal system rather than the penitentiaries for allowing the situation to arise).

Case: **Hirst v United Kingdom**

Year Judged: **2001**

Year Referred: **1998**

Summary: A man killed his landlady with an axe and was put away for manslaughter. The Court found that gaps of two years between parole reviews were as illegal for dangerous characters as they had been for cases involving mental cases in previous judgments. Notwithstanding evidence that he had been unsuitable for release, he was given £1,000 in compensation.

[UPDATE: THERE WAS PREVIOUSLY AN ERROR IN THIS ITEM; THE CONVICTION WAS ACTUALLY FOR MANSLAUGHTER. WE SINCERELY REGRET IF ANYONE WAS MISLED]

Particular consequences: Increased regularity of review of life prisoners; increased workload; increased chance of early release of prisoners without full appreciation of the genuineness of

their reform. Between 2005-6 and 2006-7, the Parole Board had an increase in workload of 31 per cent.⁵⁰ In turn, this had led to more delays for prisoners awaiting hearings, further in breach of ECHR expectations. Over 20 Judicial Reviews were on the books at one point in 2007 just on the basis of delays.

Cost impact: Failures to release on time and administrative delays cost £3 million over nine months in 2007. By extension, we can assess extra costs, delays' impact plus increased administrative burdens in the order of £5 million per year.

UK Judge dissenting opinion: No.

Case: **P.G. and J.H. v United Kingdom**

Year Judged: **2001**

Year Referred: **1998**

Summary: A bank robber's room was bugged with oral but before written authorisation by the Chief Constable (absent on holiday). The two applicants were arrested in a stolen car with bank robbery equipment. Their cells were covertly bugged to match their speech patterns with those from the first bug. Their lawyers specifically raised ECHR defences, which were overruled on review by the judge.

Again, the Government conceded (following *Khan* above) that the absence of laws on bugs guiding their use meant that they were illegal. The Court also ruled that there had also been an Article 13 breach in that there had been no effective legal remedy to review the bugging. £1,000 was awarded to each of the criminals for their frustration and invasion of privacy.

Particular consequences: Sections 26(3) and 48(1) of RIPA cover this explicitly.

UK Judge dissenting opinion: No.

Case: **O'Hara v United Kingdom**

Year Judged: **2001**

Year Referred: **1997**

Summary: The applicant was arrested after the murder by PIRA of a German caterer. His detention was extended by the Secretary of State, but he was released after six days. The Court found that excessive without appearance before a judicial officer.

Particular consequences: See earlier.

UK Judge dissenting opinion: No.

Case: **Brennan v United Kingdom**

Year Judged: **2001**

Year Referred: **1998**

Summary: The applicant was arrested after a murder in Northern Ireland. Access to a solicitor was allowed after 24 hours, though he turned up a day late; a police inspector who was unconnected with the case stayed in the room on the first occasion to ensure no information was passed outside while two other suspects were being located. He subsequently admitted to the murder and other terrorist activity. The Court found that the presence of the police officer impeded the exercise of his legal defence rights.

Particular consequences: Made it harder to prevent arrested terrorists from tipping off their colleagues.

UK Judge dissenting opinion: No.

⁵⁰ http://www.nao.org.uk/publications/0708/protecting_the_public_the_wor.aspx

Case: **Devlin v United Kingdom**

Year Judged: **2001**
Year Referred: **1995**

Summary: Related to a job application for the civil service that had apparently failed on the grounds of a security check. The Court found that the government had exceeded its rights in removing complaints of this nature from the courts' jurisdiction on security grounds. The applicant was awarded £10,000 for "feelings of frustration and injustice".

Particular consequences: Increased difficulty for the vetting process.

Cost impact: The Defence Vetting Agency was formed in 1997, though costs arising from this case cannot be isolated as this was predominantly a rationalisation.

UK Judge dissenting opinion: No.

Case: **Hatton and Others v United Kingdom**

Year Judged: **2001**
Year Referred: **1997**

Summary: People on the Heathrow flight path objected to the impact of the 1993 changes to night traffic. The Court found that the Government failed to achieve a proper balance between the UK economy and the well-being of the applicants, in other words that the traffic was excessive as the economic case was not sufficiently proven. Moreover, as the review of the changes concentrated on procedural aspects rather than ECHR issues, there had been no access to legal remedy for their Human Rights.

Particular consequences: This case may have been a key contributory element in drafting the Human Rights Act, showing another case where Article 13 (access to legal redress on Human Rights issues) had been lost from the beginning.

UK Judge dissenting opinion: Yes. The judges failed to see any assessment of the level of harm arising from night flights; modern life was full of inconveniences of this type; house prices in question allowed a move elsewhere in London; there had been sufficient research done by the Government on the issues; the economic importance of night flights is more significant than the other judges allow; Heathrow was already a longstanding major airport before the applicants were there; the flights are legal; the authorities have not taken any measures against the applicants themselves; the challenge is to a macro-economic policy not a specific; passengers and carriers have "rights" also. Given much of London is under the flight path, the right place to discuss the issue is likely not Strasbourg.

Case: **Sutherland v United Kingdom**

Year Judged: **2001**
Year Referred: **1994**

Summary: Contested the age of homosexual consent (18, as opposed to 16 for heterosexual). The case was settled before judgment.

Particular consequences: Sexual Offences (Amendment) Act 2000 equalised the age of consent.

UK Judge dissenting opinion: N/A

Case: **Mills v United Kingdom**

Year Judged: **2001**
Year Referred: **1997**

Summary: A soldier was court-martialled after a serious assault. Given clear Strasbourg case precedent, it is unclear why the UK chose to fight this case other than to deter other potential legal challenges by a lengthy process alone. It lost the case.

Particular consequences: Suggestive that the Government is very aware of a major legal flaw

that it is trying to suppress appeals by the length of the legal process alone.

UK Judge dissenting opinion: No.

Case: **I.J.L., G.M.R. and A.K.P. v United Kingdom**

Year Judged: **2001**

Year Referred: **1995, 1996**

Summary: Returned to the issue of the legal standing of material produced during the investigations by DTI Inspectors. This ruling settled the level of costs.

UK Judge dissenting opinion: No.

Case: **Duyonov and Others v United Kingdom**

Year Judged: **2001**

Year Referred: **1997**

Summary: Settled before it reached the Court. Four Georgian refugees landed in Gibraltar, apparently thinking that it was Canada. They were not allowed legal aid for an appeal to the Privy Council over whether they had been legally detained.

Particular consequences: In 2001 the Gibraltar House of Assembly (anticipating a lost case) changed the legislation allowing such legal aid. Further encouragement for illegal immigration.

Cost impact: Limited.

UK Judge dissenting opinion: N/A

2002

Case: **Morris v United Kingdom**

Year Judged: **2002**

Year Referred: **1997**

Summary: A variation on the courts martial theme, this time relating to the rank structure and the review body. Notwithstanding changes made after losing previous cases in this area, the Court ruled that there were still not enough safeguards concerning the rank hierarchical system and the court martial judges, and the non-judicial nature of the review was improper.

UK Judge dissenting opinion: No.

Case: **Devenney v United Kingdom**

Year Judged: **2002**

Year Referred: **1994**

Summary: A sacked hotel waiter blamed a visit by the RUC to his workplace and an accusation made there. He claimed that the lack of access to the background to the accusation under a public interest certificate (legally deemed of itself conclusive proof) ran contrary to his rights. The Court found it a disproportionate breach of access to a court, and awarded £10,000 in damages.

Particular consequences: Section 42 exemptions weakened, making it harder to arbitrarily stop employment of known terrorists in key jobs without risking sources.

UK Judge dissenting opinion: No.

Case: **Paul and Audrey Edwards v United Kingdom**

Year Judged: **2002**

Year Referred: **1999**

Summary: A mentally ill prisoner killed another. They had been closeted together due to space shortages. The inquiry found they should not have been in prison or in the same cell. Family

found that there were no civil remedies. Notwithstanding new case law involving prison deaths brought on two occasions under the Human Rights Act, the Strasbourg Court found itself making a similar judgment stating that the right to life protected by law had been breached, and there was (despite the now-existence of the Act) no legal remedy for a public investigation. £20,000 in damages was authorised.

Particular consequences: Pressure for an end to internal investigations in public institutions.

Cost impact: Not yet evident.

UK Judge dissenting opinion: No.

Case: **McShane v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: An army driver, on police instruction in order to control a riot, cleared a roadblock using an armoured vehicle. A man was crushed under the barricade. The Court found the investigation to have been too slow. It also found that the inquiry (notwithstanding that it even took advice on the implications of the *Hugh Jordan* case, above) fell short in terms of the witness availability and limited verdicts. £8,000 in damages was awarded. The Court also found that official complaints levied against the applicants' solicitor, deemed to have released confidential documents without the formality of asking for permission, were effectively an attempt also to hinder the exercise of the right to an ECHR hearing.

Particular consequences: The Irish deaths cases demonstrate that the ECA itself is not sufficient remedy to implement ECHR law. Where the Strasbourg Court finds structural failings and can oblige change from above, the domestic courts can only register issues from within. On the last point above, this encouraged breaking rules over confidential documents in Human Rights cases.

UK Judge dissenting opinion: No.

Case: **Stafford v United Kingdom**

Year Judged: **2002**

Year Referred: **1999**

Summary: The human rights lobby group Justice contributed to the case as a third party. A murderer on parole left the country. His parole was revoked. He was arrested years later entering the country on a false passport. Released, he was later re-imprisoned for forgery. The Secretary of State rejected the Parole Board's recommendations subsequently to re-release. The Court ruled that this was punishment resolved by administrative discretion, based on fear of re-offence rather than due process proving intent, and therefore illegal. The applicant was awarded €16,500 for "frustration, uncertainty and anxiety."

Particular consequences: Weakened the Secretary of State's powers over keeping life prisoners incarcerated - particularly re-offenders - after the punishment tariff part of their sentence was completed, if they were not a physical threat to the public. The Convention Rights Compliance Act (Scotland) 2001 had by now passed to take this under account, as had the Life Sentences (Northern Ireland) Order SI no 2564, and UK courts examining the tariff structure had already seen judges admitting that this case would likely require changes in the English system too. In sum, such cases encouraged earlier release of prisoners, even where reoffending was considered a high threat.

UK Judge dissenting opinion: No.

Case: **Kingsley v United Kingdom**

Year Judged: **2002**

Year Referred: **1997**

Summary: The casino case revisited. Damages of £50,000 were awarded.

UK Judge dissenting opinion: No.

Case: **William Faulkner v United Kingdom**

Year Judged: **2002**

Year Referred: **1997**

Summary: A prisoner convicted for drugs offences (since released) had a letter sent to the Scottish Minister of State returned to him, with no explanation of why it had not been sent. As this appeared to breach mail rules, the Court found a breach of respect to correspondence.

UK Judge dissenting opinion: No.

Case: **Willis v United Kingdom**

Year Judged: **2002**

Year Referred: **1997**

Summary: Another widower's benefits claim. The wife had been the primary breadwinner, and had been nursed during her final convalescence. This time, the Widow's Payment and the Widowed Mother's Allowance were under scrutiny. They were deemed sexually discriminatory and the amount awarded.

Particular consequences: The Widow's Payment became the Bereavement Allowance. The Widow's Payment (WPt) is still on the books but time locked to 2001. A decision was made to equalize the pension age between 2010 and 2020.

The result was that widowers achieved equality with widows but widows bereaved on or after 9 April 2001 no longer had the right to a pension for life to which they would have been entitled under the previous legislation. The rights of existing widows to WP were retained. Standardisation thus occurred by lowering the support available.

Cost impact: Successive cases would expand the challenge to include other widower claims. Estimates of the cost of equalising Widows Pensions (WP) payments was estimated in 1998 to increase the bill by £250 million annually if men were added.⁵¹ The cost of generically extending benefits to men across all available widow grants was estimated in 1990 at around £350 million, an estimate that must by definition exclude allowances already covered in the case of *Crosland v United Kingdom* (1999). The solution was instead to reduce the level of support on offer.

UK Judge dissenting opinion: No.

Case: **Wilson, National Union of Journalists and Others v United Kingdom**

Year Judged: **2002**

Year Referred: **1996**

Summary: The *Daily Mail*, and port managers, derecognized trades unions (excluding Health and Safety issues). Employees who participated were awarded pay rises in compensation. The Court ruled that this amounted to discrimination against union members and an impediment to their legal right to join one.

Particular consequences: Weakened attempts to remove existing union rights in employment where union activism had been of concern as regards the national interest, while compensating employees for the loss. Led to the Employment Relations Act 1999 which incorporated a number of ECHR principles; several fell under EC Parental Leave obligations as an intermediary.

Cost impact: The 1999 Bill was costed at £60 million a year.

⁵¹ Fuller details of this bogage of changes and potential obligations are explained at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd050505/hoop-1.htm>

UK Judge dissenting opinion: No.

Case: **I. v United Kingdom**

Year Judged: **2002**

Year Referred: **1994**

Summary: A post-op female transsexual refused to supply a birth certificate to attend an army nurse course. It was also required for a student loan, and for a job interview in a prison. Though policy had in many cases changed, the complaint was that this was not established as a right. "A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement": it correspondingly resolved that there had been a breach of a right to a private life. It also ruled that the right to marry had been breached.

Particular consequences: Authorised transsexual marriages, seemingly reversing earlier case law. Substantiated a legal trend requiring institutions to treat such cases as the transferred sex. Parallel developments under ECHR considerations included the Sex Discrimination (Gender Reassignment) Regulations 1999. A broader working group was set up across government in 1999, anticipating ECHR opposition to existing government policy not least over marriage. Changes required as a result over ACCESS to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. Marginally impacted upon the mechanics of insurance premiums. Incidentally increased the importance of and therefore priority afforded to sex change operations. By removing procreation as a rational over marriage, opened the door to a test case on gay marriage.

UK Judge dissenting opinion: No.

Case: **Christine Goodwin v United Kingdom**

Year Judged: **2002**

Year Referred: **1995**

Summary: Another case of a post-op female transsexual. The lobby group Liberty was again involved. The applicant claimed discrimination at work. The applicant also apparently referenced *Coronation Street* as evidence of changing social mores (this case may have triggered at least one storyline). The Court confirmed its analysis in the case above regarding post-op individuals.

Particular consequences: Complications for life insurance, mortgages, private pensions or car insurance companies.

This and other cases led to the 2004 Gender Recognition Act.

UK Judge dissenting opinion: No.

Case: **Ezeh and Connors v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: A rapist and would-be murderer threatened – for the seventh time - to kill a probation officer. Another rapist ran into a warden (his 37th disciplinary offence). Some administrative punishment and a few extra days custody were awarded. The applicants complained that this was an administrative justice system rather than properly judicial. The Court found that this would lead them to being imprisoned beyond the tariff set by a court, and therefore illegal, as was their lack of access to legal representation during the hearing.

Particular consequences: The prison service had been warned in an internal document after the HRA that this sort of judgment was now possible, and that measures should be made to reduce the likelihood. The Prison (Amendment) Rules 2002 (SI no. 2116/2002), and Scottish Prison Service Notice of 8 June 2001, followed. The ECHR appears to have been behind the

trend away from using additional days in prison as a punishment within prisons for bad behaviour.

UK Judge dissenting opinion: No.

Case: **P., C. and S. v United Kingdom**

Year Judged: **2002**

Year Referred: **2000**

Summary: Resulted from a mother whose first child had been removed by the US authorities due to her psychiatric condition. Her second child was taken from her at the hospital under a care order after birth. In the appeal, her lawyers withdrew as they believed they were instructed to fight the case unreasonably. The Court found that legal representation was an indisposable requirement, and that the removal of the child at birth was “draconian” given the lack of any immediate threat to life. €24,000 was awarded in damages.

UK Judge dissenting opinion: Partial, indicating that he believed that the unfairness of the hearing did not lead of itself to a violation of rights to participate in the decision-making process.

Case: **M.G. v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: A former foster child was given summary and vetted material related to his past care files from thirty years before. See *Gaskin* above for a similar case. Notwithstanding the previous case, the Court ruled that a review tribunal at that time did not exist to which he could appeal for fuller disclosure. The HRA now filled this gap for future cases. It awarded €4,000 damages.

Particular consequences: Issues of medical confidentiality, and more broadly of officials being able to write what they think.

UK Judge dissenting opinion: No.

Case: **Cuscani v United Kingdom**

Year Judged: **2002**

Year Referred: **1996**

Summary: The applicant, former manager of *The Godfather Restaurant*, was arrested for VAT evasion. The Defence stated that “for the purpose of consultation we can get by, but one of the difficulties is that his English is very poor and his Italian is very Southern,” and requested a translator. One was granted, but the arrangements were not made for the next session. His brother stood by if needed but was not called for. The appeal did not mention any interpretation difficulties, but his subsequent appeal to the Home Secretary did, indicating that he had meant to plead guilty for fraud at a lower rate. The Court found that this breached the ECHR clause giving the right to an interpreter in criminal cases.

Particular consequences: This clause has separately been abused by some criminals, particularly those on arrest claiming to only understand particular dialects.

Cost impact: The Thames Valley force alone increased spending on interpreters ten fold, to £1 million, over ten years.⁵² It is impossible to disaggregate unnecessary costs throughout the legal services (plus councils and social services for that matter) where supplied as a matter of rights and convenience rather than necessity.

⁵² <http://www.dailymail.co.uk/news/article-482559/Police-force-spending-1-million-year-interpreters-rise-migrant-workers.html>

Police spend up to £21 million on translation services across the country, while local councils spend up to £25 million. Meanwhile, the courts system spends more than £10 million, and NHS translators are estimated to cost at least £55 million per year.

If even 5 per cent efficiency savings could be made from providing a reserve service rather than an automatic right, that would be savings of over £5 million. A radical approach especially to council expenditure (mostly a political or social choice rather than obliged under ECHR provisions) would save much more.

UK Judge dissenting opinion: No.

Case: **Benjamin & Wilson v United Kingdom**

Year Judged: **2002**

Year Referred: **1995**

Summary: A rapist and a child molester were given post-sentence technical life sentences to account for mental disorders identified. As their review tribunal could recommend but not authorize release, again, the Court found that they were being detained without judgment from a competent court.

UK Judge dissenting opinion: No.

Case: **Beckles v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: A man on crack threw another man whom he had held up at knifepoint out of a fourth floor window, paralyzing him. The applicant initially claimed the victim had jumped, then stayed silent after receiving legal advice. He challenged the judge's ruling that inference could be drawn, on the basis that he had initially provided a comment and his silence was on subsequent legal advice. The Court agreed.

Particular consequences: Weakened moves to modify right to silence, deemed to have fallen under legal abuse.

UK Judge dissenting opinion: No.

Case: **D.P. & J.C. v United Kingdom**

Year Judged: **2002**

Year Referred: **1997**

Summary: Two victims of abuse sued social services. They did not get legal aid and (as with other cases of attempts to sue the authorities, above) did not get access to their case files. English case history had established that authorities could not be sued in such cases. Despite this, the Court found that the applicants had raised reasonable grounds for investigation under the Convention, but had not had a means to explore it. €10,000 in damages were awarded.

Particular consequences: Increased legal aid bills for futile cases. Increased likelihood of cases that ran contrary to Common Law getting state funding for appeals under the HRA.

Cost impact: Unquantifiable.

UK Judge dissenting opinion: No.

Case: **Perkins and R. v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: Two more cases involving homosexuals in the Royal Navy. €43,000 in compensation was awarded.

UK Judge dissenting opinion: No.

Case: Taylor-Sabori v United Kingdom

Year Judged: 2002

Year Referred: 1999

Summary: A drug smuggler complained that the Police had intercepted his pager messages without a warrant. The Government admitted again that the absence of governing legislation meant the intercepts were technically illegal.

Particular consequences: Continuing legal challenges to phone tapping and intercepts. The UK Government has seemingly accepted it will always lose such cases but is prepared to pay the price in a series of small fines in future years.

UK Judge dissenting opinion: No.

Case: Beck, Copp and Bazeley v United Kingdom

Year Judged: 2002

Year Referred: 1999

Summary: Three more cases concerning homosexuals in the armed forces. The Court again found the ban discriminatory and the investigations intrusive and awarded €454,000 damages.

UK Judge dissenting opinion: No.

Case: Allan v United Kingdom

Year Judged: 2002

Year Referred: 1999

Summary: A murder suspect's cell and visiting areas were bugged, and he was coaxed by an informant. The applicant claimed that as the police intent was to 'spook' him in interview so as to talk on tape in his cell, no inference should have been drawn from the exercise of the right to silence given the interrogation techniques used. As no law governed bugging, the Court once again found the procedure illegal. Moreover, the use of an individual to encourage admission while in prison was a breach of the right to silence. As no system existed for complaints over this, there was a breach there too.

Particular consequences: Undercover work becomes more difficult.

UK Judge dissenting opinion: No.

Case: E. and Others v United Kingdom

Year Judged: 2002

Year Referred: 1996

Summary: Another case brought against failed social services following extended abuse. Failings by the authorities were deemed by the Court to have amounted to a breach of provisions to prevent torture or inhuman or degrading treatment. The failure to allow the applicants to sue was a breach of their rights. €80,000 awarded in damages.

Particular consequences: Government agencies liable to compensation claims for failing to identify abuse, rather than the perpetrators themselves being the sole at fault. This was already by now recognized in cases addressed under HRA provisions before this particular case reached Strasbourg.

Cost impact: The cost of the legal bill for people suing social services, both in terms of their legal aid plus their compensation, is an indirect consequence of the ECHR.

UK Judge dissenting opinion: No.

Case: Waite v United Kingdom	Year Judged: 2002 Year Referred: 1999
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Summary: A murderer on parole breached his conditions on several counts, including underage homosexual sex and drugs. On recall, he did not get an oral hearing reviewing his case as he should have under the interim arrangements after the loss by HMG of a previous Strasbourg case. The Court found he should have had, and that there had been no system to seek compensation.

UK Judge dissenting opinion: No.

Case: Fielding v United Kingdom	Year Judged: 2002 Year Referred: 1997
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Summary: Settled out of court. Another widower case.

UK Judge dissenting opinion: N/A

Case: Sawden v United Kingdom	Year Judged: 2002 Year Referred: 1997
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Summary: Settled out of court. Another widower case.

UK Judge dissenting opinion: N/A

Case: Loffelman v United Kingdom	Year Judged: 2002 Year Referred: 1998
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Summary: Settled out of court. Another widower case.

UK Judge dissenting opinion: N/A

Case: Downie v United Kingdom	Year Judged: 2002 Year Referred: 1998
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Summary: Settled out of court. Another widower case.

UK Judge dissenting opinion: N/A

Case: Michael Matthews v United Kingdom	Year Judged: 2002 Year Referred: 1998
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Summary: Settled out of court. A male objected to waiting five years longer than a woman for his pensioner bus pass.

Particular consequences: Transport Concessions Eligibility Bill 2001 entitled concessions to men at the age of 60, to increase phased with new women pension provisions back to 65 jointly over 2010-2020.

Cost impact: £65 million per annum.⁵³

UK Judge dissenting opinion: No.

Case: Armstrong v United Kingdom	Year Judged: 2002 Year Referred: 1999
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⁵³ <http://www.parliament.uk/commons/lib/research/rp2001/rp01-080.pdf>

Summary: A drugs dealer was arrested after bugging authorized by someone of the wrong police rank. The Court once again found breaches in privacy and in effective remedy given the lack of legal framework already previously and repeatedly explored.

UK Judge dissenting opinion: No.

Case: **Davies v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: Related to a complicated receivership. On the last day of the time limit, the DTI launched disqualification procedures against key persons. This led to legal challenges and other delays. The Court found the 5 years of proceedings not to have been a reasonable timeframe.

UK Judge dissenting opinion: No.

Case: **Rice v United Kingdom**

Year Judged: **2002**

Year Referred: **2001**

Summary: Settled out of court. Another widower benefits case.

UK Judge dissenting opinion: N/A

Case: **Somjee v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: Related to a lengthy group of court cases claiming unfair dismissal and racial discrimination. The Court found that some of the delays were the fault of the tribunal, and this was enough to mean a breach of the principle of speedy justice.

UK Judge dissenting opinion: No.

Case: **Foley v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: An inventor sued a company. The case dragged on, in part because of a number of delays caused by the applicant. The Government admitted a year's delay out of the fourteen. The Court counted three, and found this excessive.

UK Judge dissenting opinion: No.

Case: **Stephen Jordan (No. 2) v United Kingdom**

Year Judged: **2002**

Year Referred: **1999**

Summary: Follows on from an earlier fraud court martial. The applicant applied delaying tactics. However, as there had been earlier delays due to bureaucracy, notwithstanding that "significant periods of delay can be imputed to the applicant", the Court found that the charges had not been brought within a reasonable time.

Particular consequences: Another case that encourages use of delay tactics and suing afterwards.

UK Judge dissenting opinion: No.

Case: **Mitchell and Holloway v United Kingdom**

Year Judged: **2002**

Year Referred: **1998**

Summary: A debt dispute in which the lawyers on one side were criticized by a judge for deliberate spoiling tactics that prevented speedy justice and which may have amounted to, or come close to, abuse of process. The Court ruled that the initial delay of 2½ years, fixing a slot in the legal diary for what was clearly a complex case, was excessive.

UK Judge dissenting opinion: No.

2003

Case: **Peck v United Kingdom**

Year Judged: **2003**

Year Referred: **1998**

Summary: A man intending to kill himself was spotted on CCTV. The operator alerted the Police who disarmed him. The pictures were used in trade journals and on television, but the face masking was not good enough to prevent identification. The appeal procedure recognized that the council had been within its rights to pass on the cctv footage, but that the HRA would likely in future change this. The Court found his right to respect for his private life breached on two counts (excessive to applicant's expectation and failure to mask). Furthermore, given the passing on of the recording was recognized as legal, as that had shut down his appeal he was also lacking in legal remedy. He was awarded €11,800 damages.

Particular consequences: Alongside the HRA, key to the introduction of a general right of privacy into English law. Of interest to magazines such as *Hello!*, police chase programmes, or Google street camera mapping: events which had taken place in public were nevertheless still to some extent 'private'. Impact upon Press Complaints Commission; as it has no legal powers of remedy, it was increasingly likely to be sidetracked in the future by appeals in the courts under the HRA.

UK Judge dissenting opinion: No.

Case: **Hutchison Reid v United Kingdom**

Year Judged: **2003**

Year Referred: **1999**

Summary: Another case of a mental patient complaining about the amount of time spent in hospital without review. This case involved someone inside for culpable homicide, who on transfer to an open hospital had assaulted and tried to abduct a child. After time in prison, he was retransferred to a hospital prison to better prepare him for future life outside. Psychiatric advice repeatedly pointed to his re-offending, in a sexual crime. On appeal, the judge said that "The balancing of the protection of the public against the claim of a psychopath convicted many years ago that he should not continue to be detained in hospital when medical treatment would not improve his condition was, however, an issue for Parliament to decide, not the judges." The Strasbourg judges, however, determined that it was wrong for the courts to put the burden of proof onto the inmate to prove he was safe for release. They also decided the system took too long to resolve his appeals; bluntly put, "The fact that in Scotland there is a four-tier system of review cannot serve to justify the applicant being deprived of his rights under Article 5 § 4 of the Convention. It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that provision."

Particular consequences: Weakened the ability of the state to keep dangerous convicts locked up for the public good.

This raises the question incidentally of the extent to which the Government's difficulties with releasing prisoners who have re-offended in crimes of murder and rape have been caused by

the ECHR.

UK Judge dissenting opinion: No.

Case: **McGlinchey and Others v United Kingdom**

Year Judged: **2003**

Year Referred: **1999**

Summary: A heroin addict died in prison. The Court found that the lack of dedicated medical care contravened the prohibition against inhuman or degrading treatment. Also, the lack of a mechanism to apply for compensation was a further breach. €22,900 was awarded.

Particular consequences: Increased medical expenditure required in prisons. Opened the door for cases regarding the duty of care for addicts who have gotten themselves into their own addiction, in an area where illicit drug supply behind bars is a serious area for concern. Disregarded the culpability of addicts for their own condition.

UK Judge dissenting opinion: Yes, hesitantly. The deceased had clearly belonged in prison; there was considerable medical attention paid repeatedly; there had been a medical assessment that her condition was improving; no doctors criticized anyone for late admittance to hospital. But he agreed that the compensation avenues were blocked (notwithstanding incidentally the HRA).

Case: **Easterbrook v United Kingdom**

Year Judged: **2003**

Year Referred: **1999**

Summary: An armed robber who had shot and wounded a policeman was in prison. The Home Secretary set aside the discretionary tariff in favour of a future Home Secretary's discretion, after a positive recommendation from the Parole Board. In 1998, likely under ECHR influence, the new Home Secretary changed this to a discretionary life sentence. The Government recognized that the late fixing of the tariff was a breach of the Convention.

Particular consequences: Confirmed the trend already established that a Home Secretary could not keep life prisoners locked up for life.

UK Judge dissenting opinion: No.

Case: **Chalkley v United Kingdom**

Year Judged: **2003**

Year Referred: **2000**

Summary: The pressure group *Liberty* provided the lawyer. A suspected robber was arrested for questioning in relation to a lapsed criminal investigation in order to bug his house in his absence. He was ultimately convicted, though the police were found to have trespassed. Given previous Strasbourg cases, the Court found another breach on the basis of a lack of legal cover (see *Khan* above) and of legal remedy.

Particular consequences: See earlier.

UK Judge dissenting opinion: No.

Case: **Stretch v United Kingdom**

Year Judged: **2003**

Year Referred: **1998**

Summary: A Council revoked a lease its predecessor had had no legal right to enter, as it exceeded the maximum time frame allowed. As a void agreement, the applicant could not sue for the council's mistake. The courts reluctantly upheld this. The Court found this disproportionate and a breach of the right to peaceful enjoyment of possessions. €36,000 was

awarded in damages.

Particular consequences: Local Government (Contracts) Act 1997 allowed such contracts to have legal force.

UK Judge dissenting opinion: No.

Case: **Dowsett v United Kingdom**

Year Judged: **2003**

Year Referred: **1998**

Summary: The applicant was in prison for murder. He claimed he had only hired two thugs to break one of his business partner's limbs; that the Police withheld evidence that disproved the motive for killing him (evidence of joint fraud guilt); and the judge's failure to indicate to the jury that his lies on wanting his colleague assaulted proved dishonesty with respect to the murder as well. The Court of Appeal recognized some flaws but saw no evidence of a miscarriage of justice. The Strasbourg Court, on the other hand, had issues with the disclosure and review system for documents held by the Prosecution (notwithstanding several developments in UK law and practice).

Particular consequences: Similar to previous cases in Northern Ireland which had led to the Criminal Procedures and Investigations Act 1996, with the requirement for primary disclosure of relevant documents. Of note is the admission that "the prosecution continued to reassess its duty of disclosure in the light of developments in the common law."

UK Judge dissenting opinion: The contrary: a concurring statement was issued.

Case: **Finucane v United Kingdom**

Year Judged: **2003**

Year Referred: **1995**

Summary: Arose from the murder of the Northern Irish solicitor by the UFF, and the subsequent investigation. The Government acknowledged precedent in that it was another case where the RUC had investigated itself and that this was a Convention breach, and that the Stevens inquiry ten years after the event could not be construed as a speedy resolution. The failure to explain the lack of prosecutions was also deemed a failure by the Court

Cost impact: Some consideration might be given in another place of the impact of the ECHR behind the political decision to hold several high profile and very expensive enquiries.

UK Judge dissenting opinion: No.

Case: **Perry v United Kingdom**

Year Judged: **2003**

Year Referred: **2000**

Summary: A suspect in several armed robberies repeatedly failed to attend identification parades. He was covertly videoed when he refused to attend another, having been taken from prison (which he was at on a separate matter) for the latest. At trial, the judge ruled that procedure had been broken on several counts, but that it was admissible as the process itself had been taped to show the court. He was acquitted of two counts and convicted on three. The Strasbourg Court on the other hand found that the filming (despite it being in a public custody suite) had not been done voluntarily or where it could be reasonably anticipated) was an unjustified breach of his privacy. It awarded €1,500 in damages.

Particular consequences: An astonishing judgment with impact upon the use of covert surveillance as evidence.

UK Judge dissenting opinion: No.

Case: **Edwards and Lewis v United Kingdom**

Year Judged: **2003**
Year Referred: **1998**

Summary: A drugs runner and a counterfeit supplier were both separately in prison thanks to sting operations. They claimed entrapment by agents provocateurs, and that they did not have access to the documents that might prove this. The Court found that non-disclosure breached their rights.

Particular consequences: "The Review of the Criminal Courts in England and Wales" ("the Auld Report") was commissioned in 1999 and reported in 2001. This in part covered disclosure practices. Prior to this case, Under English law, where public interest immunity evidence is not likely to be of assistance to the accused, but would in fact assist the prosecution, the trial judge was likely to find the balance to weigh in favour of non-disclosure. This was now under challenge.

UK Judge dissenting opinion: No.

Case: **Wynne v United Kingdom (no 2)**

Year Judged: **2003**
Year Referred: **2001**

Summary: A murderer on parole killed again. Another tariff, discretionary/mandatory sentence and parole issue. Notwithstanding the appropriateness of the sentence, the Court found he should have had greater parole review rights.

Particular consequences: A baffling case for the general public to appreciate the (legal) niceties of.

UK Judge dissenting opinion: No.

Case: **Grievs v United Kingdom**

Year Judged: **2003**
Year Referred: **2000**

Summary: Related to a Royal Navy court martial over a serious assault. The Navy system being different from the RAF system because of the difference in postings and traditions (the latter is a civilian position), the Court found that the rank structure made the system unfair.

UK Judge dissenting opinion: No.

Case: **Obasa v United Kingdom**

Year Judged: **2003**
Year Referred: **1999**

Summary: A disabled black woman claimed discrimination when not given a promotion. The tortuous proceedings found there was no discrimination. The Court found the delay unreasonable. €5,000 in damages was awarded.

Particular consequences: Pressure on the legal system for speedier resolution of cases, ie extra costs.

UK Judge dissenting opinion: No.

Case: **Atkinson v United Kingdom**

Year Judged: **2003**
Year Referred: **2001**

Summary: Widower's Benefits case, settled out of court.

UK Judge dissenting opinion: N/A

Case: Hewitson v United Kingdom

Year Judged: **2003**
Year Referred: **1999**

Summary: A drug importer complained at the fact his garage had been bugged by police. At the time, there was no legal authority to do so (see *Khan* above) so the Court again ruled this a breach.

Particular consequences: Part II of the Regulation of Investigatory Powers Act 2000 (“RIPA”).

UK Judge dissenting opinion: No.

Case: Mellors v United Kingdom

Year Judged: **2003**
Year Referred: **2000**

Summary: A rapist refused to attend an appeal hearing unless in non-prison clothes. The Court found this was unreasonable, and that overall one year of the delays in his proceedings (which appeared to be due to pressures on the Prosecution and on the Courts) constituted a violation of his rights. He was awarded €2,800 damages.

Particular consequences: The clothing issue is almost an aside in the proceedings, but gave rise to a number of possible avenues for legal claim about ‘image’ and ‘dignity’ in connection with convicts in public. Examples include visible wearing of handcuffs, and public entry into courts. Proposals floated by Home Office minister Hazel Blears in 2005 would have been dropped once ministers became aware it would have breached ECHR law: a remarkable failure of policy planning.⁵⁴

UK Judge dissenting opinion: No.

Case: Z.W. v United Kingdom

Year Judged: **2003**
Year Referred: **1997**

Summary: A foster case where the children had been abused. This was settled out of court for £50,000. Earlier cases had already recognized that there was no legal redress for negligence claims against local authorities, and that this was against ECHR principles.

Particular consequences: Liability with the system rather than with the abusers.

UK Judge dissenting opinion: N/A.

Case: Brown v United Kingdom

Year Judged: **2003**
Year Referred: **1999**

Summary: Another RAF homosexual case. This was settled out of court for £52,500 including costs.

UK Judge dissenting opinion: N/A.

Case: Price and Lowe v United Kingdom

Year Judged: **2003**
Year Referred: **1998**

Summary: A property dispute involving a doctor and his patient that dragged on, almost entirely it appears through the parties. The Court resolved that notwithstanding the fact that the court was not the motor in such cases, the state should not have let the proceedings drag on and therefore it was at fault.

⁵⁴ http://news.bbc.co.uk/1/hi/talking_point/4551291.stm

Particular consequences: Another astonishing ruling, where blame is passed onto the arbiter rather than the cause. “The manner in which a State provides for mechanisms to comply with this requirement – whether by way of increasing the numbers of judges, or by automatic time-limits and directions, or by some other method – is for the State to decide.”

UK Judge dissenting opinion: Only in so far as it related to the award of damages (€1,000 each), as they had made use of the property in dispute throughout and had been in part at fault themselves. So there was nothing to compensate for.

Case: **Von Bulow v United Kingdom**

Year Judged: **2003**

Year Referred: **2001**

Summary: The applicant murdered a policeman and shot two others. See *Stafford* above. The system of having Parole Boards that could not overturn mandatory life sentences was again found to be in breach. The murderer was awarded €1,500 for “feelings of frustration, uncertainty and anxiety”.

Particular consequences: Another ludicrous award in the public eye for a criminal who should be behind bars for the public good.

UK Judge dissenting opinion: No.

Case: **Lewis v United Kingdom**

Year Judged: **2003**

Year Referred: **2002**

Summary: A prisoner claimed that bugged material from his cottage were “drug-crazed ramblings” and therefore inadmissible. The judge in summing up invited the jury to consider this possibility. As in *Khan* above, the Government acknowledged legal issues over legal authority to bug, and over the appeal system about it. The Court concurred.

UK Judge dissenting opinion: No.

2004

Case: **B.B. v United Kingdom**

Year Judged: **2004**

Year Referred: **2000**

Summary: A man was arrested after reporting being assaulted by a 16 year old with whom he had homosexual relations. After complaining of violations of his human rights referencing the *Sutherland* case, the charge was dropped. The Court agreed that his rights had been breached.

Particular consequences: Sexual Offences (Amendment) Act 2000 reduced the age of consent to 16. This bill had been initially defeated in the Lords. A comprehensive government review of all laws relating to sexual offences followed.

UK Judge dissenting opinion: No.

Case: **Glass v United Kingdom**

Year Judged: **2004**

Year Referred: **2000**

Summary: This related to the giving of morphine to a severely handicapped child, and an associated do-not-resuscitate note: a doctor observed, “I have told [the second applicant] that we can give morphine to alleviate distress even vs. their wishes (and we can – I am assured by the Official Solicitor that no judge has ever overturned a doctor’s decision to withdraw treatment/alleviate symptoms) but we wouldn’t without telling them.” NHS medical staff and

the parents disagreed over whether to disturb the child, leading to a major assault on staff members and on intervening police officers. Arrangements were made to attend an alternative hospital in future.

The applicant complained that her child had been assaulted by the doctors administering morphine without her consent. These complaints were investigated but rejected. Strasbourg, however, ruled that there had been a transgression of the child's right to respect for his physical integrity, particularly given that the Trust had failed to refer the matter to the High Court at an early stage. €10,000 in damages were awarded.

Particular consequences: Increased strain on the ability of medical staff to balance their Hippocratic Oath with the likelihood of a major law suit.

A bitter revisitation of the consequences of this legal debate occurred in the case of Kerrie Woollorton, who after reportedly swallowing antifreeze called an ambulance to seek admittance but not full treatment from the local Norfolk hospital. A 'living will', permitted by the *Mental Capacity Act 2005*, created a legal dilemma for medical staff, the renal consultant indicating he even feared an assault charge. In fact, the legal status of a document showing premeditation is less clear cut. In any events, the Rights culture had generated a legal ambiguity. There were reports the parents were considering suing.

Cost impact: The Treasury initially waived the cost analysis requirement of the Bill, much to the surprise and disappointment of the Select Committee. Subsequent data established an initial cost of £27.25 million and annual running costs of £27.2 million, plus costs beyond those to Government itself.⁵⁵ It can be argued that this was the cost forced on Government in selecting a law option rather than the three others: advisory, code of practise or clear official guidelines, less satisfactory in defence at Strasbourg.

UK Judge dissenting opinion: No.

Case: **Hirst v United Kingdom (No. 2)**

Year Judged: **2004**

Year Referred: **2001**

Summary: This was another case brought by the man who killed his landlady with an axe, following on from a previous case which had seen him awarded £1,000 for not having had annual parole reviews to consider whether he should be released. Hirst objected to being denied the vote. Eight European countries deny prisoners a vote, while another eight limit it. Appeal was declined on the basis that the Strasbourg Court had ruled against the principle. The Strasbourg Court found differently in the event, ruling that the action was indiscriminate.

[UPDATE: THERE WAS PREVIOUSLY AN ERROR IN THIS ITEM; THE CONVICTION WAS ACTUALLY FOR MANSLAUGHTER. WE SINCERELY REGRET IF ANYONE WAS MISLED]

Particular consequences: The principle of "civic death", dating back in English law to the time of Edward III, is overturned. The announcement to overturn the 1870 act governing its application today was made in April 2009 - during a Parliamentary Recess. Dominic Grieve, the shadow Justice Secretary, said: "Many people will question whether this is a sensible development. The principle that those who are in custody after conviction should not have the opportunity to vote is a perfectly rational one. Civic rights go with civic responsibility, but these rights have been flagrantly violated by those who have committed imprisonable offences [...] The Government must allow a parliamentary debate which gives MPs the opportunity to insist on

⁵⁵ <http://www.dca.gov.uk/risk/mcbria.pdf>

retaining our existing practise that convicted prisoners can't vote."

The ruling further demonstrated the flaw in the EHA system, not least given the actual consideration of Strasbourg intent under HRA principles, but also that the principle of denying prisoners the vote was specifically addressed in the debate around the Representation of the People Act 2000 – which was accompanied by a certificate of compatibility in the HRA.

The ruling also encouraged vexatious claims.

Cost impact: Marginal, seemingly, thanks to proxy and postal voting. Possibly in the order of £30,000. The issue is symbolic and one of defining the responsibilities of citizenship.

UK Judge dissenting opinion: No.

Case: **Kansal v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: A man on the brink of bankruptcy was lent £100,000 by a building society. His wife took it to India in a bin bag. He was charged with deception. The transcript of the Official Receiver was used during the trial. In 2001, the conviction was overturned on the basis of past rulings of the Strasbourg Court (see *Saunders*) relating to material obtained by company investigators before the Police were involved. This in turn was overturned again on further appeal, on the basic principle that laws could not be retrospective, so the HRA could only apply to trials after 1998. The Strasbourg Court found that an absence of remedy prior to 1998 was a breach of the ECHR.

Particular consequences: The HRA is proven to be flawed and not a solution to the ECHR (or at least won't be for another 30 years).

UK Judge dissenting opinion: No.

Case: **Connors v United Kingdom**

Year Judged: **2004**

Year Referred: **2001**

Summary: A family of gypsies had been driven off their site by the antisocial activities of other gypsies. Family members caused a number of complaints to be made at a caravan site they were allowed to stay at. One family member married a man identified as a "magnet for trouble". They were evicted with some difficulty. As the family had been settled over some time, and given the failure to establish an alternative location that proved to be satisfactory, the Strasbourg Court found a breach of their right to a family life. It also awarded €14,000 in damages.

Particular consequences: Increased difficulty to manage the troublemaking amongst the travellers.

It is appropriate to broaden the review at this stage somewhat. More broadly, cases brought under the HRA affected councils across the country. The right to a domestic life was been a consideration in the requirement for all local councils to establish travellers sites. This is because despite Articles 6, 8 and 14 of the ECHR, the law did not grant them the same level of protection as council house occupiers. Given the relatively small number of pitches available for roaming as opposed to sedentary families, more traveller sites would be needed. Retrospective planning permission for existing ones would also gain added legal weight.

Changes would see print in the Housing Act 2004.

It is significant that cases judged under the HRA concerning travellers had interpreted the councils as having more latitude than Strasbourg did.

Cost impact: Difficult to disaggregate. The Bill covered several areas that had Human Rights aspects (indeed, Right To Buy was questioned under these provisions). It is possible to claim that minimum housing standards covered in the legislation arise legally from ECHR obligations, even if political priority was the clear driving force. The duty to act came to a bill of £260 million annually (2001 prices), or £4.8 billion over 30 years. We would also have to factor in the cost of HIPs. Given the complexity, we merely note the ECHR minimum living conditions as a contributory factor in establishing minimum standards.

UK Judge dissenting opinion: No.

Case: **G.W. v United Kingdom**

Year Judged: **2004**

Year Referred: **1996**

Summary: A Royal Navy embezzlement court martial. Changes had been made after the *Findlay* judgment. The Court found that there had still been a breach, as under the *Lane* case. Reforms had affected the appeals system rather than those who pleaded guilty.

Particular consequences: Demonstrated that the 1996 Act, designed to fix problems with the ECHR, had failed.

UK Judge dissenting opinion: No.

Case: **Le Petit v United Kingdom**

Year Judged: **2004**

Year Referred: **1997**

Summary: Another RN court martial with a guilty plea (see above).

UK Judge dissenting opinion: No.

Case: **Thompson v United Kingdom**

Year Judged: **2004**

Year Referred: **1997**

Summary: An army court martial following a wounding and a desertion. The applicant claimed he had not had the option of a court martial for one of the offences, leading to a summary trial by his CO, and an award of 28 days. This was disputed. Nevertheless, the Court found that punishment under the chain of command, and the lack of legal representation, was a breach of trial rights.

Particular consequences: The last nail in the coffin for the old system of military punishment. The AGAI 67 provisions (with significant paper trail) was developed following the Armed Forces Act 2006.

Cost impact: Removes a reviewing authority to be replaced with an automatic right of appeal, amongst other changes. Paradoxically, increased costs while potentially reducing the likelihood of the observation of miscarriages. Comparisons were briefly made following the Money Resolutions with £7 million spent on a similar system in Northern Ireland annually. However, there is no reference to comparisons of scale, and this sum is smaller than earlier known estimates of the system on the mainland. In the absence of data, we are therefore obliged to withhold an estimate.

UK Judge dissenting opinion: No.

Case: **S.C. v United Kingdom**

Year Judged: **2004**

Year Referred: **2000**

Summary: An 11 year old boy snatched a pensioner's handbag, who fell and fractured her arm. As he had previous for robbery, burglary, theft and arson, it was decided to try him with a mind to a custodial sentence if found guilty. The judge ruled him fit to stand trial in a 'childrenised' court, notwithstanding claims of "impaired intellectual capacity" (from skipping school). The Strasbourg Court was not convinced.

Particular consequences: Increased concept of criminal pass for juveniles.

UK Judge dissenting opinion: Yes. The UK court had been modified for the child as a result of previous Strasbourg rulings; there was no pressure from media interest as had occurred in *T.* and *V.*; there was no sense of post-trial stress; a Youth Court would have been similar; he had experienced the Youth Court proceedings several times before; there was no medical evidence suggesting he was unfit to plead; a pre-trial hearing reviewed the complaint specifically; the applicant improved after the trial; and his own lawyers must have thought him capable of understanding events and impressing the jury as they called him as a witness.

Case: **H.L. v United Kingdom**

Year Judged: **2004**

Year Referred: **1999**

Summary: Related to an "informal psychiatric patient". An autistic self-harmer was admitted without recourse to the Mental Health Act 1983, as he was compliant, but would have been formally had he resisted. He was subsequently found to have been detained unlawfully as the Act had not been invoked, though this was challenged at the Lords. The Strasbourg Court looked at the issue of "deprivation of liberty" rather than the tort of false imprisonment, and decided that compliant or not, the Convention protection remained. Moreover, it had limited his access to his carers, and the review process that followed lacked procedural safeguards. His rights had therefore been denied.

Particular consequences: Circumvented an entire debate in English law over concepts such as the difference between "lockable" and "locked" doors. Led to the Mental Capacity Act 2005 (see above).

Cost impact: See above.

UK Judge dissenting opinion: No.

Case: **Miller v United Kingdom**

Year Judged: **2004**

Year Referred: **1999**

Summary: Courts martial relating to charges of indecent assault, and of wounding. The army at the time refused appeal specifically as changes had been made since *Findley*. The Court ruled that these changes had not been sufficient.

Particular consequences: See above.

UK Judge dissenting opinion: No.

Case: **Hooper v United Kingdom**

Year Judged: **2004**

Year Referred: **1998**

Summary: A man charged with assault and failing to answer bail, who further "reacted adversely" in the court, was bound over without discussion (partly it seems due to the inexperience of his solicitor). He defaulted. As he had not had a chance to object at his inability to pay, the Court found a breach of a fair hearing. He was awarded €8,000 in damages.

Particular consequences: The Government had argued that as the High Court had already found a breach, the applicant could hardly claim he had not had access to legal redress. Strasbourg ruled, however, that the delay in the system had been breach enough. In effect, this meant that the EHA would have to be applied at the very lowest levels of the UK legal system, or else appeals could still go to Strasbourg.

Cost impact: Extra delays and complexity, which cannot yet be costed.

UK Judge dissenting opinion: No.

Case: **Owens v United Kingdom**

Year Judged: **2004**

Year Referred: **2000**

Summary: Another widower case, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **Martin v United Kingdom**

Year Judged: **2004**

Year Referred: **2000**

Summary: A council videoed the front door area of a reported nuisance family in a council house. They claimed intrusion. The case was settled out of court with £4,000 damages.

Particular consequences: Surveillance issues, both positive and negative. In the context of the restricted observation of an external feature in support of a troubled neighbourhood, the Strasbourg decision appears in this instance to lean towards the latter.

UK Judge dissenting opinion: N/A.

Case: **Hill v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: Another parole case involving a murderer. After *Stafford*, the Home Secretary announced to the Commons that he would normally accept Parole Board recommendations for release as an interim arrangement pending changes in the law to accommodate the Strasbourg ruling. The Court found that, notwithstanding the fact that the Board had never recommended his release, a body that could have ordered his release did not review his case. He was also denied a mechanism for compensation.

Particular consequences: The Home Secretary is still run rings around by the ECHR. €2,200 compensation is awarded to a prisoner who would never have been released, despite the Home Secretary having made stop gap arrangements, notwithstanding having put in place the Human Rights Act.

UK Judge dissenting opinion: No.

Case: **Broadhurst v United Kingdom**

Year Judged: **2004**

Year Referred: **2001**

Summary: Another poll tax imprisonment case. It was settled out of court with £2,700 damages.

UK Judge dissenting opinion: No.

Case: **Eastaway v United Kingdom**

Year Judged: **2004**

Year Referred: **2001**

Summary: A lengthy case concerning the disqualification of businessmen in a company that had gone bankrupt. The case dragged on. An appeal was made under the HRA on the basis of the reasonable time provision for trials. This was rejected. The case was settled with an agreed time limit for disqualification. The Strasbourg Court, however, ruled contrary to the national courts' assessment of the HRA and did find the delay unreasonable, and awarded €4,500 damages.

UK Judge dissenting opinion: No.

Case: **Henworth v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: A murder case involved two mistrials, and a third trial delay caused by the prisoner. He was convicted. There was a subsequent debate over whether it was appropriate to retry a prisoner more than twice. The Court found that cumulative small delays made the overall delay oppressive.

UK Judge dissenting opinion: No.

Case: **Edwards v United Kingdom**

Year Judged: **2004**

Year Referred: **1997-2002**

Summary: Several more cases where people were imprisoned for non-payment of local taxes or fines. £23,200 was awarded in damages in an out of court settlement by the government.

UK Judge dissenting opinion: N/A.

Case: **King v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: A tax dodger was fined to recoup several years' worth of lost taxes. A review of Inland Revenue's procedures under the HRA considered the system to a "punitive" and dependent upon the culpability of the person fined, rather than an administrative exercise. Nevertheless, as the applicant had wilfully deceived and had made a number of unmeritorious appeals, the taxmen had operated correctly. The Strasbourg Court found to the contrary that the system had operated too slowly.

Particular consequences: Encouragement for tax evasion.

UK Judge dissenting opinion: No.

Case: **Massey v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: The applicant was convicted of child abuse. He complained that delays in processing allegations allowed opportunities for witness collusion. In fact, this did happen, but only because the applicant ignored police warnings and did so himself. The Court of Appeal declined to take the HRA into account (the case preceded its passage into law) but indicated that it would not have modified their opinion, as the judge could not have come to any other conclusion but that a fair trial was possible. However, the Strasbourg Court found that the delays combined did make up an unreasonable passage of time. €4,000 in damages was awarded.

Particular consequences: Note that these damages were not awarded to the victims of abuse.

UK Judge dissenting opinion: No.

Case: **Wood v United Kingdom**

Year Judged: **2004**

Year Referred: **2002**

Summary: A suspected gang of burglars and robbers were arrested and put in groups in bugged cells. The trial judge considered the ECHR in reviewing whether the tapes were admissible, and observed that “If, on the other hand, he is guilty then he does not deserve the same right of privacy as anyone else”. He judged the bugging “according to the law”. On appeal, Lord Woolf ruled that such evidence could be accepted by the courts alongside a recognition that human rights had been breached in the process, possibly accompanied by compensation: a remarkable acknowledgement of the legal dilemma. Strasbourg duly recognised a breach.

Particular consequences: Notwithstanding the HRA, the shallowness of official policy towards the ECHR was exposed.

UK Judge dissenting opinion: No.

2005

Case: **Steel and Morris v United Kingdom**

Year Judged: **2005**

Year Referred: **2001**

Summary: The McDonald’s Greenpeace leaflet case, where diners were handed flyers accusing the company of economic imperialism and general evil. It led to the longest trial in English legal history, at 313 court days, which McDonald’s won (at an estimated cost of £10 million in legal expenses, in no small part because the applicants sought to maximize the profile of the case). The applicants claimed that they were denied a fair trial through lack of legal aid, and this was upheld by Strasbourg. Given the scale of damages made against them (£76,000), despite the lack of measures to actually enforce them, the Court also ruled that these fines impeded the right to free speech also. It awarded €35,000 in damages for stress and time spent away from the family, regardless of the fact that proceedings were drawn out by the applicants. Costs were also awarded that appear to reclaim a portion of the original costs from the Government.

Particular consequences: Increased pressure on legal aid budget for civil cases. Decreased the disincentive for wilful libel. State increasingly expected to fund one individual suing another for personal benefit over perceptions and feelings.

Cost impact: Increased legal aid liability.

UK Judge dissenting opinion: No.

Case: **Beet and Others v United Kingdom**

Year Judged: **2005**

Year Referred: **1999, 2000**

Summary: More cases of people imprisoned for non-payment of local taxes, and the lack of free legal advice.

Particular consequences: See earlier.

UK Judge dissenting opinion: No.

Case: **Lloyd and Others v United Kingdom**

Year Judged: **2005**

Year Referred: **1996-2003**

Summary: 38 grouped cases also relating to people imprisoned for non-payment of local taxes. €146,000 Euros in damages was awarded.

Particular consequences: See above.

UK Judge dissenting opinion: No.

Case: **Bubbins v United Kingdom**

Year Judged: **2005**

Year Referred: **1999**

Summary: A massively drunk man with a replica gun was shot dead by police after repeated warnings. The Government acknowledged that since the HRA, UK courts were now recognizing that existing laws providing for challenges to inquests were not sufficient. The Court found that, although it itself ruled that the shooting had been legal under the ECHR, there should have been a legal challenge possible under English law at the time, and awarded €10,000 in damages.

Particular consequences: Effectively set a precedent level of compensation for cases where the HRA had not been in force at the time.

UK Judge dissenting opinion: No.

Case: **Whitfield and Others v United Kingdom**

Year Judged: **2005**

Year Referred: **1999, 2000**

Summary: A GBH convict headbutted a prison guard; and armed robber set fire to his cell; a young offender punched another inmate; a criminal motorist threw burning material from his cell window. The applicants claimed their internal discipline hearings were not impartial as they were undertaken within the prison hierarchy, and that they had not been given legal representation (one applicant actually declined it). This was a second adjudicated breach.

Particular consequences: See earlier.

UK Judge dissenting opinion: No.

Case: **Blackstock v United Kingdom**

Year Judged: **2005**

Year Referred: **2000**

Summary: Another life tariff case, this time for the shooting and wounding of a police officer. The Parole Board did not this time recommend release, but downgrading to an open prison, which the Home Secretary declined (he had the power to do so but not under Strasbourg case law to reject the Board's recommendations over release). The Court found the next review took too long to take place, as it was over a year later, and awarded £1,000 damages.

Particular consequences: In 2005, the Government introduced the new "indeterminate" sentence of imprisonment for public protection, which meant that release would be subject to a parole board assessing there was no public risk. This was initially intended to be little used, but 11,000 such sentences are reported to have been issued. This includes the category of people known informally as "short term lifers", who received a minimum term of 12 months.⁵⁶ The consequences of this are to place additional reliance on parole board members who might be subject to manipulation Sideshow Bob-style, while an innocent person who refuses to confess his guilt might stay incarcerated for longer. As such, this rewards those who play the system and threatens to increase public distrust over early releases.

UK Judge dissenting opinion: No.

Case: **Kolanis v United Kingdom**

Year Judged: **2005**

⁵⁶ A development explored by Domonic Lawson in the *Sunday Times*, 31 May 2009

Year Referred: **2002**

Summary: The applicant was detained under the Mental Health Act after committing GBH with intent. The terms of conditional discharge were such that no clinical psychiatrist was prepared to supervise her on conditional release. The case was reviewed under appeal prior to the HRA, but with reference to Strasbourg case law. The judge there found that continued detention had been legal as the hospital had taken all available steps, but that the patient was still not fully cured and the prerequisite facilities were not available in the community (contrasting with the *Johnson* case above). Strasbourg found the detention justified, but the incumbent delays in reviewing it not so. €6,000 compensation was awarded.

Particular consequences: In a subsequent case in the English courts, *R. (I.H.) v. Secretary of State for the Home Department and Another* [2002], the Court of Appeal overturned existing precedent in favour of compliance with Article 5 of the ECHR and speedy resolution. This in turn set precedent for this case at Strasbourg: all rather cyclical.

Cost impact: Added to the inclination for unsound individuals to be released unsupervised into the community.

UK Judge dissenting opinion: No.

Case: **P.M. v United Kingdom**

Year Judged: **2005**

Year Referred: **2003**

Summary: Related to a dispute over tax relief over child maintenance payments, refused as the couple were unwed. The Court found this discriminatory.

Particular consequences: Weakened measures by government to strengthen families by endorsing marriage. Existing framework of the QMPA (qualifying maintenance payment allowance) legally undermined.

Cost impact: Tax and Civil Partnership Regulations 2005 removed a marriage prerequisite for these benefits. Costs were estimated to run annually at £5 million with start up costs of £3.25 million.⁵⁷ It is worth recording as a comparative aside that annual costs for leaflets and IT systems for the change to civil partnerships was also estimated at £3.25 million.⁵⁸

UK Judge dissenting opinion: No.

Case: **B. and L. v United Kingdom**

Year Judged: **2005**

Year Referred: **2002**

Summary: A father-in-law wanted to marry his daughter-in-law, who was the mother of his grandson. This was illegal under affinity, requiring a personal Act of Parliament to allow. The Court found this solution cumbersome, and the right to a family breached.

Particular consequences: Weakened the family. Encouraged comedians.

UK Judge dissenting opinion: No.

Case: **Shannon v United Kingdom**

Year Judged: **2005**

Year Referred: **2003**

Summary: The Chairman of the Irish Republican Felons Club (sic) was arrested over fraud. He

⁵⁷ http://www.opsi.gov.uk/si/em2005/uksiem_20053229_en.pdf

⁵⁸ http://pims.parliament.uk:81/PIMS/Static%20Files/Extended%20File%20Scan%20Files/LIBRARY_OTHER_PAPERS/STANDARD_NOTE/snbt-02995.pdf

refused to attend a meeting with the financial investigators unless receiving assurances such material was not used at trial, raising issues seen earlier in the *Saunders* case. The Court ruled that he had been within his rights not to attend. He was awarded €1,750 damages.

UK Judge dissenting opinion: No.

Case: **Hirst v United Kingdom (Number 2)**

Year Judged: **2005**

Year Referred: **2001**

Summary: Followed on from the case relating to prisoners and the vote.

Particular consequences: 2000 Act granted votes to remand prisoners (see also earlier).

UK Judge dissenting opinion: No, though several other judges did.

Case: **Roche v United Kingdom**

Year Judged: **2005**

Year Referred: **1996**

Summary: Liberty represented the applicant, who complained over a lack of access to documents relating to tests he took part in at Porton Down. The Court found that the delays in providing old files, and the lack of research analyzing the assessed impact of the tests on the servicemen, was a breach. €8,000 damages was awarded.

UK Judge dissenting opinion: No.

Case: **Yetkinsekerci v United Kingdom**

Year Judged: **2005**

Year Referred: **2001**

Summary: A convicted drugs courier, whose sentence had been reduced on appeal under ECHR considerations because of the delays, still objected to delays in his sentencing. The Court agreed and awarded €1,000 damages.

UK Judge dissenting opinion: No.

Case: **J.A. Pye (Oxford) v United Kingdom**

Year Judged: **2005**

Year Referred: **2002**

Summary: Squatter's rights relating to land used for grazing, whose actual ownership was undisputed and where occupation had been accidental. Another retrospective case for judges looking at it under the HRA, and therefore predestined for a Strasbourg contrary decision. That court indeed indicated that the owners' rights had been violated.

Particular consequences: Land Registration Act 2002 addressed the issue of what happened to squatters rights on registered land.

Cost impact: The Government's cost-analysis is a case model of why the assessment behind these documents need to be reformed.⁵⁹ Total official estimate of costs of £12.5 million.

UK Judge dissenting opinion: No.

Case: **Townsend v United Kingdom**

Year Judged: **2005**

Year Referred: **1998**

Summary: Another Poll Tax imprisonment case, settled for £6,000.

UK Judge dissenting opinion: N/A.

⁵⁹ http://www1.landregistry.gov.uk/assets/library/documents/explan_memo_ira2002.pdf

Case: **Crowther v United Kingdom**

Year Judged: **2005**
Year Referred: **2000**

Summary: A drug smuggler had his ROLEX confiscated. This, and the broader confiscation order, was appealed against. The Government blamed a dozen delays by the applicant. The Court disagree.

UK Judge dissenting opinion: No.

Case: **Wood v United Kingdom**

Year Judged: **2005**
Year Referred: **1999**

Summary: Another Poll Tax imprisonment case, settled for £2,500.

UK Judge dissenting opinion: N/A

Case: **Wingrave v United Kingdom**

Year Judged: **2005**
Year Referred: **2002**

Summary: Settled out of court, this related to a claim for the Disability Living Allowance. The applicant (since deceased) had been found to have been more mobile than previously assessed. She complained that the review process had taken so long.

UK Judge dissenting opinion: N/A

2006

Case: **Grant v United Kingdom**

Year Judged: **2006**
Year Referred: **2003**

Summary: A sex change post-op female challenged the pension qualifying age. Paralleled the *Christine Goodwin* case (earlier), and granted pension equivalence.

Particular consequences: Gender Recognition Act 2004.

Cost impact: Administrative rather than based on numbers of benefits. £250,000 legal aid in the first year processing a backlog, with £2,000 legal aid annually after that; £200,000 costs to establish a gender recognition register.⁶⁰

UK Judge dissenting opinion: No.

Case: **Saadi v United Kingdom**

Year Judged: **2006**
Year Referred: **2003**

Summary: An asylum seeker was to be deported to Kurdish Iraq (in 2001). By 2003, after appeal he was granted asylum. The Court ruled that his detention was unlawful in that the grounds for it, and the mechanism for challenging it, were not explained for three days.

Particular consequences: Ministers continued to defend the existing system.⁶¹ This suggests more cases will follow.

UK Judge dissenting opinion: No.

⁶⁰ <http://www.dca.gov.uk/risk/grbria.htm#part5>

⁶¹ See <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrightts/128/12814.htm>

Case: **Keegan v United Kingdom**

Year Judged: **2006**
Year Referred: **2003**

Summary: The Police raided a house where the criminals had moved out. The UK courts had found that there had been no reasonable grounds; the Government countered that the suspect had access to firearms. The Court found that there had not been a reasonable attempt to make sure the suspects were still associated with the house, and that as the Police were protected because they had acted in good faith, the occupants had no legal remedy for redress. The family claimed a variety of psychological disorders as a result; they got €15,000.

Particular consequences: Encouraged malicious ambulance-chasing cases against public servants acting in the national interest. Ministerial response was to claim the HRA protected the government against being taken to Strasbourg despite the fact that the case demonstrated the exact opposite.

UK Judge dissenting opinion: No.

Case: **Blake v United Kingdom**

Year Judged: **2006**
Year Referred: **2001**

Summary: The autobiography of espionage traitor George Blake. The appeal was made from Moscow against the Government confiscating the royalties arising from the breach of the Official Secrets Act from publication in the UK. The Court judged that the court process and several appeals had been processed too slowly. Blake was awarded €5,000 in damages.

Particular consequences: Rewarded a traitor. Encouraged breaches of the Official Secrets Act.

UK Judge dissenting opinion: No.

Case: **Wainwright v United Kingdom**

Year Judged: **2006**
Year Referred: **2004**

Summary: Two members of a family were strip searched while visiting a murderer who was a drug supplier in prison. They claimed for post traumatic stress disorder. The English courts awarded damages and noted retrospective HRA interest. The Court indeed found them degrading, and noted a lack of legal remedy. €6,000 was awarded in damages.

UK Judge dissenting opinion: No.

Case: **Martin v United Kingdom**

Year Judged: **2006**
Year Referred: **1998**

Summary: The British son of a soldier was tried for murder, under court martial as per the NATO state of forces agreement for Germany. As in the *Findlay* case, the Court found once again that the rank and command structure interfered with the prospect of a fair trial.

UK Judge dissenting opinion: No.

Case: **Tsfayo v United Kingdom**

Year Judged: **2006**
Year Referred: **2000**

Summary: An Ethiopian asylum seeker challenged that she had received warning that she would have to reapply for benefits. The Court found that her case should have been legally reviewed a step away from the council, as the reviewing board was made up of councillors and the council was responsible for the allowances in the first place. She was awarded €2,000

damages.

Particular consequences: Recognised that “Since the coming into force of the Human Rights Act 2000, the English courts have considered on a number of occasions the extent to which judicial review can remedy defects of independence in a first instance administrative tribunal”. These included cases, judged under HRA principles, with significant conclusions: inspector’s inquiries for planning and compulsory purpose should be carried out at Secretary of State level; and people who refuse offers of council flats should have their cases reviewed outside the housing office.

With reference to this case, Housing Benefit Review Boards have been replaced by tribunals set up under the Child Support, Pensions and Social Security Act 2000.

Cost impact: It has proved impossible to separate these costs from others in the Act. But it seems highly probable that administrative costs arose from the changes, and that increased legal costs have followed from changing an administrative function into a judicial one.

UK Judge dissenting opinion: No. But one judge to his credit did make a key observation: *“The majority has now decided to award almost 30,000 euros to the applicant’s lawyer. The applicant had already been awarded 2,000 euros in respect of non-pecuniary damage in the judgment adopted on 14 November 2006. In other words, by accepting the rectification request the Court now awards to the lawyer an amount which is fifteen times greater than the applicant’s award.*

“I agree (I am a lawyer myself) with the importance of a lawyer’s work, which is evident in the present case. Nevertheless, is such a difference between the amounts awarded respectively to the applicant and to the lawyer consistent with a system of protection of the applicant’s rights? I would like to recall that the problem raised in this case had originated in a court order requiring the applicant to pay off rent arrears at a cost to her of GBP 2.60 (EUR 3,84) per week.

“In my opinion, there is something wrong with the discrepancy between the two amounts awarded. The applicant is at the origin of the case and is its raison d’être, and the lawyer only became involved in it because the applicant had a problem.”

Case: **Yassar Hussain v United Kingdom**

Year Judged: **2006**

Year Referred: **2004**

Summary: The prosecution dropped a case against an individual for intimidating witnesses, after a witness backed down. His costs were refused. The Applicant claimed this was a breach of the presumption of innocence given his acquittal, and the Court agreed.

Particular consequences: Extended legal aid in cases where there were neither convictions nor acquittals by the case being heard.

UK Judge dissenting opinion: No.

Case: **Oliver and Britten v United Kingdom**

Year Judged: **2006**

Year Referred: **2000, 2001**

Summary: More widower benefits cases, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **Cole v United Kingdom**

Year Judged: **2006**

	Year Referred: 2000
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Summary: A further widower benefits case, settled out of court.

UK Judge dissenting opinion: N/A

Case: Singh and Others v United Kingdom	Year Judged: 2006 Year Referred: 2000
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Summary: A British national and his wife adopted an Indian cousin's child. The child was refused entry as the parents were able to care for him. The case was reviewed under the ECHR provisions in the UK relating to family rights, and settled out of court with £25,000 damages.

Particular consequences: Recognised a swift change in the UK law was required. A case of the HRA merely acting as a mechanism to pre-empt a Strasbourg ruling, but at ten times the normal rate of damages, and still allowing for further legal challenges that would in turn themselves have to be bought off in order to avoid an interim precedent.

UK Judge dissenting opinion: No.

Case: Elahi v United Kingdom	Year Judged: 2006 Year Referred: 2004
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Summary: The leader of a heroin smuggling gang was sentenced on the basis of covert recordings. The Government admitted a breach given past precedent.

UK Judge dissenting opinion: No.

Case: Greenhalgh v United Kingdom	Year Judged: 2006 Year Referred: 2000
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Summary: A further widower benefits case, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Hyde v United Kingdom	Year Judged: 2006 Year Referred: 2000
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Summary: Another widower benefits case, settled out of court.

Particular consequences: Widowed Mother's Allowance replaced by Widowed Parents Allowance from April 2001.

Cost impact: It was estimated in 1999 that the number of additional claimants would rise from 10,000 immediately to 30,000 by 2020.⁶² We estimate £94 million on average additional cost per year over this period. We assume this cost was included in the earlier estimate, and we err on the side of caution though this might be presumptuous.

UK Judge dissenting opinion: N/A.

2007

Case: ASLEF v United Kingdom	Year Judged: 2007 Year Referred: 2005
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⁶² Hansard 14 April 1999 vol 329 cc281-2W

Summary: The trade union tried to expel a member who was a BNP candidate. There had been a challenge as to whether membership was enough of a justification, rather than basing his expulsion upon actual conduct. The Court found that the Tribunal should have applied the ECHR in the trade union's favour.

Particular consequences: The Government lawyers floated the idea of a notwithstanding clause within UK law – inserting a reserve caveat of “save as necessary to avoid breach of Convention rights”. This would clearly recognise UK law being subservient to Strasbourg despite (indeed, as a consequence of) the HRA, astonishingly described as operating under a “creative interpretation” of British law.

The Trade Union and Labour (Consolidation) Act 1992 was amended.

UK Judge dissenting opinion: No.

Case: **Copland v United Kingdom**

Year Judged: **2007**

Year Referred: **2000**

Summary: A college PA had her phone and internet viewing records checked to see if she was using them for personal use. As these checks were not governed by law, there had been a Convention breach. €3,000 damages were awarded.

Particular consequences: Regulation of Investigatory Powers Act 2000 provided for the regulation of, inter alia, interception of communications. The Telecommunications (Lawful Business Practice) Regulations 2000 were promulgated under the 2000 Act.

An example of the Court working contrary to the Common Law principle of people being able to do anything unless prohibited; Napoleonic law has people able to do things they are permitted. Demonstrates that the UK will always be losing ECHR-based cases under the present system.

Cost impact: This added to RIPA costs explored earlier for law enforcement. Cost assessments varied from negligible (DTI) to £15 per employee.

We turn this around and assume every business in the country to adopt a minimalist approach, with a responsible member of staff spending half an hour familiarising themselves with the new regulations, ensuring compliance, and passing the new regulations on via e mail or verbally, which appears generous. For 2.15 million businesses, that would make 1.07 million man hours. Assuming the average national wage (which would likely not be the average managerial wage in any event), this suggests lost productivity of £13 million, with annual reminders and compliance checks triggering like sums annually.

UK Judge dissenting opinion: No.

Case: **Runkee and White v United Kingdom**

Year Judged: **2007**

Year Referred: **1998, 1999**

Summary: Related to a lack of means testing and the widow's pension, which had been designed to help the older widows automatically as they had traditionally been the poorest. The Court found that by extension of previous case law, that principle should apply to men also.

Cost impact: Difficult to judge as a stand-alone cost. On the basis of the award, at an average at £200 per applicable person per year, estimated at £1 million p.a., but see earlier.

UK Judge dissenting opinion: No.

Case: **Gault v United Kingdom**

Year Judged: **2007**
Year Referred: **2005**

Summary: A woman was convicted for aiding her lover murder her husband. The conviction was overturned and a retrial for murder ordered. She was subsequently acquitted. The Court found the delays excessive, in particular given the later refusal of bail (on the basis that she was originally found guilty). €7,500 was awarded in damages.

UK Judge dissenting opinion: No.

Case: **Reavey v United Kingdom**

Year Judged: **2007**
Year Referred: **2004**

Summary: Another case where case precedent had already determined that the RUC was too close as an institution to its investigation, this time into collusion loyalist paramilitary killings. €5,000 in damages was awarded.

UK Judge dissenting opinion: No.

Case: **Brecknell v United Kingdom**

Year Judged: **2007**
Year Referred: **2004**

Summary: Another case where case precedent had already determined that the RUC was too close as an institution to its investigation, this time into collusion loyalist paramilitary killings. €5,000 in damages was again awarded.

UK Judge dissenting opinion: No.

Case: **O'Dowd v United Kingdom**

Year Judged: **2007**
Year Referred: **2004**

Summary: Another case where case precedent had already determined that the RUC was too close as an institution to its investigation, this time into collusion loyalist paramilitary killings. €5,000 in damages was again awarded to both applicants.

UK Judge dissenting opinion: No.

Case: **McCartney v United Kingdom**

Year Judged: **2007**
Year Referred: **2004**

Summary: Another case where case precedent had already determined that the RUC was too close as an institution to its investigation, this time into collusion loyalist paramilitary killings. €5,000 in damages was again awarded.

UK Judge dissenting opinion: No.

Case: **Runkee and White v United Kingdom**

Year Judged: **2007**
Year Referred: **1998, 1999**

Summary: More cases relating to Widow's Payments. Damages were again awarded for the denial of, but not failure to qualify for, the payments.

UK Judge dissenting opinion: No.

Case: **Crew v United Kingdom**

Year Judged: **2007**

Year Referred: 2000

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Rathfelder v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Gamble v United Kingdom	Year Judged: 2007 Year Referred: 2001
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Summary: Widow's benefits, settled out of court.

Particular consequences: The case background supplies us with an update of the Government's position. By a letter of 11 May 2005 the respondent Government informed the Court that the House of Lords had decided, in relation to the claims for Widowed Mother's Allowance (WMA) and Widow's Payment (WPt), that there was in principle no objective justification at the relevant time for not paying these benefits to widowers as well as widows, but that the Government had a defence under section 6 of the Human Rights Act 1998 (the HRA). It noted that, in view of this, the multitude of cases before the Court and the fact that the HRA defence was only applicable in the domestic arena, the Government were prepared, in principle, to settle all claims made by widowers against the United Kingdom arising out of the arrangements applicable prior to April 2001 for the payment of WMA and WPt. In March 2006 the respondent Government sent a table setting out the list of applicants who had been proposed a settlement of their claims, including the present applicant.

UK Judge dissenting opinion: N/A.

Case: Terrill and Others v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Bell v United Kingdom	Year Judged: 2007 Year Referred: 1998
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Summary: Another military punishment, after a soldier told a sergeant to f- off. The soldier took the CO's punishment rather than a court martial. The Court found this a breach of the right to an impartial trial.

UK Judge dissenting opinion: No.

Case: Young v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: A prisoner with cerebral palsy refused to produce a urine specimen for a drugs sample. Strasbourg ruled that the disciplinary procedures were not independent enough (being the prison governor) and lacked counsel.

UK Judge dissenting opinion: No.

Case: Black v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: An armed robber on a strip search had something drop from his posterior. He reinserted it and declared he could not then hand it over. He was given 5 days extra sentence. As the maximum was potentially 42, the Court ruled that he should have had his case reviewed by someone other than the prison governor, notwithstanding the actual end tariff awarded.

Particular consequences: Weakened internal proceedings, notwithstanding absence of criticisms of actual impartiality. Extra administrative burden.

UK Judge dissenting opinion: No.

Case: Corcoran and Others v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Davis and Others v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Hart and Others v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Donovan v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Hancock v United Kingdom	Year Judged: 2007 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A

Case: c. v United Kingdom	Year Judged: 2007 Year Referred: 2003
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Summary: A judgment reached under the HRA (with right of appeal originally refused) that nevertheless ended up being settled out of court for €40,000. It related to placing the children of a bipolar mother into social care.

Particular consequences: Augmented uncertainty over whose interests are paramount in welfare cases. Increased liabilities.

UK Judge dissenting opinion: N/A.

Case: **Haggan and McCavery v United Kingdom**

Year Judged: 2007

Year Referred: 2000, 2001

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **McElroy and Others v United Kingdom**

Year Judged: 2007

Year Referred: 2000

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **O'Connell and Others v United Kingdom**

Year Judged: 2007

Year Referred: 2000

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **Forbes v United Kingdom**

Year Judged: 2007

Year Referred: 2001

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: **Arkwell v United Kingdom**

Year Judged: 2007

Year Referred: 1999

Summary: Widow's benefits, settled out of court.

Particular consequences: Note that several other cases around this time were simply dropped rather than formally closed.

UK Judge dissenting opinion: N/A.

Case: **Bhandari v United Kingdom**

Year Judged: 2007

Year Referred: 2004

Summary: A raspberry grower sued his lawyers who had been suing the Government. He then took the Government back to Court over the length of the proceedings, and was awarded €7,000.

UK Judge dissenting opinion: No.

Case: **Cross v United Kingdom**

Year Judged: 2007

Year Referred: 2000

Summary: A widow's benefits case, resolved at Strasbourg as it predated the 1998 HRA and therefore could not have been passed by an English Court under the principle of retrospective laws.

UK Judge dissenting opinion: No.

Case: McWilliams v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widow's benefits, settled out of court.	
UK Judge dissenting opinion: N/A.	
Case: Sinclair v United Kingdom	Year Judged: 2007 Year Referred: 2001
Summary: Widow's benefits, settled out of court.	
UK Judge dissenting opinion: N/A.	
Case: McCrory v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widow's benefits, settled out of court.	
UK Judge dissenting opinion: N/A.	
Case: Anderson v United Kingdom	Year Judged: 2007 Year Referred: 2001
Summary: A widow's benefits case, resolved at Strasbourg as it predated the 1998 HRA and therefore could not have been by an English Court.	
UK Judge dissenting opinion: No.	
Case: Woods v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widowed Mother's Allowance.	
UK Judge dissenting opinion: No.	
Case: Norbury v United Kingdom	Year Judged: 2007 Year Referred: 2001
Summary: Widow's benefits, settled out of court.	
UK Judge dissenting opinion: N/A.	
Case: Steff v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widow's benefits, settled out of court.	
UK Judge dissenting opinion: N/A	
Case: Fallon v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widow's benefits.	
UK Judge dissenting opinion: N/A.	

Case: Dobb v United Kingdom	Year Judged: 2007 Year Referred: 2000
Summary: Widow's Bereavement Allowance, settled out of court.	
UK Judge dissenting opinion: N/A.	

Case: Cairney v United Kingdom	Year Judged: 2007 Year Referred: 1999
Summary: Widowed Mother's Allowance, settled out of court.	
UK Judge dissenting opinion: N/A.	

Case: Crilly v United Kingdom	Year Judged: 2007 Year Referred: 2002
Summary: Widow's Bereavement Allowance.	
UK Judge dissenting opinion: No.	

2008

Case: Saadi v United Kingdom	Year Judged: 2008 Year Referred: 2003
Summary: An Iraqi Kurd sought asylum. The ECHR found that he was not given ample explanation in his own language of the reasons for his detention during processing.	
Cost impact: See earlier references to increased interpretation burdens.	
UK Judge dissenting opinion: No. Several judges did dissent in assessing there should have been no detention at all.	

Case: McCann v United Kingdom	Year Judged: 2008 Year Referred: 2004
Summary: A separated man was evicted from his family-sized council house after his family moved out. The Court found this procedurally flawed, and awarded €2,000 damages.	
Particular consequences: Reduction in the ability of councils to manage properties to best effect.	
Cost impact: This case underscored a parallel suit in the British courts led to a change in the Housing Act 1996.	
This added, according to a departmental assessment, £413,800 p.a. for extra housing costs for an estimated 400 families nationwide.	
UK Judge dissenting opinion: No.	

Case: Liberty & Others v United Kingdom	Year Judged: 2008 Year Referred: 2000
Summary: Related to intercepts of Irish phone calls. Liberty, British Irish Rights Watch and the Irish Council for Civil Liberties assumed that their phone calls would have been amongst those routinely intercepted by the system and brought a case. The Court found the system intrusive.	

Particular consequences: Regulation of Investigatory Powers Act 2000 (part designed to respond to ECHR issues) found to be wanting. Given longstanding government policy on intercepts, it is inevitable that HMG will continue to lose cases in court on this issue.

UK Judge dissenting opinion: No.

Case: **NA v United Kingdom**

Year Judged: **2008**

Year Referred: **2007**

Summary: A Sri Lankan asylum seeker appealed against deportation. The Court ruled that he would be a subject of interest to the local authorities on arrival, notwithstanding the then-peace accords.

Particular consequences: Continuing impact upon the ability of the Home Office to deport based on its own review and appeals both within the system and through the domestic courts, thereby reducing the number of people deported, in turn increasing the appeal for the UK as a migration target.

UK Judge dissenting opinion: No.

Case: **R.K. and A.K. v United Kingdom**

Year Judged: **2008**

Year Referred: **2005**

Summary: A child was put into care without adequate interpretation (Pashtu) during the investigation.

Particular consequences: Increased reliance upon council and state services to provide language cover. This case happened before the 1998 HRA so the High Court did not take the act into retrospective account. It was overruled by the European Court. As such, it provides another example of cases that would otherwise today currently pass under the radar as a case being interpreted under ECHR rather than Common Law provisions. €10,000 in damages was awarded.

UK Judge dissenting opinion: No.

Case: **S. and Marper v United Kingdom**

Year Judged: **2008**

Year Referred: **2004**

Summary: Police retained fingerprints and DNA of a man acquitted of robbery, and a man who had charges dropped by the subject of his reported harassment. The Court found the retention of both intrusive, especially for minors.

Particular consequences: There are strong ethical grounds for the destruction of one set of data and the retention of the second. However, elected representatives do not get the opportunity to make that choice.

UK Judge dissenting opinion: No.

Case: **Deak v Romania and the United Kingdom**

Year Judged: **2008**

Year Referred: **2005**

Summary: A British family access case involving Romanian nationals. This involved interpreting both Romanian and UK family law under the provisions of ECHR law. The Court found that the UK had infringed the father's rights by limiting his access.

Particular consequences: Demonstrated the supremacy of ECHR from a broader perspective (implications over visa rights are yet to be explored).

UK Judge dissenting opinion: No.

Case: Williams v United Kingdom	Year Judged: 2008 Year Referred: 2000
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Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Boyle v United Kingdom	Year Judged: 2008 Year Referred: 2000
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Summary: A soldier was detained prior to court martial on a rape charge in order to prevent the intimidation of witnesses. He was later acquitted. The Court found his detention illegal.

Particular consequences: The courts martials regulations were modified by the Armed Forces Discipline Act 2000 (amending, inter alia, section 75 of the Army Act 1955) and the Army Custody Rules 2000 (Statutory Instrument 2000 No. 2368) which replaced the 1997 Regulations.

UK Judge dissenting opinion: No.

Case: Higham v United Kingdom	Year Judged: 2008 Year Referred: 2001
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Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Goodwin v United Kingdom	Year Judged: 2008 Year Referred: 2001
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Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Herbert v United Kingdom	Year Judged: 2008 Year Referred: 2000
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Celia v United Kingdom	Year Judged: 2008 Year Referred: 2001
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Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: McNamee v United Kingdom	Year Judged: 2008 Year Referred: 2000
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Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Cummins v United Kingdom	Year Judged: 2008 Year Referred: 2002
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Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Robertson v United Kingdom

Year Judged: 2008

Year Referred: 2002

Summary: Widow's benefits, settled out of court.

UK Judge dissenting opinion: N/A.

Case: Bond v United Kingdom

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Szulc v United Kingdom

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Smith v United Kingdom

Year Judged: 2008

Year Referred: 2001

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Twizell v United Kingdom

Year Judged: 2008

Year Referred: 2002

Summary: Widow's benefits.

Particular consequences: Here is as good as any point to observe with some astonishment the volume of cases going through the system on this issue, which in some cases do not even have a lawyer or plaintiff present when the Court finds against the Government. There are two interpretations that arise. The first is that the Government is attempting to dissuade legal action by obstructionism to the point of judgment, yet clearly in a number of cases settlements are reached prior to this point. Alternatively, that the Government is fighting rearguard actions on very specific points particularly relating to compensation and above all to legal fees. In the White case, part of this centred on fighting to determine that people had only been discriminated against if they actually asked for benefits, in Nelson over cut off dates for applications, and in Runkee and White over the issue of speed of introducing reform. From an outside vantage point it does look suspiciously like a mixture of both motives. Nor is this the only example. In any event, the HRA has clearly failed.

UK Judge dissenting opinion: No.

Case: Wakeling v United Kingdom

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Hubley v United Kingdom**

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Wells v United Kingdom**

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **O'Brien v United Kingdom**

Year Judged: 2008

Year Referred: 2000

Summary: Widow's Payment ("Wpt"), Widowed Mother's Allowance ("WMA"), Widow's Bereavement Allowance ("WBA") and Widow's Pension ("WP").

UK Judge dissenting opinion: No.

Case: **Harrison v United Kingdom**

Year Judged: 2008

Year Referred: 2002

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Thomas v United Kingdom**

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Ginnifer v United Kingdom**

Year Judged: 2008

Year Referred: 2001

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Jackson v United Kingdom**

Year Judged: 2008

Year Referred: 2000

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Shireby v United Kingdom**

Year Judged: 2008

Year Referred: 2002

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: Nelson v United Kingdom

Year Judged: 2008

Year Referred: 2001

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

2009

Case: A. and others v United Kingdom

Year Judged: 2009

Year Referred: 2005

Summary: After 9/11, the Home Secretary notified the ECHR secretariat that it was derogating from the Convention in order to deport foreign nationals believed to be serious Al-Qaeda threats. The derogation related to the threat that these individuals would be mistreated by their home governments on return. The UK courts had separately (though in keeping with Convention guidelines) concluded that their detention was unlawful as UK nationals in the same situation would not have been held, even if they were at liberty to leave the country. The Strasbourg Court found that most of the individuals in this case had been detained unlawfully, notwithstanding a recognised government derogation and an agreed public emergency. It also found that in some of the cases, not enough background was released to the deportees, despite it being intelligence. It further found that the UK was wrong not to have provisions to compensate these individuals. €29,300 in damages was awarded.

Particular consequences: Part 4 of the Anti-terrorism, Crime and Security Act 2001 deemed to be out of keeping with ECHR provisions. The Court suggested that the bill had been passed with undue speed. In any event, severe limitations on HMG ability to expel known terrorists followed.

Cost impact: Given that the families of Northern Irish terrorists were awarded the same level of end-of-Troubles compensation as those of their victims, the gravity of this and similar rulings might not perhaps prove as surprising as in the past. Again, ECHR levels of compensation are not the issue: it is the following civil claims predicated upon the loss of initial cases, coupled with the obligation to provide full social welfare.⁶³ If the figure is correct as given of one case where an inability to deport under ECHR provisions requires £500,000 of surveillance plus £50,000 in benefits, even if there were a total of ten priority cases of this nature across the whole of the UK would suggest a net cost annually of £5.5 million, which seems a cost underevaluation in the circumstances. A true costing would likely be impossible as government departments shy from revealing data on surveillance for obvious and sensible reasons.

UK Judge dissenting opinion: No.

Case: Szuluk v United Kingdom

Year Judged: 2009

Year Referred: 2005

Summary: Medical correspondence was intercepted involving an imprisoned drug dealer, to be read by the prison medical officer. This decision was taken by the prison governor on recommendation from HM Prison Headquarters after originally approving it to be completely

⁶³ A noted example being this case: <http://www.dailymail.co.uk/news/article-1028399/Muslim-extremist-Abu-Qatada-receive-8-000-incapacity-benefits-year--bad-back.html>

unread. The Court found an intrusion and awarded €1,000 damages.

UK Judge dissenting opinion: No.

Case: **Bullen and Soneji v United Kingdom**

Year Judged: **2009**

Year Referred: **2006**

Summary: Convicted fraudsters had confiscation orders put on them to recoup £400,000. The Court found the delays in the proceedings to be cumulatively too long.

Particular consequences: Delays orchestrated by defence lawyers are reported in some cases to have facilitated the hiding of proceeds of crime. Judgments such as this one do not make the work of SOCA any easier.

Cost impact: Anecdotal evidence suggests that tens of millions of pounds are squirreled away as a result of such tactics. As such is not per se the consequence of this court case, we simply here note the (mal)practice with a recommendation of criminal review by a future government.

UK Judge dissenting opinion: No.

Case: **Thorne v United Kingdom**

Year Judged: **2009**

Year Referred: **2002**

Summary: Widow's benefits.

UK Judge dissenting opinion: No.

Case: **Al-Khawaji and Tahery v United Kingdom**

Year Judged: **2009**

Year Referred: **2005, 2006**

Summary: Two cases where statements made to the police were read at trials in the absence of the witness; in one case because she had died, in the other as he was afraid to appear as coming from a close-knit community in a stabbing case, but did appear before the judge. Both were caveated by the judge. The Court assessed this a breach of a fair trial, and awarded each €6,000 damages.

Particular consequences: Somewhat the reverse of a death bed confession principle. The fall out from this case will likely be revisited in several cases in the High Court in the coming months.

The principle was separately and subsequently visited in *Horncastle and Others v R* at the Court of Appeal. Contrary to the ECHR, the Court ruled that it was possible for evidence provided previously by witnesses now absent for a variety of reasons to be considered as other than hearsay. The Court of Appeal noted that its requirement was to "take note" of Strasbourg (rather than follow it) given that "it may sometimes happen that some divergence of view as to the application of the ECHR is unavoidable". In this case, the Court of Appeal interpreted case law differently from the Strasbourg Court in one of its cases!

UK Judge dissenting opinion: No.

Case: **Booth v United Kingdom**

Year Judged: **2009**

Year Referred: **2002**

Summary: Widow's Benefits

UK Judge dissenting opinion: No.

Case: Turner v United Kingdom	Year Judged: 2009 Year Referred: 2002
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Summary: Widow's benefits. The Government's case seemingly rested solely on the line that an appeal to the Court letter-dated 18 March 2002 fell over six months after the final UK decision in his case dated 20 October 2001, attempting to disqualify it based on his lawyer's use of the postal service. This rather sets the tone of the Government's handling of the ECHR.

UK Judge dissenting opinion: No.

Case: Mitchard v United Kingdom	Year Judged: 2009 Year Referred: 2002
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Summary: Widow's Benefits.

UK Judge dissenting opinion: No.

Case: Robert Murray v United Kingdom	Year Judged: 2009 Year Referred: 2002
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Summary: Widow's Benefits.

UK Judge dissenting opinion: No.

Case: Twomey v United Kingdom	Year Judged: 2009 Year Referred: 2002
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Summary: Widow's Benefits.

UK Judge dissenting opinion: No.

Case: Blackgrove v United Kingdom	Year Judged: 2009 Year Referred: 2007
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Summary: Widow's Benefits.

UK Judge dissenting opinion: No.

Case: Hunt and Miller v United Kingdom	Year Judged: 2009 Year Referred: 2005
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Summary: Two former service personnel sued the government over investigations into their sexuality that took place around 1989-1991, but before changes were implemented driven by ECHR case law. Neither was sacked but both were moved and subsequently resigned. Both settled out of court for £29,000 each.

Particular consequences: Demonstrates the retrospective nature of ECHR rulings that can reach back over decades.

UK Judge dissenting opinion: N/A.

Case: Crompton v United Kingdom ⁶⁴	Year Judged: 2009 Year Referred: 2005
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Summary: A TA admin clerk on full time service was sacked after a reorganisation which

⁶⁴ This case appears to have fallen off the ECHR database

civilianised his post but failed to allow him either to retrain or to move. He was given an offer of compensation, subsequently increased to over £150,000. He refused. The Strasbourg Court found that the reviewing tribunal was sufficiently independent but should have been processed quicker.

Particular consequences: it is too early for any detailed MoD response, but it seems quite possible that employment of NRPS (Non Regular Permanent Staff) will come under review as being no longer cost effective, to the detriment both of the flexibility of the armed forces and also as concerns the employment of TA personnel seeking medium term employment beyond short term mobilisation opportunities. This is despite their continuing value for money (if properly employed) plus the fact that the case appears to have been one of exceptional MoD negligence.

Cost impact: Strictly looking at the Court's ruling rather than the MoD's policy, we do not anticipate major cost effects. There are understood to be around 1,000 NRPS personnel at any time.

UK Judge dissenting opinion: No.

Case: **Omojudi v United Kingdom**

Year Judged: **2009**

Year Referred: **2008**

Summary: An asylum seeker (failed after attempt at deception, but allowed to stay) was in prison for sexual assault. The Home Secretary sought his deportation in the light of nine criminal offences and drug use. The counterclaim (notwithstanding his crime) was that this affected his right to a family life. The Court concurred.

Particular consequences: It appears that the Government went to Strasbourg while actually conceding a breach of the right to a family life existed, demonstrating an intent to dissuade other cases by dragging them out, rather than arguing the case. In any event, moves to expel foreign criminals took another hit.

UK Judge dissenting opinion: No.

Case: **Financial Times Ltd and Others v United Kingdom**

Year Judged: **2009**

Year Referred: **2003**

Summary: This related to a leaked document behind a business bid involving *Interbrew*. The statistics were challenged by the companies concerned, and affected share prices; it was seen as a spoiling exercise and the originals were sought in order to begin proceedings for damages. The papers objected on the grounds of journalistic freedoms. Strasbourg concurred and awarded €160,000 costs.

Particular consequences: Encouraged malicious leaking, in a case worth billions of pounds.

UK Judge dissenting opinion: No.