ministerial statements

The Human Rights Act 1998

A compilation of ministerial statements made on behalf of the government during the Bill's passage through parliament

ILPA Immigration Law Practitioners' Association

ministerial statements

The Human Rights Act 1998

A compilation of ministerial statements made on behalf of the government during the Bill's passage through parliament

Katie Ghose

ILPA Immigration Law Practitioners' Association

August 2000

The Immigration Practitioners' Association Limited
is a company limited by guarantee.
Registered in England and Wales. Reg No 2350422.

The Immigration Law Practitioners' Association (ILPA)
is the UK's professional association of immigration lawyers,
advisers and academics practicing in or concerned about
immigration, asylum and nationality law.

This is the third ILPA compilation of ministerial statements:
similar reports were compiled on the Asylum and Immigration
Appeals Act 1993 and on the Asylum and Immigration Act 1996.

ILPA would like to thank the Joseph Rowntree Charitable Trust,
the Barrow Cadbury Trust and Wilson & Co for the funding,
and INRIC for its support of the project.

This project was co-ordinated by Susan Rowlands,
General Secretary, ILPA, and Chris Randall and Raza Husain,
members of the ILPA Executive Committee.

Further information and copies of this report are available from:

ILPA
Lindsey House, 40–42 Charterhouse Street
London EC1M 6JN, UK

Telephone: +44 20 7251 8383 Email: info@ilpa.org.uk
Fax: +44 20 7251 8384 http: www.ilpa.org.uk

ISBN 1 901833 05 4

Designed by Pat Kahn
Printed by Russell Press

Contents

Ministerial statements

Appendices

Foreword

Practitioners in the immigration field have seen asylum and immigration laws become increasingly restrictive, resulting often in harsh decisions in their clients' cases. Decisions in this field have become very difficult to challenge in the courts. The restricted right of appeal against deportation in cases of breaches of limited leave, for example, has removed from many people the right to have their claims to stay in the UK substantively considered on appeal (Immigration Act 1988, section 5(1) & (2)).

In the context of asylum, the courts have in recent years taken a narrow approach to the interpretation of the 1951 United Nations Convention on the Status or Refugees (hereafter the '1951 Convention'), limiting drastically the numbers of people afforded protection under its provisions (see for example *SSHD v Adan* [1998] Imm AR 338, and much of the jurisprudence arising from challenges to the removal of asylum-seekers to 'safe third countries'). Notable exceptions are the generous interpretation of Article 1A of the 1951 Convention by the House of Lords in *Islam (Shahana) and Others v SSHD*; *R v IAT and SSHD ex parte Syeda Shah*, HL [1999] INLR 144, and the Divisional Court's judgement in *ex parte Adimi, Sorani and others*, CO/2533/98, 29.7.99, which has halted prosecutions of asylum-seekers for entering the UK with false documents.

The Immigration and Asylum Act 1999

The Immigration and Asylum Act 1999 (hereafter 'the Immigration and Asylum Act'), places further obstacles in the way of asylum-seekers seeking recognition as refugees. Tight time limits for the production of medical evidence and a draconian new support system for asylum-seekers are just two examples of the harsher system that will emerge once the Immigration and Asylum Act is in force. The Immigration and Asylum Act also includes a disturbing limitation on appeal rights. If an appellant serves a notice of appeal which claims that a decision-maker breached his or her human rights, 'the Secretary of State may certify that in his opinion' such a claim could reasonably have been included either in a statement required at an earlier stage but was not, or could reasonably have been made in the original appeal but was not so made (and that the sole purpose of such a claim would be to delay the removal from the UK or the appellant or of any member of his family), which has the effect of removing the appeal right.

The Immigration and Asylum Act provides for appeals to be brought where human rights breaches are alleged. **Section 65** of the Immigration and Asylum Act confers a right of appeal to an adjudicator on a person 'who alleges that an authority [the Secretary of State, an immigration officer or a

person responsible for the grant or refusal of entry clearance] has, in taking any decision under the Immigration Acts relating to that person's entitlement to enter or remain in the United Kingdom, acted in breach of his human rights.' Such a breach is defined as being an act or omission made unlawful by section 6(1) of the HRA (Section 65(2)). If, on an appeal before an adjudicator or the Immigration Appeal Tribunal, a question arises as to such a breach, and the tribunal decides that the authority concerned acted in breach of the appellant's human rights, they have the power to allow the appeal on that ground (Section 65(3), (4) & (5)). The Human Rights Act 'point' therefore gives rise both to a new right of appeal and amounts to an additional ground of appeal where there are existing appeal proceedings. For those who have no right of appeal at all in which the human rights point could be canvassed, judicial review will be the appropriate remedy where 'victim status' can be established under section 7 of the HRA.

The Immigration and Asylum Act 1999 and the s.65 human rights appeal represent a welcome reversal of the general trend of decreasing appellate protection for immigrants, albeit that human rights points appear to be the 'ceiling' of protection against exercises of State power rather than the 'floor' envisaged by the ECHR.

Practitioners' concerns

Practitioners' primary concern will be how the incorporation of the ECHR into domestic law will make a practical difference to their clients – to asylum-seekers at risk of inhuman or degrading treatment in the country from which they have fled, to people with exceptional leave to remain with severely restricted rights to family reunion, or to people facing removal who have established family ties in the UK.

The HRA has far-reaching implications both for individual cases and for the law itself. This is reflected in the Government's comprehensive audit of existing laws to discover potential breaches of the HRA, an exercise which will delay the coming into force of the HRA until 2 October 2000. As well as giving people direct recourse to a UK court to complain of human rights breaches under the ECHR, the courts will have a duty to interpret legislation 'so far as it is possible to do so' to be compatible with rights under the ECHR. This will apply to pre-existing legislation as well as to new Acts. In addition, at the outset of the passage of a Bill through Parliament, section 19 of the HRA obliges the relevant minister to state (in writing) whether or not its provisions are compatible with the HRA.

Much parliamentary time was devoted to the courts' powers to make 'declarations of incompatibility', signaling to the Government that it should introduce the appropriate amendments through Parliament. In practice, due to the very strong presumption in favour of interpreting legislation to be compatible with ECHR rights, declarations will be a last resort.

Duty to argue breaches of ECHR rights

The principal effect of the HRA on practitioners will be the professional duty to argue breaches of relevant ECHR rights (usually Article 3 and Article 8) at all stages, i.e. in representations to the Secretary of State, before Special

Adjudicators, the Immigration Appeals Tribunal and upwards. Raising potential breaches at all stages is essential, not least because individuals will have to show that all domestic remedies have been exhausted before taking their case to the European Court of Human Rights in Strasbourg (hereafter the 'European Court').

Representatives will need to gather evidence to show potential breaches at the earliest opportunity. For example, a psychologist's report might be needed to show the effects on a six year old of separation from her father who is facing deportation.

Many cases in which a breach of the right to family life is raised will turn on showing that there are 'serious obstacles' to the UK settled partner returning with their partner to their country of origin (*Adegbie v Austria* European Commission report 26998/95, 9.4.96). Evidence of the UK settled partner's other family ties; compelling health reasons; their work in the UK and any particular difficulties they would have in adapting linguistically and culturally will be vital. The greater the obstacles to relocation, the more difficult for the state to argue successfully that there is no interference with family life. Additional evidence of severe discrimination/ill-treatment the family members might face in the new country, for example for having a child together outside marriage would be relevant to showing a breach of Article 3 (inhuman/degrading treatment) as well as of Article 8.

Article 3: prohibition against torture/ inhuman or degrading treatment

Article 3 is an absolute prohibition against torture/inhuman or degrading treatment. In contrast, Article 8 does in some circumstances permit interference with the right to private and family life. The Article provides for such interference to be permissible if it is 'in accordance with the law' and 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.' The courts are certain to acknowledge that the aim of effective immigration control is a legitimate purpose. Case law suggests that the crucial issue on which they will focus is whether the interference is 'necessary', in the sense of being *proportionate* to the aim of achieving effective immigration controls (Key cases include *Berrehab v The Netherlands* (1988) 11 EHRR 322; *Gul v Switzerland*, (1996) 22 EHRR 93). The courts must also be satisfied that any interference is non-discriminatory (Article 14).

In the Tom Sargant Memorial Lecture on 16.12.97, the Lord Chancellor, Lord Irvine of Lairg, spoke of a shift from decisions based solely on questions of procedural fairness to a duty to take a principled, moral approach to the question of whether a public body can justify its interference with a fundamental human right. The courts' scrutiny should extend to being satisfied that the 'spirit' and not just the words of a justification for interference is made out. A full transcript of the speech is appendix two of this publication.

The greater the interference with the rights at issue, the easier it should be to persuade the courts that interference is disproportionate to the legitimate purpose of immigration control. Again, this approach highlights the

importance of gathering substantial evidence to show the severity of the interference with a client's family life.

It is difficult to predict the courts' approach to the interpretation of the ECHR. An approach based on the application of a set of positive rights is radically different from the current system, under which public bodies are allowed to act as they wish unless a specific prohibition applies. The courts will need to be persuaded to apply the guiding principles underlying the ECHR rather than being governed by whether or not there was a violation in a particular case. Otherwise, there is a real risk that case law will develop which is based on the application of Articles 3 and 8 in cases which are factually weak.

The European Court often hears cases from countries which have incorporated the ECHR, an indication that post-incorporation, recourse will still be had to Strasbourg. As now, Rule 39 will continue to be the procedure under which, once domestic remedies have been exhausted, a formal request can be made to the President of the European Court for an indication to be given to the Government as to the interim measures to be taken pending the hearing of the full application by the Court. In the context of immigration, this is usually a stay on removal whilst the European Court considers the case. The requirement to exhaust domestic remedies is based on the principle that states should be afforded the opportunity to put right violations alleged against them. It is a requirement that is certain to continue to be strictly enforced by the European Court.

A potential gap in available remedies may arise when the court makes a declaration of incompatibility. The declaration will have no retrospective effect, meaning that the individual whose complaint prompted the declaration will have no remedy. In such a case, recourse may be had to the European Court, although in practice it is very likely that the Government, having decided to take heed of the declaration and amend the law accordingly, would give the individual the remedy they sought.

The 'margin of appreciation'

The 'margin of appreciation' is the doctrine developed by the European court which holds that national states are best able to decide what is in the interests of its own citizens. When considering whether or not there is a violation of the ECHR, the courts have given a degree of leeway to member states, the idea being that national authorities are best able to carry out the balancing exercise between human rights and legitimate aims restricting the exercise of those rights. Pre-incorporation, UK courts have acknowledged this approach, describing it as the 'wide margin of discretion' to be afforded the immigration authorities in reaching decisions in which, for example, a breach of family life is alleged. In *R v SSHD ex parte Bina Rajendra Patel* [1995] Imm AR 223, Brooke J stated that national governments had been given a 'wide margin of discretion' in performing their obligations when breaches of ECHR rights were alleged. The Court of Appeal upheld this approach in the case of *Mbatube* [1996] Imm AR 184).

The UK courts have sought to give the 'margin of appreciation' a different meaning, treating it as part of the reasonableness test in the context of judicial review. In *R v Ministry of Defence, ex parte Smith*, Sir Thomas Bingham MR stated:

> 'The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.'

In the case of *ex parte Kerrouche*, Lord Woolf MR referred to the 'margin of appreciation' or 'range of tolerance' as a measure of the difference in interpretation of the 1951 Convention provisions between different signatories (*R v Special Adjudicator ex parte Kerrouche*, [1998] INLR 88, Vol 1). On the facts the Court of Appeal held that there was no significant difference between the French and UK authorities' interpretation of Article 1(F) (b) of the 1951 Convention and that the safety of France as a third country could not therefore be challenged on this ground. Lord Woolf stated (at page 93):

> 'While it is highly desirable that there should be a harmonised approach to the interpretation of international documents such as the Convention, until that harmonisation is achieved, one signatory must allow another signatory a margin of appreciation before treating that country as being one which did not fulfill its obligations to adhere to the principles of the Convention.'

However, in the case of *R v SSHD ex parte Iyadurai*, the Court of Appeal considered the approach taken in *Kerrouche* ([1998] INLR No 4 at 472). Lord Woolf accepted that it was not appropriate to speak in terms of a 'margin of appreciation' in relation to the 1951 Convention (as opposed to the ECHR). The Secretary of State's duty was to consider, on the material before him, whether the third country would properly give effect to the 1951 Convention. This involved not a test of the precise language used, but rather a comparison of the third country's approach with 'the proper international interpretation of the provisions of the Convention' (*Iyadurai* at 478).

Post-incorporation, the UK courts will become the national authorities with specific responsibility for adjudicating on human rights issues. The UK courts will be well placed to assess the Government's arguments that interference with an individual's family life is justified. The margin of appreciation is a doctrine which is only applied by a supra-national court, and it should therefore become redundant in the UK's domestic courts (albeit still applied by the Court in Strasbourg in relation to decisions of member states).

UK courts' duty to take account of Strasbourg case law

The courts will have a duty to take account of Strasbourg case law. This includes judgements of the European Court of Human Rights and opinions and decisions of the European Commission of Human Rights[1]. Ministers resisted opposition calls for the duty to become a discretion, (for 'must take account of' to be replaced with 'may take account of') but nonetheless emphasised a discretionary element and stated that there would be occasions when it was proper for the courts to depart from decisions made in Strasbourg.

1 The European Commission of Human Rights was abolished on 1.11.98, although it will still deal with cases brought before it prior to this date.

A number of factors will influence the courts' approach to this duty, one being the age of the decision, with greater weight being placed on more recent decisions. Account may also be taken of decisions of national courts of other member states which have been applying the ECHR for some time[2].

There was much debate about the definition of 'public authority' for the purposes of the HRA. Ministers emphasised the very wide scope of the term, in order to ensure maximum protection of human rights. The actions or omissions of a wide range of public bodies will be challengeable. Relevant authorities include, but are not limited to, the Secretary of State, (who includes Immigration and Nationality Directorate (IND) officials, Immigration Officers and Home Office Presenting Officers), entry clearance officers, adjudicators and the Immigration Appeal Tribunal. The public or private nature of the functions carried out by the body is to be the significant factor, rather than the name or label given to the body. This suggests that Group 4 or other security firms carrying out duties in relation to the detention of asylum-seekers/enforcement action could be subject to challenges under the HRA.

Right to an effective remedy

Article 13 of the ECHR confers the right to an effective remedy. It provides for everyone whose rights and freedoms as set forth in the ECHR are violated to have 'an effective remedy before a national authority notwithstanding that the violation has been committed by acting in an official capacity'. The Government resisted calls for this Article to be incorporated, arguing that as the HRA achieved the aim of providing an effective remedy no purpose would be achieved by its inclusion. When pressed as to the outcome of there being a gap in the remedies available the Home Secretary stated that the safeguard was for litigants to go to Strasbourg, where Article 13 would arise (see page 63). Another reason given was that specific remedies available were clearly set out in Section 8 of the HRA, and to include Article 13 could mean the court creating remedies in addition to those set out in Section 8 (although ministers were unable to identify what these remedies might be) (see page 64).

Incorporation of the ECHR in domestic law is an opportunity for protection to be afforded to many who now fall outside the provisions of the 1951 Convention. The HRA also has the potential for a broad and flexible approach to be taken towards the rights of those who are in the UK as family members, students or visitors. It is notable that family visitors for example will potentially have a right of appeal under the Immigration and Asylum Act as well as under the HRA.

Practitioners will have a vital role to play in ensuring that good law is made, which will have the maximum impact on clients, enabling them to enjoy family life without interference, to be protected from inhuman or degrading treatment and to enjoy the other fundamental rights and freedoms which are shortly to become binding law.

2 For a useful analysis of the relative weight to be applied to decisions, see the Special Bulletin on the Human Rights Act by Dr Hugo Storey in *Butterworths Immigration Law Service*, March 1999.

Using the publication

This publication has three aims:

i) to inform immigration practitioners about the implications for their clients of the HRA and to encourage good practice in relation to the gathering of evidence etc;

ii) to contribute to the ongoing debate as to how to encourage broad and flexible interpretations of the HRA's provisions; and

iii) to provide in one source a list of all relevant ministerial statements to which reference could usefully be made, either under the practice established in *Pepper (Inspector of taxes) v Hart* [1993] AC 593, by which a tribunal may consider a clear statement made in Parliament by the promoting minister in order to clarify an ambiguity on the face of the HRA, or more generally, to clarify the meaning and effects of the new law.

During the parliamentary passage of the HRA through Parliament, there were few specific references to immigration law and practice, (with the exception of the amendment which conferred on adjudicators when considering whether a person's removal would be contrary to the 1951 Convention the power also to consider breaches of the ECHR). In addition, ministers displayed growing reluctance to make statements which could be used in a *Pepper v Hart* challenge. These factors mean that practitioners will not find sections in the publication about areas of specific interest, such as deportation, asylum appeals or exceptional leave to remain. However, there are included many statements of general intention, regarding the scope of the HRA's provisions, and how it will be enforced, which are very relevant to the immigration field. For example, the restriction of claims against public authorities to the 'victims' (or potential victims) 'of the unlawful act' remains, but the Government clarified how interest groups will be able to play a role in ECHR cases (e.g. by way of interventions or *amicus* briefs).

The section on using ministerial statements contains guidance on referring to ministerial statements strictly within *Pepper v Hart*, but also emphasises the importance of using the statements as a more general source of information as to Parliament's intentions in relation to the courts' role in relation to the interpretation of the HRA's provisions.

The chapters follow closely the order of the sections of the HRA. Each quotation is accompanied by a Hansard reference. There are some statements which relate to more than one section. Most have been listed once only, and cross-referenced where appropriate.

The use of italics signifies a non-ministerial statement, for example by an Opposition MP or peer. Square brackets [ ] contain the writer's commentary or clarification of the meaning of a statement, or of the context in which it was made.

The Bill was piloted through the Commons by the Home Secretary Jack Straw MP, Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP, and the Parliamentary Secretary in the Lord Chancellor's Department Geoff Hoon MP. Shadow Home Secretary Sir Brian Mawhinney MP and Home Affairs spokesperson James Clappison MP, spoke on behalf of the Conservative Party in the Commons. Ministers responsible for the Bill in the Lords were the Lord Chancellor Lord Irvine of Lairg and Parliamentary Under-Secretary of State Lord Williams of Mostyn. Liberal Democrat peers who played a prominent role in debates were Lord Lester of Herne Hill QC, Earl Russell and Baroness Williams of Crosby.

Other MPs and peers whose statements are either included in the report or to whose comments reference is made are: Sir Nicholas Lyell, Lord Kingsland, Lord Ackner, Lord Simon of Glaisdale, Lord Goodhart, Robert MacLennan MP, Dominic Grieve MP, Theresa May MP, Humfrey Malins MP, Edward Leigh MP and Andrew Rowe MP.

Using ministerial statements as an aid to interpretation of the Human Rights Act

Since the decision in *Pepper v Hart*, lawyers have been allowed to refer to ministerial statements as an aid to statutory interpretation if they help to clarify an 'ambiguity' or 'obscurity', or to clarify wording the literal meaning of which leads to an 'absurdity'. The statement must be 'clear' and have been made by a minister or other promoter of the Bill in Parliament. These are significant restrictions on the statements to which reference can be made.

As awareness of the potential of *Pepper v Hart* has increased amongst parliamentarians, backbenchers increasingly make explicit their wish to elicit precisely such statements of clear intention: 'reassurances and explanations, in particular explanations of the *Pepper v Hart* sort' (Lord Henley, HL Committee 24.11.97, Col 788). Inevitably, ministers have become cautious when responding to such requests for clarification.

The Lord Chancellor said during the HRA's passage: 'One of the dangers of *Pepper v Hart* is that if one becomes drawn in that way, what one says can be too readily cited in the courts for a particular interpretation of the Bill. *Pepper v Hart* does not come free of risk' (HL Committee 24.11.97, Col 800). In responding to a question about the powers of a judicial review court to award damages, the Lord Chancellor spoke of his 'grave reservations about giving legal advice' which 'will then be transmuted by the doctrine of *Pepper v Hart* into what the Government intended as a result of this provision of the Bill.' He then confined his substantive response to a direct quotation from Clause 8(3) of the Bill, without any further explanation. On the other hand, when ministers actively wish to encourage interpretation of a provision in a specific manner, they will refer to the doctrine in *Pepper v Hart* to signal that they are making a clear statement of intention which they wish the courts to follow.

This development, together with Parliament's focus on the wider issues arising from the HRA rather than the implications for specific groups of potential applicants, such as asylum-seekers, limits the circumstances in which practitioners will be seeking to refer to statements under *Pepper v Hart*. However, reference can usefully be made to statements which do not clarify a statutory ambiguity and therefore do not fall within *Pepper v Hart*, but which nonetheless illuminate Parliament's intentions and may also assist in educating tribunals as the scope of the HRA's provisions in an immigration context, particularly in the run-up to enforcement.

Where practitioners have identified a statement which arguably clarifies a statutory ambiguity and satisfies the other criteria, there are specific procedures to be followed, which are set out in the Practice Direction (Hansard Extracts) [1995] 1 WLR 192, reproduced at the end of this report. A brief summary of the argument and the extract/s should be served on the court and other parties no later than five working days before the court hearing.

How to use the HRA in the run-up to enforcement

Pre-enforcement, practitioners should use every opportunity to raise Article 3 and Article 8 points both in order to draw the new law to the attention of decision-makers and judges, as well as for the purposes of the individual case. The following points may be usefully made in encouraging tribunals to have full regard to the provisions of the HRA.

The starting point for examining the approach of the courts to alleged breaches of the ECHR is the case of *R v SSHD ex parte Brind* ([1991] AC 696 at 748–9). Lord Bridge acknowledged that the ECHR was not part of domestic law, stating:

> *But I do not accept that this conclusion means that the courts are powerless to prevent the exercise by the executive of administrative decisions, even when conferred, as in the instant case, in terms which are on their face unlimited, in a way which infringes fundamental human rights.*

The classic use of the ECHR has been as an aid to resolve the meaning of ambiguous legislation, eg. in the recent cases of *R v IAT ex p. Arman Ali* [2000] INLR 89, where Collins J held that Article 8 should inform the meaning to be given to the maintenance and accommodation provisions of the immigration rules attaching to those seeking entry to the UK as family members.

In an Australian High Court case, the Court concluded that ratification of an international Convention (in that case the Convention on the Rights of the Child) in itself was the basis for a legitimate expectation that decision-makers would comply fully with its provisions (*Minister for Immigration and Ethnic Affairs v Teoh* [1995] 128 ALR 353). The Convention on the Rights of the Child had not been incorporated into domestic law but the Court's view was that its ratification was a public acceptance of its provisions and amounted to a declaration that the public authorities would act in accordance with its provisions.

The strongly worded ministerial statements of commitment to incorporation will be useful in arguing that a similar approach should be taken by the UK courts in the run up to enforcement (see section on Government's general intentions as to the aims of the HRA).

Similarly, it can be argued that there is a legitimate expectation that the provisions of the HRA will be adhered to, in the absence of any statement from the Government to the contrary. In a 1998 case, the Court of Appeal held that the entering into a Treaty by the Secretary of State could give rise to a legitimate expectation on which the public in general were entitled to rely because, subject to any indication to the contrary, ratification could be a representation that the Secretary of State would act in accordance with any obligations which he accepts under the relevant Treaty. Such a legitimate expectation could, in turn, give rise to a right to relief, as well as to additional obligations of fairness, if the Secretary of State, without reason, acted inconsistently with the obligations which the UK had undertaken (*R v SSHD ex parte Ahmed v Patel* [1998] INLR 570).

In *R v DPP, ex parte Kebilene*, the High Court's approach was to treat the ECHR as a relevant consideration rather than the foundation for a legitimate expectation. The High Court held that certain sections of the Prevention of Terrorism (Temporary Provisions) Act 1989 under which the applicants had been charged were contrary to several requirements of Article 6 of the ECHR (right to a fair trial)[3]. The Lord Chief Justice Lord Bingham of Cornhill rejected the notion that the UK's ratification of the ECHR, the enactment of the HRA or public ministerial statements made since the passing of the HRA founded a legitimate expectation that the Director of Public Prosecutions would exercise his prosecutorial discretion in accordance with the ECHR. Nor was there a legitimate expectation arising from the limited retrospectivity provided for by section 22(4) of the HRA; it was Parliament's clear intention that the HRA's central provisions should come in at a date to be specified, after the passing of the HRA. Parliament had however shown a clear intention that the ECHR rights scheduled to the HRA should be protected, and in view of this, it was appropriate for the court to examine the substantial effects of the relevant legislation so as to decide whether it infringed this presumption. It was appropriate for the Court to review the legal basis of the Director of Public Prosecutions' decision and to give guidance as to the effect of the ECHR. The enactment of the HRA was a relevant consideration to the Director of Public Prosecutions' reconsideration of the prosecutions, not least because of the prospect of the HRA coming into force, and of the appeals against conviction being quashed accordingly. The decision was reversed by the House of Lords[4] on the basis that save in exceptional cases, the DPP's decision to prosecute should not be the subject of judicial review. However, the Lords did not interfere with or throw doubt on the propositions of Lord Bingham CJ or Laws LJ that the Convention obligation was a relevant matter for the discretion of the decision maker where the decision touched Convention rights.

This approach was applied in *R v Secretary of State ex p. Quaquah* [2000] INLR 196 where Turner J quashed the Secretary of State's proposed removal of the Applicant to Ghana. The Applicant was one of the 'Campsfield 9' who had been unsuccessfully prosecuted for riot at Campsfield House detention centre, who then sought to sue the Home Office and Group 4 for malicious prosecution. In allowing the application for judicial review, Turner J held that the Secretary of State had *inter alia* erred in failing to have regard to Article 6 ECHR.

3 [1999] 3 WLR 175 (QBD)

4 28.10.99

> In cases in which the Secretary of State has accepted that consideration of Article 8 is relevant, for example through a Home Office policy which explicitly refers to this Article, he has a duty to give proper consideration to two questions: whether removal would cause interference with family life, and whether in all the circumstances such interference is justified (i.e. outweighed by the need for effective immigration control) (*Zighem* [1996] Imm AR 184). The judgement focused on the absence of reasons for the Secretary of State's decision, such as to make it impossible to know the Secretary of State's view on matters of significance such as the level of contact between the child and her father who was facing removal.

Both before and after the HRA comes into force, ministerial statements of general intent will be helpful in informing adjudicators and Tribunal members of their powers under the HRA, and the basic principles they will be applying as a matter of routine once the HRA is in force – and in encouraging them to exercise their powers with regard to ECHR rights in a flexible, broad manner.

Chronology of the Bill's passage through parliament

House of Lords

First Reading	23 October 1997	
Second Reading	3 November 1997	HL Hansard Vol 582 No 56
Committee	18 November 1997	HL Hansard Vol 583 No 65
	24 November 1997	HL Hansard Vol 583 No 68
	27 November 1997	HL Hansard Vol 583 No 71
Report	19 January 1998	HL Hansard Vol 584 No 87
	29 January 1998	HL Hansard Vol 585 No 94
Third Reading	5 February 1998	

House of Commons

First Reading	6 February 1998	
Second Reading	16 February 1998	HC Hansard Vol 306 No 120
Committee	20 May 1998	HC Hansard Vol 312 No 175
	3 June 1998	HC Hansard Vol 313 No 179
	17 June 1998	HC Hansard Vol 314 No 188
	24 June 1998	HC Hansard Vol 314 No 193
	2 July 1998	HC Hansard Vol 315 No 198
Report and Third Reading	21 October 1998	HC Hansard Vol 317
Consideration of of Commons Amendments by the House of Lords	29 October 1998	HL Hansard Vol 593
Royal Assent	9 November 1998	

Articles of the European Convention on Human Rights (as contained in Schedule 1 of the HRA) in summary form

[NB: Articles 2, 3 and 8 are of particular relevance to immigration practitioners]

Schedule 1 of the HRA contains Articles 2–12 and 14, 16–18 and Articles of the First Protocol.
Article 13 (right to an effective remedy) is absent.

Article 2	Right to life
Article 3	Prohibition of torture
Article 4	Prohibition of slavery and forced labour
Article 5	Right to liberty and security
Article 6	Right to a fair trial
Article 7	No punishment without law
Article 8	Right to respect for private and family life
Article 9	Freedom of thought, conscience and religion
Article 10	Freedom of expression (Article 10)
Article 11	Freedom of assembly and association
Article 12	Right to marry
Article 14	Prohibition of discrimination
Article 16	State's right to impose restrictions on political activities of aliens
Article 17	Prohibition of abuse of Convention rights
Article 18	Limitation on use of restrictions on rights

Protocol 1 (Schedule 1, Part II) contains Articles on protection of property, and rights to education and to free elections

Ministerial statements

1 The Government's general intentions as to the aims of the HRA

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 769

The Bill will guarantee to everyone the means to enforce a set of basic civil and political rights, establishing a floor below which our standards will not be allowed to fall. The Bill will achieve that by giving further effect in our domestic law to the fundamental rights and freedoms contained in the European convention on human rights.

The Lord Chancellor Lord Irvine of Lairg,
HL Report 19.1.97, Col 1266

The Bill has been constructed in a way that affords ample protection for individuals' rights under the convention. We have adopted an intentionally wide definition of public authority under Clause 6, and Clause 8(1), which I have already read, gives the courts ample scope for doing justice when unlawful acts are committed. I would say that these are measures of a government determined to deliver a strong form of incorporation, not a government fighting shy of enhancing our citizens' rights.

See also statements under section:
Definition of 'public authority' for purposes of the HRA

2 UK courts' duty to take account of European Commission and Court of Human Rights judgements etc
(Clause 2)

The meaning of 'must take into account'

The Lord Chancellor Lord Irvine of Lairg,
HL Committee
18.11.97, Cols 514–515

We believe that Clause 2 gets it right in requiring domestic courts to take into account judgements of the European Court, but not making them binding.

…The Bill would of course permit United Kingdom courts to depart from existing Strasbourg decisions and upon occasion it might well be appropriate to do so, and it is possible they might give a successful lead to Strasbourg. For example, it would permit the United Kingdom courts to depart from Strasbourg decisions where there has been no precise ruling on the matter and a commission opinion which does so has not taken into account subsequent Strasbourg court case law.

These cases aside, it is not considered necessary to set out to provide that United Kingdom courts and tribunals are bound by Strasbourg jurisprudence, since where it is relevant we would of course expect our courts to apply convention jurisprudence and principles to the cases before them.

The Lord Chancellor Lord Irvine of Lairg,
HL Report 19.1.98,
Cols 1270–1271

We take the view that the expression "take in account" is clear enough. Should a United Kingdom court ever have a case before it which is a precise mirror of one that has been previously considered by the European Court of Human Rights, which I doubt, it may be appropriate for it to apply the European court's findings directly to that case; but in real life cases are rarely as neat and tidy as that. The courts will often be faced with cases that involve factors perhaps specific to the United Kingdom which distinguish them from cases considered by the European court. I agree with the noble and learned Lord, Lord Browne-Wilkinson, that it is important that our courts have the scope to apply that discretion so as to aid in the development of human rights law.

There may also be occasions when it would be right for the United Kingdom courts to depart from Strasbourg decisions. We must remember that the interpretation of the convention rights develops over the years. Circumstances may therefore arise in which a judgment given by the European Court of Human Rights decades ago contains pronouncements which it would not be appropriate to apply to the letter in the circumstances of today in a particular set of circumstances affecting this country. The Bill as currently drafted would allow our courts to use their common sense in applying the European court's judgment to such a case. We feel that to accept this amendment [amendment seeking to make ECHR decisions binding on UK courts] removes from the judges the flexibility and discretion that they require in developing human rights law.

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 402

With respect, the hon. Gentleman [Oliver Heald MP] puts two different points. The words "take into account" have the precise meaning of his second point [that UK courts should be able to make their 'own judgement and interpretation of the Convention']. …The phrase clearly allows for Strasbourg jurisprudence not to be precisely followed but to be taken into account. That is the meaning of the English words. The word "must" in this context clearly means that the courts must take into account the jurisprudence. That is what the words in English say. They do not mean that there has to be uniform jurisprudence. They mean that the courts must take the jurisprudence into account in reaching a decision.

Let me suggest what the effect of the discretionary word "may" will be. It will mean that our courts might produce, on the same set of facts, different results because some may take the jurisprudence into account and some may not. That can hardly be sensible when we are trying to promote consistency in the decision making of our courts. If we allow courts not to take into account the jurisprudence, we shall end up, on similar facts, with different results. That can hardly be satisfactory.

Consistency of UK law with decisions of the European Court of Human Rights

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 403

Clearly, it is important, because the UK is bound internationally by the convention's provisions, that our law should be consistent with the general provisions of the European convention. That is already the law of the UK in relation to the international position. The Government are seeking to incorporate those international obligations into our domestic law. Therefore, it is important, ultimately, that the law of the UK, as applied by UK courts, is broadly consistent with the jurisprudence of the Strasbourg court.

That is something that, if cases were pressed to their logical and ultimate conclusion, is already necessary. Having been bound internationally to satisfy the terms of the convention, there is an obligation on the UK, as a signatory state to the European convention, to translate those decisions into our domestic legislation, so there is no legal distinction between the position today and the position that will obtain once incorporation has taken place.

Lord Kingsland: If a domestic court makes a decision which is then incorporated into domestic law under the fast-track procedure, and meanwhile the litigant goes to the European Court of Human Rights and gets a decision that is different from that which has been incorporated in domestic law, does it mean that the government of the day will not under any circumstances incorporate the decision of the European Court of Human Rights in domestic law to the extent that it differs from their reaction to the domestic decision? Put another way, if a declaration of inconsistency by a domestic court has been incorporated in our own law does that set the limits of what the Government are prepared to accept from a decision of the European Court of Human Rights, whatever it is?

The Lord Chancellor Lord Irvine of Lairg,
HL Report 19.1.97, Cols 1271–1272

My Lords, I am not sure that I entirely understand the force of the question. As I understand it, the supposition is that the courts of the United Kingdom make a declaration of incompatibility and give their reasons for holding a statute to be incompatible; alternatively, Parliament moves fast and passes a remedial order which is of legislative effect in a certain legislative sense. As I understand the question, I am asked further to suppose that the European Court of Human Rights in Strasbourg pronounces on that point, or something very close to it, in a sense not quite in accord with the reasons given by the court in making its declaration of incompatibility or the purpose of the remedial order. I can only say that in those circumstances the Government would obviously think again.

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 392

In response to a question from James Clappison MP as to whether UK courts may depart from Strasbourg decisions when the European Court has made a precise ruling in a case:

The hon. Gentleman knows the answer to his question. The answer is clear: it is for the independent judgment of a court to resolve the issue before it. Nothing that can be said here will affect that independence. I am surprised to hear him pursue that argument because, by doing so, he seeks to fetter that independence. If a court arrives at an apparently incorrect decision, there is the prospect of an appeal, which, ultimately, could end up in the court in Strasbourg. Those matters are routinely resolved before the courts every day of the year. The hon. Gentleman seeks to go into a logical cul de sac from which there is no exit.

3 UK courts' duty to interpret legislation to be compatible with Convention rights
(Section 3)

Legislation to be interpreted 'as far as possible' to be compatible with Convention rights

Home Secretary Jack Straw MP,
HC Committee 3.6.98, Col 422

As I have said, we want the courts to strive to find an interpretation of legislation that is consistent with convention rights, so far as the plain words of the legislation allow, and only in the last resort to conclude that the legislation is simply incompatible with them.

…Let me say in reply to a point made by the hon. Member for Maidenhead [Theresa May MP] that there was a time when all the courts could do to divine the intention of Parliament was to apply themselves to the words on the face of any Act. Now, following *Pepper v Hart*, they are able to look behind that and, not least, to look at the words used by Ministers. I do not think the courts will need to apply themselves to the words that I am about to use, but, for the avoidance of doubt, I will say that it is not our intention that the courts, in applying what is now clause 3, should contort the meaning of words to produce implausible or incredible meanings. I am talking about plain words in what is actually a clear Bill with plain language – with the intention of Parliament set out in Hansard, should the courts wish to refer to it.

The Lord Chancellor,
HL Report 19.1.97, Col 1262

We want the courts to strive to find an interpretation of legislation which is consistent with convention rights so far as the language of the legislation allows and only in the last resort to conclude that the legislation is simply incompatible with them. …Our position is that the courts should apply the law and not make it and that they should not be dragged into the area of opinion or into judgment of a political character perhaps to a greater or lesser extent.

The word "possible" is the plainest means that we can devise for simply asking the courts to find the construction consistent with the intentions of Parliament and the wording of legislation which is nearest to the convention rights. On the other hand, "reasonable" is an evaluative criterion and the proponents of the amendment do not offer us any guidance as to what the criteria might be.

…we want the courts to construe statutes so that they bear a meaning that is consistent with the convention whenever that is possible according to the language of the statutes but not when it is impossible to achieve that. More generally, we proceed on the basis that Parliament, at least post-ratification of the convention, must be deemed to have intended its statutes to be compatible with the convention to which the United Kingdom is bound, and that courts should hold that that deemed general intention has not been

carried successfully into effect only where it is impossible to construe a statute as having that effect. This seems to me to be a sensible principle and is consistent both with Parliament's presumed intention post-ratification and with ministerial statements of compatibility, when they come to be made, under Clause 19 of the Bill. If this amendment were agreed to, the only intention that I could divine behind it would be to maximise rather than minimise declarations of incompatibility which would tend to bring the statute book into unnecessary disrepute.

HL Report 19.1.97, Cols 1291–1292

Lord Lester of Herne Hill: With your permission I would like to refer to one or two of the matters in that lecture [the Tom Sargant Memorial Lecture given by the Lord Chancellor Lord Irvine of Lairg on 16 December 1997] which seem to me to show exactly the approach that the courts will be adopting.

The Lord Chancellor pointed out that the HRA, when it comes into force, will require new judicial techniques of interpretation. He said:

> "The HRA will require the courts to read and give effect to the legislation in a way compatible with the convention rights 'so far as it is possible to do so'. This…goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the courts will be required to interpret legislation so as to uphold the convention rights unless the legislation itself is so clearly incompatible with the convention that it is impossible to do so".

The Lord Chancellor continued:

> "Moreover, it should be clear from the parliamentary history, and in particular the ministerial statement of compatibility which will be required by the HRA, that Parliament did not intend to cut across a convention right. Ministerial statements of compatibility will inevitably be a strong spur to the courts to find means of construing statutes compatibly with the convention".

I break off to observe that that, of course, is dealing with post Human Rights Act legislation not pre-Act. Then the Lord Chancellor said this:

> "Whilst this particular approach is innovative, there are some precedents which will assist the courts. In cases involving European Community law, decisions of our courts already show that interpretative techniques may be used to make the domestic legislation comply with the community law, even where this requires straining the meaning of words or reading in words which are not there".

He gave as an example the well known Litster case decided in 1990. He also referred to the jurisprudence in New Zealand. He then said this:

> "The court will interpret as consistent with the convention not only those provisions which are ambiguous in the sense that the language used is capable of two different meanings but also those provisions where there is no ambiguity in that sense, unless a clear limitation is expressed. In the latter category of case it will be 'possible' (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected rights was intended so as to make it 'impossible' to read it as conforming".

I apologise for reading all of that but it is very important because it shows, from the highest authority among the makers of the Bill in this House, that there will be a new approach to statutory interpretation. A declaration of incompatibility will be a systemic failure.

The Lord Chancellor Lord Irvine of Lairg,
HL Report 19.1.97, Col 1294–1295

The position under the Bill is that, where pre-existing legislation cannot be construed by the courts compatibly with the convention, the intention of the Government is that the courts may make a declaration of incompatibility and then Parliament may make a remedial order.

…I would add that it is not the intention of the Bill to repeal any pre-existing legislation that is incompatible with the convention. The noble Lord, Lord Lester of Herne Hill, was kind enough to refer to my recent Tom Sargant Memorial Lecture. I shall not add to whatever authority these extra-judicial observations may have – I doubt much – by repeating in the House anything that I said then.

Doctrine of the 'margin of appreciation'

Home Secretary Jack Straw MP,
HC Committee 3.6.98, Col 424

The doctrine of the margin of appreciation – it is an important one – recognizes that a state is allowed a certain measure of discretion, subject to European supervision, when it takes legislative, judicial or administrative action in respect of some convention rights. In other words, it is best placed to decide in the first place whether – and, if so, what – action is required.

My first point about the margin of appreciation is that it is more relevant to some convention rights than others. It is especially relevant to articles 8 to 11, which enable restrictions to be placed on rights where that is necessary is a democratic society, for any one of a number of reasons. It is less relevant to some of the other articles, for example, article 2 on the right to life and article 3 on the prohibition on torture or inhuman and degrading treatment or punishment.

Balancing different Convention rights

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Report 19.1.98, Cols 1296–1297

I was about to say that we entirely agree that a court should be able to take account of convention rights that pull in different directions. The noble and learned Lord the Lord Chancellor and I have said that. It has been readily accepted by noble Lords who have attended that that is the whole purpose of the Bill. But our analysis of the position differs from that of the noble and learned Lord [Lord Simon of Glaisdale].

Perhaps I may take his example. A claimant will allege that a particular convention right of his or hers has been infringed. The respondent will claim that it has not. I entirely agree, therefore, that the question is this. In what circumstances will the court have to balance his right against the convention right of some other person? The answer comes from the convention itself and the European Court of Human Rights.

As regards the Article 8 example, the claimant will allege infringement of his rights to respect for private and family life, home and correspondence, in Article 8(1). The authority may well reply that the act in question was

necessary to pursue one of the aims permitted by Article 8(2), which, of course, include the rights and freedoms of others, including other convention rights. The claim will be that there has been a breach of Article 8(1). The court, in considering that claim, will be able to look beyond Article 8 itself; for example, to Article 10. But the finding will not be that there has been a breach of Article 8 justified by Article 10. The finding in these circumstances will either be that there has been a breach of Article 8 or that there has been no breach of that article.

Even where a claimant relies on an article of the convention which has no built-in reference to other rights, as Article 8 undoubtedly does, there is the overriding effect of Article 17. Clause 1(1) of the Bill refers to it. I do not believe that it has been mentioned frequently in your Lordships' House, but Article 17 states:

> "Nothing in this Convention may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or"

then these important words –

> "their limitation to a greater extent than is provided for in the Convention".

That is a classic description of the balancing act which the Government believe is the appropriate task for the courts to perform. Therefore, we suggest that the balancing which I have described quite briefly is much more sophisticated and subtle and is designed specifically to be that, rather than the simple case of two litigants, each asserting conflicting convention rights.

The balancing is to be carried out in the context of the particular article on which the claimant bases his claim. So in the Article 8 example, the court will be adjudicating on the question whether that article has been infringed. Plainly, there will be different balancing to be done by the courts in different claims.

We believe, on sound historic experience, that the courts in this jurisdiction are peculiarly well equipped to carry out these balancing exercises as the whole development of the common law tradition in this country has been substantially based on the sort of subtle balancing that the courts will be required to carry out. That leads to the question as to the best formulation. Should the Bill refer to "one or more of the Convention rights," or "the Convention rights" or "a Convention right?" We have genuinely and conscientiously given this a good deal of thought and we believe that the phrase "a Convention right" is the proper one to use. It is shorter than "one or more of the Convention rights" and is preferable in drafting terms and a more natural formulation.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Report 19.1.97, Col 1297

…"a Convention right" properly describes what we are looking for as regards the background to the courts' consideration. We fully understand that balance is what the courts will have to find.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Report 19.1.97, Col 1301

It is self evident – I say it, and I almost said, "for the last time", but no one is that fortunate – that this point will involve a balancing exercise. Article 8.1 and 8.2 will not just have to be balanced internally, they will have to be balanced, as the noble and learned Lord the Lord Chancellor has told our friends and colleagues in the media, with Article 10. They will have to be balanced – to take up an implied point put by the noble Viscount, Lord Colville of Culross – with the question of a right to a fair trial. There may be many circumstances with which he and I are well familiar in practice over the years where a fair criminal trial for one person may well involve an infringement of someone else's private confidences or family life. That is a commonplace that we all know.

There is nothing difficult about the balancing in principle. It will be an anxious task for the courts to carry out.

4 Declarations of incompatibility
(Section 4)

General statements relating to courts' declarations of incompatibility

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 773

I can say, first, that occasions on which the courts declare an Act of Parliament to be incompatible are rare; there will be very few such cases.

The Lord Chancellor Lord Irvine of Lairg,
HL Second Reading 3.11.97, Col 1229

Parliament may, not must, and generally will, legislate. If a Minister's prior assessment of compatibility (under Clause 19) is subsequently found by declaration of incompatibility by the courts to have been mistaken, it is hard to see how a Minister could avoid remedial action.

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 774

What the Bill makes clear is that Parliament is supreme, and that if Parliament wishes to maintain the position enshrined in an Act that it has passed, but which is incompatible with the convention in the eyes of a British court, it is that Act which will remain in force.

There is, however, a separate question, which is why, in most instances, Parliament and Government will wish to recognise the force of a declaration of incompatibility by the High Court. Let us suppose that a case goes to Strasbourg, where the European Court decides that an action by the British Government, or the British Parliament, is outwith the convention. According to 50 years of practice on both sides, we always put the action right, and bring it into line with the convention.

The Lord Chancellor,
HL Committee 18.11.97, Col 547

A court strives, so far as possible, to construe a statute to be compatible. It fails. Therefore it may – not must – make a declaration of incompatibility. If it makes a declaration of incompatibility, nothing at all flows. The statute remains in full force and effect and that is so whether or not there is another route of appeal. However, the declaration of incompatibility puts some pressure on Parliament to make a remedial order.

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 780

A declaration of incompatibility will not affect the continuing validity of the legislation in question. That would be contrary to the principle of the Bill. However, it will be a clear signal to Government and Parliament that, in the court's view, a provision of legislation does not conform to the standards of the convention.

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 853

I think the best guess is that…the Judicial Committee of the House of Lords will hold only infrequently that there are incompatibilities. The speeches of many distinguished members of the senior judiciary in the other place show that the judiciary will do its best to declare Acts of Parliament consistent with the convention, as they are required to do.

The form in which a court's declaration of incompatibility will be set out/ duty to give reasons for declarations of incompatibility

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 454

In response to an amendment to introduce a requirement on a court making a declaration of incompatibility to set out 'the nature and extent thereof in so far as arises from the nature of the case before the court':

Can he [Humfrey Malins MP] contemplate a decision [to make a declaration of incompatibility] by any of the courts listed in clause 4(5) that does not give carefully particularised reasons for the finding of incompatibility?

HC Committee 3.6.98, Col 454

Edward Leigh MP: The Minister has at least done the House a service. Under Pepper v Hart, a Minister's words…can be used by the courts to interpret the intentions of Parliament. Although the Minister will instruct his minions to vote down this sensible amendment, he has just said, in effect, that the courts should do precisely what the amendment would require them to do.

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 458

With great respect to the hon. Member for Woking (Mr Malins), I believe that his description of courts suggested that they would pronounce on incompatibility at the drop of a hat. There will be a vigorous contest before a court, and both sides of the argument will be extensively debated and discussed before that court reaches a decision. As I have said in an intervention, it will be obvious that the matter has been explored in considerable detail and, clearly, one of the higher courts that are set out in clauses 4 and 5 will be required to explain in some detail the reasons for issuing the declaration.

The Parliamentary Secretary, Lord Chancellor's Department, Geoff Hoon MP,
HC Committee 3.6.98, Col 459

I doubt if a requirement on the court to explain the "nature and extent" of the incompatibility would add anything to the Bill, from anyone's point of view. As the Bill stands, I would expect a court, when making a declaration, to explain what the difficulty was and why it had been impossible to overcome it by constructive interpretation of clause 3. How the declaration arose would be apparent from the judgment as a whole.

A legislative provision will either be compatible or incompatible. The idea that it is possible for a court to certify the extent of the incompatibility is patent nonsense – forgive me for putting it so brutally. It is not possible to certify the extent of an incompatibility. There is either a breach of the convention or there is not.

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 774

I do not believe that writing a timetable into the Bill would be desirable, or consistent with the scheme of the legislation. …In practice, however – even under the current arrangements – Government always move to remedy a matter if it has been found in Strasbourg to be outwith the convention.

Lord Lester of Herne Hill: …does it follow from what he said that where there is existing legislation, before the Human Rights Bill becomes law that has to be interpreted so far as possible to comply with convention rights in accordance with Clause 3(1), that the courts' obligation will be to strive, wherever possible, to read the existing legislation in accordance with the convention, using whatever interpretative tools they think fit, and, if they fail, to grant a declaration of incompatibility, if that is their conclusion? That is how I understand the position. One does not need the doctrine of implied repeal, which would involve saying that the existing statute is, as it were, void, has been overtaken by a subsequent Act, but instead, by a process of judicial interpretation, the existing legislation is to be read in accordance with the convention rights wherever possible, which is what Clause 3(1) says.

The Lord Chancellor,
HL Committee 18.11.97, Col 523

In my view that is what the Bill means. The interpretative provision of Clause 3 applies to legislation in being prior to the passage of this Act and legislation that comes into being after the passage of this Act. I see no need for any reliance on the doctrine of implied repeal.

The court's discretion to make declarations of incompatibility

The Lord Chancellor,
HL Committee 18.11.97, Col 546

Clause 4(2) and (4) give a court, if satisfied that a provision of primary or subordinate legislation is incompatible with the convention rights, a discretion to make a declaration of incompatibility.

…The reason Clause 4 only confers a discretion is in part that in our domestic law a declaration is generally a discretionary remedy. A Clause 4 declaration has no operative or coercive effect and in particular does not prevent either party relying on, or the courts enforcing, the law in question unless and until changed by Parliament.

The courts may, therefore, not wish to make a declaration of incompatibility in all cases. It is possible that the facts of particular cases may suggest that legislation as it is applied in that case is incompatible with the convention, but there may be reasons peculiar to the particular case why the legislation should not be declared incompatible on the occasion when the court would be free to do that.

…I suggest that I certainly would expect courts generally to make declarations of incompatibility when they find an Act to be incompatible with the convention. However, we do not wish to deny them a discretion not to do so because of the particular circumstances of any case.

If the noble Lord asks me for examples of that, I suggest that there might be an alternative statutory appeal route which the court might think it preferable to follow, or there might be any other procedure which the court in its discretion thought the applicant should exhaust before seeking a declaration which would then put Parliament under pressure to follow a remedial route.

I cannot envisage many more particular circumstances, but it appears to me to be sensible to leave the courts a discretion, while I well recognise that in the great majority of cases courts would want to make declarations of incompatibility, where that was appropriate.

Government's response to declarations of incompatibility/scope for parliamentary debate about declarations of incompatibility

Home Secretary Jack Straw MP,
HC Report 21.10.98, Cols 1300–1301

We did not propose that the Judicial Committee of the House of Lords should have the power to override Acts of Parliament by stating that, because they were incompatible with the convention, they were unenforceable and of no effect.

We said that the Judicial Committee of the House of Lords would be able to declare whether, in its opinion, an Act of Parliament was incompatible with the convention, and subsequently to refer the matter back to the Government, which is answerable to Parliament in the majority of cases, regardless of which party was in government. I think Ministers would examine the matter and say, "A declaration of incompatibility has been made and we shall have to accept it. We shall therefore have to remedy the defect the law spotted by the Judicial Committee of the House of Lords". Therefore…we have included procedures in the Bill for remedial orders. It is also always open to Ministers to introduce amending legislation in the normal way.

It is possible that the Judicial Committee of the House of Lords could make a declaration that, subsequently, Ministers propose, and Parliament accepts, should be accepted. …it is possible to conceive that, sometime in the future, a particularly composed Judicial Committee of the House of Lords reaches the view that provision for abortion in either the United Kingdom or part of the United Kingdom is incompatible with one or another article of the convention. Although the Committee would be entitled to say that such provision was incompatible with the convention, such a view would create very great controversy and, in some quarters, considerable social anxiety.

We judged that, in that event, it would be wrong simply to accept what the Committee had said and that a right to abortion, albeit quite properly limited and developed in this country over a period of 30 years, should suddenly be cast aside. My guess…is that, whichever party was in power would have to say that it was sorry, that it did not and would not accept that and that it was going to continue with the existing abortion legislation.

Home Secretary Jack Straw MP,
HC Report 21.10.98, Cols 1302–1303

…let us assume that an equivalent judgement had been made in the form of a declaration of incompatibility by the Judicial Committee of the House of Lords. It has been suggested that the Government would hide away and refuse to explain their position. Within five minutes of such a judgement being made, the Government would be asked for their position. If I happened to be the relevant Minister, I should say that we study the judgement and no doubt consult the Law Officers, but within a matter of weeks we would have to explain our position, and quite rightly too. If we did not volunteer our position – that would be an abdication of good government – we would be brought to the House to explain ourselves.

…Meanwhile [referring to the situation where the Government disagreed with a declaration of incompatibility and the party to the proceedings had as a result taken the case to Strasbourg] we would continue to apply the existing law unless and until there was an adverse judgement in Strasbourg. As the right hon. and learned Gentleman knows, there has to be some certainty about the law. The alternative is that she, as the initiator of the proceedings, would decide not to proceed to Strasbourg in which case, notwithstanding the declaration of incompatibility, the existing electoral law would continue to be valid and would continue in its operation and enforcement.

Home Secretary Jack Straw MP,
HC Report 21.10.98, Col 1304

People will know where they are. There is no question about that, because the situation will be clear. The speed of the Government response will depend on the complexity of what is handed down from the other place and other matters, but the Government will respond.

Home Secretary Jack Straw MP,
HC Report 21.10.98, Col 1306

The right hon and learned Gentleman asked me what would happen with the lower courts, and whether they would follow the judgement. No, they would not, because clause 4(6) is clear: a declaration does not affect the validity, continuing operation or enforcement of the provisions in respect of which it is given. There is absolute clarity there. In a judicial and political sense, the status quo ante would apply.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Committee 27.11.97, Col 1106

The noble Earl rightly reminded us that the noble and learned Lord the Lord Chancellor had told noble Lords that we anticipated that the declaration, or the declarator, would be, first, important – that is why we have limited it to the higher courts – and, secondly, very rare. There is sometimes a danger of over-legislation. The Bill is perfectly simple in scheme, and we look at what might happen in practice were there to be a declarator of incompatibility. The Government would need no prompting either from inside or outside Parliament to come to a decision. I do not think that it is factually correct to suggest that there would be no opportunity for questioning or for debate. From my experience at this Dispatch Box, which is quite limited – it feels longer, and there is no remission for good conduct! – I do not find anyone backward in coming forward, as they used to say in the days of my youth, about questioning Ministers.

I do not believe that this is a real mischief which needs to be on the face of the Bill as a matter of legislation. If the Minister is dilatory he can be asked questions either by a Member of Parliament on behalf of an aggrieved victim or potential victim, or by Questions for Written Answer in either House, and

by Questions or debates in this House. We have come to this conclusion as a matter of judgment. One does not need to legislate for every conceivable circumstance. We believe that the legitimate pressures outside Parliament and the focused pressures within both Houses of Parliament are sufficient to direct the Minister's attention to the question if he needs any direction.

Declarations of incompatibility: remedies available

The Lord Chancellor,
HL Committee
27.11.97, Col 1108

We think it more appropriate [than a statutory provision empowering a Minister to grant relief to a person in a case in relation to which a declaration of incompatibility has been made] for decisions on what remedy should be given to individuals affected by a particular act to be taken by the Government in light of the individual circumstances of every case – and they will vary infinitely. There are existing ways in which this could be achieved. For example, should it be thought necessary for a remedial order affecting the legislation to take effect from a date earlier than that on which the order was made, this will be possible under the Bill; Clause 11(1)(b) so provides. This will not of itself provide a direct remedy to individuals affected by the legislation which has been retrospectively amended; but, following the order, it may be open to them to seek such a remedy. In addition to these powers in the Bill, there are prerogative powers which can be exercised and other ex gratia actions that could be taken to grant remedies in appropriate circumstances.

The Lord Chancellor,
HL Committee
27.11.97, Col 1118

Legislation will be subject to the fast-track procedure, not institutions. Of course, institutions will be affected by the legislation once altered by remedial order, but where it affects their interests, they will have had the fullest notice because of the preceding argument in the courts. I am sure that that will be drawn fully to the attention of any public bodies that are likely to be affected, culminating in what I think will be a rare happening, the making of a declaration of incompatibility by a higher court.

Minister's duty to make and publish written statement on compatibility of a Bill before Parliament (Section 19)

The Lord Chancellor the Lord Irvine of Lairg,
HL Committee
27.11.97, Col 1163

And so, by requiring the Minister in charge of a Bill to give a statement about its compatibility, we are underlining our commitment to undertaking further pre-legislative scrutiny of all new policy measures. …Also, where the Minister states that he is unable to make a positive statement about the Bill's compatibility, that will be a very early signal to Parliament that the possible human rights implications of the Bill will need and will receive very careful consideration. Therefore, a statement giving the Government's conclusions, whether positive or negative, on the status of the Bill will go a long way towards the achievement of those aims. Therefore I ask the Committee not to underestimate the significance of what is already there.

Of course, Parliament will wish to know the reasons why the Government have taken whatever view they have taken. Therefore, I can understand why

these amendments have been put forward. But the reasoning behind a statement of compatibility or the inability to make such a statement will inevitably be discussed by Parliament during the passage of the Bill. Of course it will be; and it will be discussed thoroughly.

The Lord Chancellor,
HL Committee 27.11.97, Cols 1165–1166

Our scheme plainly puts responsibility upon the individual Minister who has charge of the Bill in either relevant place. He is given the particular responsibility of ensuring that the policy accords with convention rights. His is the duty and his is the responsibility to answer to this Chamber or the other place. We believe that to be the correct focus and that is where it presently stands. Of course, the Minister would be answering on behalf of Her Majesty's Government as, by convention, Ministers answer questions not on behalf of their own departments but on behalf of the Government generally.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Report 21.10.98, Cols 1350–1351

By requiring a Minister in charge of a Bill to give a statement on its compatibility, we are underlining our commitment to pre-legislative scrutiny of all new policy measures. Also, where the Minister states that he is unable to make a positive statement about the Bill's compatibility, that will be an early signal to Parliament that the possible human rights implications of the Bill will need to be given careful consideration by the House – especially, no doubt, in Committee.

…Our view is that the amendments are unnecessary because the House provides for the examination of such issues in its procedures in any event. The amendments would almost create an artificial mechanism to do what the House already does. A statement as provided for by the Bill as it stands will be sufficient to achieve the important aims that both we and, in many ways, Opposition members want clause 19 to deliver. That would flag up the issue to the House, which in the normal course of events would be able to look into the reasoning behind the statement of compatibility. Inevitably, that will be an issue during the passage of the Bill.

A debate would provide the best forum in which the Government's thinking could be fully explained. I cannot imagine how the mere giving of such a statement could enhance the debate that would normally take place on Second Reading or in Committee, which would usually elicit the required answers.

…A written statement would be readily available to whoever wanted to read it. As I said, anything in that statement and any other aspect of the human rights implications of a Bill could be debated under the normal proceedings of the House.

What might be of assistance would be any report made on the Bill, for example, by a human rights committee of the House, if it decided to set one up. In due course, that might be certainly be a way of informing the debate, whether in Committee or elsewhere, and looking into the detail of why such a statement was made by the Government. Obviously, such a Committee of the House could discuss the detail.

5 Public authorities: acts incompatible with Convention rights (Section 6)

Definition of 'public authority' for purposes of the HRA

The Lord Chancellor,
HL Committee 27.11.97, Col 1262

More generally, the Bill provides for a wide interpretation of the term 'public authority' because we want to provide as wide a protection as possible for the human rights of individuals against an abuse of those rights. There is an exemption for Parliament so as to protect the principle of parliamentary sovereignty; but nothing in the proceedings so far has convinced us that it would be right to create any further exemptions. We must remember that the purpose of this Bill is to enhance the basic human rights of the people of this country.

HC Committee 17.6.98, Col 407

Mr. Rowe: Is the Home Secretary saying that, for the purposes of the Bill, the definition of the state is that which has been evolved by the court in Strasbourg, or that it is what we have traditionally defined as the state? That is quite an important distinction.

Home Secretary Jack Straw MP,
HC Committee 17.6.98, Cols 407–408

I take the hon. Gentleman's point, but the distinction is not as great as he thinks. If we are to incorporate the convention in British law and make sense of it we must, as a basic minimum, ensure that the Bill and its application require that the British courts recognise domestically as public bodies those bodies that would be recognised as such in Strasbourg. Otherwise we will not be bringing rights home and we will simply make a rod for our own back by ruling out adjudication by British courts on questions that can plainly go to Strasbourg.

Home Secretary Jack Straw MP,
HC Committee 17.6.98, Col 408

As a minimum, we must accept what Strasbourg has developed and is developing, as otherwise we will not be bringing rights home. We wanted to ensure that, when courts were already saying that a body's activities in a particular respect were a public function for the purposes of judicial review, other things being equal, that would be a basis for action under the Bill.

In most cases in which convention rights are prayed in aid, that will be done by way of an application for judicial review. That will be one of the arguments as to why an administrative decision should be overturned, but others, relating wholly to domestic law, will no doubt be on the application.

Home Secretary Jack Straw MP,
HC Committee 17.6.98, Cols 409–410

We decided that the best approach [to the scope of 'public authority'] would be reference to the concept of a public function. After stating that it is

> "unlawful for a public authority to act incompatibly with a Convention right",

clause 6 accordingly provides that a public authority includes a court or a tribunal, and

> "any person certain of whose functions are functions of a public nature."

The effect of that is to create three categories, the first of which contains organisations which might be termed "obvious" public authorities, all of whose functions are public. The clearest examples are Government Departments, local authorities and the police. There is no argument about that.

The second category contains organisations with a mix of public and private functions. One of the things with which we had to wrestle was the fact that many bodies, especially over the past 20 years, have performed public functions which are private, partly as a result of privatisation and partly as a result of contracting out.…

Private security firms contract to run prisons: what Group 4, for example, does as a plc contracting with other bodies is nothing whatever to do with the state, but, plainly, where it runs a prison, it may be acting in the shoes of the state. The effect of clause 6(7) is that those organisations, unlike the "obvious" public authorities, will not be liable in respect of their private acts. The third category is organisations with no public functions – accordingly, they fall outside the scope of clause 6.

As with the interpretation of any legislation…it will be for the courts to determine whether an organisation is a public authority. That will be obvious in some cases, and there will be no need to inquire further; in others, the courts will need to consider whether an organisation has public functions. In doing that, they should, among other things, sensibly look to the jurisprudence which has developed in respect of judicial review. …

The courts will consider the nature of a body and the activity in question. They might consider whether the activities of a non-statutory body would be the subject of statutory regulation if that body did not exist, which covers the point about the Takeover Panel; whether the Government had provided underpinning for its activities; and whether it exercised extensive or monopolistic powers.

What I have said is intended to make clear why we have drafted clause 6 in the way that we have, and what effect it is intended to achieve.

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 775

Clause 6 therefore adopts a non-exhaustive definition of a public authority. Obvious public authorities, such as central Government and the police, are caught in respect of everything they do. Public – but not private – acts of bodies that have a mix of public and private functions are also covered.

Home Secretary Jack Straw MP,
HC Committee 17.6.98, Col 414

We think that tribunals should be public authorities, at least in so far as they are bodies in which legal proceedings may be brought. If they were not, there would be a significant gap in the protection of human rights offered by the Bill. "Tribunals" include industrial tribunals, the employment appeals tribunal, immigration adjudicators and the immigration appeals tribunal. If those bodies are not required to comply with convention rights, it is hard to think of bodies that should be.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Committee 24.11.97, Cols 758–759

We suggest that "public authority" is plainly defined in Clause 6. When the Bill is enacted, one will be dealing with two types of public authority – those which everyone would recognise as being plainly public authorities in the exercise of their functions, and those public authorities which are public authorities because, in part of their functions, they carry out what would be regarded as public functions. Examples vary, but I believe that the courts will have in mind changing social economic and cultural conditions when they come to consider particular decisions on particular aspects of a public authority.

We suggest that the purpose behind the noble Lord's amendment [Lord Coleraine] is unnecessary because the Bill already brings about what he wishes to achieve. As Members of the Committee have seen, Clause 6(1) makes it unlawful for a public authority to act in a way which is incompatible at present – subject to reflection on the amendment that we have just discussed – with convention rights. Clause 6(3)(C) provides that a "public authority" includes,

> "any person certain of whose functions are of a public nature".

Clause 6(5) provides that:

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

I believe that my noble and learned friend the Lord Chancellor gave an illustration on an earlier occasion. For example, Railtrack has statutory public powers and functions as the safety regulatory authority; but, equally, it may well carry out private transactions, such as the disposal of, the acquisition of, or the development of property.

If one follows the scheme through, we suggest that it is perfectly capable of being understood. The amendment would exempt from the prohibition in Clause 6(1) a public authority falling within Clause 6(3) in respect of its private acts. However, I venture to suggest to the Committee that that is already achieved, we say satisfactorily, by subsection (5). The other public authorities specified in Clause 6(3) are courts and tribunals which, we think, are in a very similar position to obvious public authorities, such as government departments, in that all their acts are to be treated as being of such a public nature as to engage the convention.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Second Reading 3.11.97, Cols 1309–1310

He [Lord Simon of Glaisdale] rightly conjectured that we would anticipate the BBC being a public authority and that Channel 4 might well be a public authority, but that other commercial organisations, such as private television stations, might well not be public authorities. I stress that that is a matter for the courts to decide as the jurisprudence develops. Some authorities plainly exercise wholly public functions; others do not. There is no difficulty here. … It is a mistake to think that we are hobbling authorities because they are now private whereas they used to be private. The point is not the label or description; it is the function.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Second Reading 3.11.97, Col 1310

…subject to the cautious provision that this is a matter for the courts to determine in due time, it is our belief that a newspaper is not a public authority. A court is a public authority which is obliged to act lawfully.

The Lord Chancellor,
HL Committee 24.11.97, Cols 783–785

We believe that it is right as a matter of principle that organisations which are, on a reasonable view and as decided by the courts, exercising a public function should be so treated under the Bill and should have the duty, alongside other organisations having public functions, to act compatibly with the convention rights in respect of those functions. That means (among other things) that, in doing what they do, they should pay due regard to Article 8 (on privacy) as well as to Article 10 (on freedom of expression, which includes also the freedom of the press).

We also believe that it is right as a matter of principle for the courts to have the duty of acting compatibly with the convention not only in cases involving other public authorities but also in developing the common law in deciding cases between individuals.

The noble Lord, Lord Wakeham, properly referred to my letter to him of this morning. I think it preferable,…that I should read it out in full. The first paragraph refers to the relevant paragraph from counsel's opinion, with which the noble Lord, Lord Wakeham, supplied me, and after referring to that, my letter states:

"I have been giving further thought to whether the Press Complaints Commission (PCC) is a 'public authority' under the Human Rights Bill.

The authorities which [counsel] cites are not, as I said, precisely in point because they are judicial review cases. But I do agree that they show a disposition on the part of the Courts to regard the PCC as a 'public authority'. On reconsideration, therefore, of the relevant provision of the Bill: is the PCC a 'person certain of whose functions are functions of a public nature'? (Clause 6 (3)(C)). I now tend to think that…the press might well be held to be a 'function of a public nature', so that the PCC would be a 'public authority' under the Human Rights Act.

I do, however, think that, for the reasons I gave when we met, this possibility is an opportunity, not a burden, for the PCC. The opportunity is that the courts would look to the PCC as the pre-eminently appropriate public authority to

deliver effective self-regulation, fairly balancing Articles 8 and 10. The Courts, therefore, would only themselves intervene if self-regulation did not adequately secure compliance with the Convention.

I repeat that when the press has solid grounds, in the public interest, for publication, even where an individual's privacy is invaded, it will not go down to interim injunctions; in just the same way as it does not go down to injunctions, in libel cases, when it says that it will justify.…

What I say positively is that it [a law on privacy] will be a better law if the judges develop it after incorporation because they will have regard to Articles 8 and 10, giving Article 10 its due high value….

I would not agree with any proposition that the courts as public authorities will be obliged to fashion a law on privacy because of the terms of the Bill. That is simply not so. If it were so, whenever a law cannot be found either in the statute book or as a rule of common law to protect a convention right, the courts would in effect be obliged to legislate by way of judicial decision and to make one. That is not the true position. If it were – in my view, it is not – the courts would also have in effect to legislate where Parliament had acted, but incompatibly with the convention. Let us suppose that an Act of Parliament provides for detention on suspicion of drug trafficking but that the legislation goes too far and conflicts with Article 5. The court would so hold and would make a declaration of incompatibility. The scheme of the Bill is that Parliament may act to remedy a failure where the judges cannot.

In my opinion, the court is not obliged to remedy the failure by legislating via the common law either where a convention right is infringed by incompatible legislation or where, because of the absence of legislation – say, privacy legislation – a convention right is left unprotected. In my view, the courts may not act as legislators and grant new remedies for infringement of convention rights unless the common law itself enables them to develop new rights or remedies. I believe that the true view is that the courts will be able to adapt and develop the common law by relying on existing domestic principles in the laws of trespass, nuisance, copyright, confidence and the like, to fashion a common law right to privacy.

The Lord Chancellor,
HL Committee
24.11.97, Col 786

…the PCC might well be held to be a public authority under the Human Rights Bill. …The opportunity is that the courts would look to the PCC as the pre-eminently appropriate public authority to deliver effective self-regulation fairly balancing Articles 8 and 10. The courts therefore would have to intervene only if self-regulation did not adequately secure compliance with the convention.

…I do not believe that the courts will grant temporary injunctions where there are solid grounds for the press to maintain that they have public interest grounds to publish something, just as the courts do not restrain libels where the press intends to justify them.

The Lord Chancellor
HL Committee
24.11.97, Cols 796–797

…we took a policy decision to avoid a list. …There are obvious public authorities – I have mentioned some – which are covered in relation to the whole of their functions by Clause 6(1). Then there are some bodies some of whose functions are public and some private. If there are some public functions the body qualifies as a public authority but not in respect of acts which are of a private nature. Those statutory principles will have to be applied case by case by the courts when issues arise. We think that it is far better to have a principle rather than a list which would be regarded as exhaustive.

…What we have sought to do in Clause 6 is to set out a principle: first, that the effects of Clauses 6 to 8 should apply in the first place to bodies which are quite plainly public authorities such as government departments; and, secondly, to other bodies whose functions include functions of a public nature, and therefore the focus should be on their functions and not on their nature as an authority. In the latter case the provisions of the Bill would not apply to the private acts of the bodies in question.

The Lord Chancellor
HL Committee
24.11.97, Col 800

If a court were to uphold that a religious organisation, denomination or church, in celebrating marriage, was exercising a public function, what on earth would be wrong with that? If a court were to hold that a hospice, because it provided a medical service, was exercising a public function, what on earth would be wrong with that? Is it not also perfectly true that schools, although underpinned by a religious foundation or a trust deed, may well be carrying out public functions? If we take, for example, a charity whose charitable aims include the advancement of a religion, the answer must depend upon the nature of the functions of the charity. For example, charities that operate, let us say, in the area of homelessness, no doubt do exercise public functions. The NSPCC, for example, exercises statutory functions which are of a public nature, although it is a charity. We believe that the principles of the Bill are right and that the courts will come to answers in which the public will have confidence.

The Lord Chancellor
HL Committee
24.11.97, Cols 808–809

In developing our proposals in Clause 6 we have opted for a wide-ranging definition of public authority. We have created a correspondingly wide liability. That is because we want to provide as much protection as possible for the rights of individuals against the misuse of power by the state within the framework of a Bill which preserves parliamentary sovereignty.

As a matter of principle it is plain that a prosecuting authority is a public authority and that it is right that it should abstain from acting in a way which is incompatible with one or more of the convention rights, but if it does so act, then it acts unlawfully.

…on the narrow issue of whether a decision to prosecute could arguably be said to infringe any convention rights, I shall consider it and write to the noble and learned Lords.

The Lord Chancellor
HL Committee
24.11.97, Col 811

Perhaps I may give an example that I have cited previously. Railtrack would fall into that category because it exercises public functions in its role as a safety regulator, but it is acting privately in its role as a property developer. A private security company would be exercising public functions in relation to the management of a contracted-out prison but would be acting privately when, for example, guarding commercial premises. Doctors in general practice would be public authorities in relation to their National Health Service functions, but not in relation to their private patients.

The Lord Chancellor
HL Committee
24.11.97, Col 812

The effect of Clause 6(5) read with Clause 6(3)© is that all the acts of bodies with mixed functions are subject to the prohibition in Clause 6(1) unless – I emphasise this – in relation to a particular act, the nature of which is private.

…it is right to exempt from Clause 6 their private acts. In relation to employment matters, for example, I do not see a distinction between a private security company which has a contracted-out prison in its portfolio and one which does not. There is no reason to make the first company liable under Clause 6 in respect of its private acts and the second one not liable simply because the first company is also responsible for the management of a prison. As far as acts of a private nature are concerned, the two private security companies are indistinguishable; nor do I see a distinction in this area between Railtrack and other property developers or between doctors with NHS patients and those without.

The Lord Chancellor
Lord Irvine of Lairg,
HL Committee
18.11.97, Col 475

The very ample definition of public authority in Clause 6 makes it plain that there is no intention to protect persons acting in an official capacity. On the contrary, our definition of public authority in that clause could not be wider.

6 Victim or potential victim's right to bring proceedings against public authority (Section 7)

Home Secretary Jack Straw MP,
HC Second Reading 16.2.98, Col 780

Clause 7 ensures that an individual will always have a means by which to raise his or her convention rights. It is intended that existing court procedures will, wherever possible, be used for that purpose.

The requirement to be a victim or potential victim of an unlawful act/involvement of third parties (interest groups) in Convention cases

The Lord Chancellor Lord Irvine of Lairg,
HL Committee 24.11.97, Cols 830–831

The basic point, the critical issue, can be shortly and easily stated. It is whether the judicial review standing test domestically should apply to convention cases as well rather than the Strasbourg victim test, which is perhaps naturally more appropriate when we are bringing convention rights home.

…The purpose of the Bill is to give greater effect in our domestic law to the convention rights. It is in keeping with this approach that persons should be able to rely on the convention rights before our domestic courts in precisely the same circumstances as they can rely upon them before the Strasbourg institutions. The wording of Clause 7 therefore reflects the terms of the convention, which stipulates that petitions to the European Commission (or to the European Court once the Eleventh Protocol comes into force) will be ruled inadmissible unless the applicant is the victim of the alleged violation.

I acknowledge that a consequence of that approach is that a narrower test will be applied for bringing applications by judicial review on convention grounds than will continue to apply in applications for judicial review on other grounds. But interest groups will still be able to provide assistance to victims who bring cases under the Bill and to bring cases directly where they themselves are victims of an unlawful act.

I also point out that Clause 7, consistently with the position in Strasbourg, also treats as victims those who are faced with the threat of a public authority proposing to act in a way which would be unlawful under Clause 6(1). So potential victims are included. Interest groups will similarly be able to assist potential victims to bring challenges to action which is threatened before it is actually carried out.

My noble friend, Lord Williams of Mostyn, reminded the House, both at Second Reading and on our first Committee day, that I am committed to implementing measures that will improve access to justice, and that I am giving serious

consideration to Sir Peter Middleton's proposal that there should be a separate fund for public interest cases, including those involving convention rights.

I said in my speech to the Law Society's annual conference at Cardiff on 18th October that I believed it right to make special arrangements for cases that raise issues of wider public interest and that I intended to consult about the details. I am planning to issue a consultation paper early next year, but my officials have already begun informal discussions with various interest groups. That will of course include those bodies such as the Public Law Project, Justice, Liberty and the Child Poverty Action Group which regularly support applicants in the courts.

…Clause 13(2) also makes clear that the Bill does not affect the existing ability of anyone with a sufficient interest to seek judicial review of a decision on non-convention grounds. A judicial review test will continue to apply and is in no way interfered with by the Bill. The sole and narrow point is whether the domestic English judicial review test of standing should apply where an application for judicial review is made on grounds other than convention grounds.

Lord Goodhart: Can the noble and learned Lord the Lord Chancellor say what is the position of a public interest group which, having perfectly properly brought proceedings under Clause 13 of the Bill on grounds which do not involve convention rights, then finds that in those same proceedings it is unable to raise issues of convention rights because of Clause 7?

The Lord Chancellor
HL Committee
24.11.97, Cols 832–833

I do not believe, for reasons I shall explain in a moment, that that consequence will follow.

I focus first on the essential and critical point – that is, whether there should be a victim test in relation to a complaint of an unlawful act on convention grounds. Essentially we believe the victim/potential victim test to be right. If there is unlawful action or if unlawful action is threatened, then there will be victims or potential victims who will complain and who will in practice be supported by interest groups. If there are no victims, the issue is probably academic and the courts should not be troubled.

…The European Court of Human Rights rules of procedure allow non-parties such as national and international non-governmental organisations to make written submissions in the form of a brief. There is no reason why any change to primary legislation in this Bill is needed to allow the domestic courts to develop a similar practice in human rights cases, which is the answer to the noble Lord's question on how I would respond to the point that an interest group would have the right to be heard in a judicial review case under the English domestic test but that, if there was not a victim, could the individual interest group be heard on the convention point? So now, in its proper context, I address an answer to that question.

This is a development – that is to say, allowing third parties to intervene and be heard – which has already begun in the higher courts of this country in public law cases. Provisions as to standing are quite different. They determine who can become parties to the proceedings. The standing rule which the Bill proposes in relation to convention cases simpliciter is identical to that operated at Strasbourg; …It would not, however, prevent the acceptance by the courts in this country of non-governmental organisational briefs here any more than it does in Strasbourg.

Your Lordships' House, in its judicial capacity, has recently given leave for non-governmental organisations to intervene and file amicus briefs. It has done that in *Queen v. Khan* for the benefit of Liberty and it has done that in *Queen v. Secretary of State for the Home Department ex parte Venables and Thompson* for the benefit of Justice. So it appears to me, as at present advised, that the natural position to take is to adopt the victim test as applied by Strasbourg when complaint is made of a denial of convention rights, recognising that our courts will be ready to permit *amicus* written briefs from non-governmental organisations; that is to say briefs, but not to treat them as full parties.

The Lord Chancellor
HL Committee
24.11.97, Col 834

Clause 7(1)(b) states:

…"but only if he is (or would be) the victim of the unlawful act".

It does not touch a third party who has not *ex hypothesi* been the victim of the infringement of a convention right. It in no way precludes a third party from making submissions about the implication of convention rights in written briefs if a written brief is invited or accepted by the court, as I believe will happen.

As regards oral interventions by a third party, I dare say that the courts will be equally hospitable to oral interventions provided they are brief.

The Lord Chancellor
HL Committee
24.11.97, Col 834

It is no part of the intention of this Bill to alter the standing rules in relation to judicial review in either England or Scotland.

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 17.6.98, Cols 1083–1084

The most obvious effect of the amendments [to enable applicants with 'sufficient interest' to bring judicial review proceedings against a public authority] would be to open the way for interest groups to bring proceedings on application for judicial review.

The issue was debated at great length in another place, and has been discussed at great length today. I understand the reasons for tabling the amendments, but the concerns about the implications of applying the victim test are misplaced. The approach taken in clause 7 is the best way to bring rights home.

The purpose of the Bill is to give effect in our domestic law to the convention rights. It is in keeping with that approach that people should be able to rely on those rights before our courts in the same circumstances as they can rely on them before the Strasbourg institutions. Clause 7 accordingly seeks to mirror the approach taken by Strasbourg – reliance on the convention rights is restricted to victims or potential victims of unlawful acts and the definition of a victim for this purpose is tied to article 34 of the convention as amended by the 11th protocol.…

Our approach seems to be wholly justifiable. I acknowledge that, as a consequence, a narrower test will be applied for bringing applications by judicial review on convention grounds than in applications for judicial review on other grounds. However, interest groups will still be able to provide assistance to victims who bring cases under the Bill, including the filing of amicus briefs. Interest groups will also be able to bring cases directly where they are victims of an unlawful act.

I do not believe that the different tests for convention and non-convention cases will cause undue difficulty for the courts, or prevent interest groups from helping individuals who are victims of unlawful acts.

…If a group is genuinely acting on behalf of a person, the proceedings can perfectly well be brought in that person's name. As I have said, the Bill does not prevent interest groups from providing assistance to a victim once a case is brought.

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 17.6.98, Col 1084

On the question of individuals having access to the courts, the Lord Chancellor's Department issued a paper in March on the first stage of our proposals for reviewing legal aid. We intend to develop a way of supporting certain cases that have significant wider public interest, but which might otherwise not be brought. One definition of public interest that we have in mind includes cases involving challenges to the acts or omissions of public bodies, including breaches of convention rights.

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 17.6.98, Cols 1086

We do not want to create a situation in which the court has to decide what is in the broad public interest in every case. We would rather ensure that, as a House, we had accepted our responsibility to give the court clear laws by which it can guide its decisions. That means stating the basis on which we wish cases to be brought, which is that there is a real victim with real problems, which must be resolved by a court. The court must be given clear guidance.

Jurisprudence of the European Court of Human Rights on the requirement to be a 'victim' of an unlawful act

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 24.6.98, Cols 1084–1086

It is important to give examples in connection with the victim requirement, and I will consider some in due course. By virtue of clause 2, our courts must take account of any relevant Strasbourg jurisprudence, whether more expansive or not. They will decide how best to use that in the circumstances of the case before them.

The hon. and learned Member for Harborough [Edward Garnier MP] suggested that the reference to the convention rights in clause 1 is inadequate because it does not refer to the relevant article on victims – article 34. In fact, we pick up that article, …in clause 7(6), which defines a victim for the purposes of that clause.

The hon. Gentleman also suggested that reference to clause 7(6) and article 34 is not helpful. I do not understand why. It is clear that we are appropriating the text of article 34 and the jurisprudence that goes with it. The intention is that a victim under the Bill should be in the same position as a victim in Strasbourg. A local authority cannot be a victim under clause 7 because it cannot be a victim in Strasbourg under current Strasbourg jurisprudence.

On the definition, the convention provides that

Mike O'Brien, *cont'd*

> "The Commission may receive petitions…from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention".

Applying the victim requirement, the basic approach of the Commission and the Court has been to require that the applicant must claim to be directly affected in some way by the matter complained of. In some cases, they have interpreted fairly flexibly the requirement for the applicant to be directly affected, although the jurisprudence on the issue is not always entirely consistent. The victim requirement was, for example, applied restrictively in a series of sado-masochist cases, in which the Commission considered that applications from persons claiming to indulge in certain acts that were prohibited by law did not satisfy the victim test because, at that stage, there had been no interference by the police or prosecuting authorities in what they were doing.

There are other examples of a more expansive approach…. Individuals can sometimes complain of a particular practice in the absence of a measure of implementation if they run the risk of being directly affected by it. For example, children attending a school where corporal punishment was practiced have been treated by the Commission as having a direct and immediate personal interest in complaining about such a punishment, even though they had not been punished. That was in the case of *Campbell and Cosans v UK* in 1982.

The Court and Commission have shown a readiness to accept that the category of persons affected by a particular measure – and accordingly the number of potential victims – may be broad. The hon. Member for Gainsborough has referred to the case of Open Door and Dublin Well Woman v Ireland in 1992, in which the Irish Supreme Court had granted an injunction preventing the provision of information regarding abortion facilities outside Ireland. The Commission and Court considered that women of child-bearing age could claim to be victims of the injunction, as they belonged to a class of women that might have been adversely affected by the restriction.

Applications have been allowed not only by the person immediately affected – sometimes referred to as the direct victim – but by indirect victims. Where there has been an alleged violation of the right to life and the direct victim is dead, for example, close relatives of the deceased can be treated as victims on the basis that they were indirectly affected by the alleged violation.

A number of hon. Members have referred to family members. Obviously, they can be victims in appropriate circumstances. For example, a decision to deport someone might allow the family of the person to claim to be a victim of a violation of article 8 – the right to respect for family life. The hon. Member for Solihull also sought confirmation that guardians ad litem and so forth would still have the right to behave as they would in the normal course of events in legal proceedings. I can confirm that we have no intention of restricting guardians ad litem or others who could normally undertake cases from doing so. Likewise, a case can be brought on behalf of a dead victim by his or her family or relatives. The best known case, of which we have all heard, is the "Death on the Rock" case, brought on behalf of a dead IRA terrorist shot

in Gibraltar. That is the sort of area that we are considering. A person may be able to claim that he or she is directly affected as a consequence of a violation of the rights of someone else. Where complaints are brought by persons threatened by deportation, that may arise.

The right hon. Member for Caithness, Sutherland and Easter Ross talked about allowing interest groups to assist the court. The difficulty is that if such groups are to have that right, how many of them will claim that they want to participate in a court proceeding? Under the provisions of the human rights convention, many groups may feel that they have an interest in a particular issue and wish to assist the court. We are talking not only of Liberty, as there are a large number of different groups. For example, the Right to Life could produce a series of litigation cases, which might involve many interest groups that might want to assist the court. Interest groups, such as professional associations and NGOs, can bring an application in Strasbourg only if they can demonstrate that they themselves are victims of a breach – that is, that they are in some way affected by the measure complained of. It is not enough that the actual victim, whether a member of the organisation or not, consents to them acting on his behalf.

In *B v. the UK*, both Mrs. B and the Society for the Protection of the Unborn Child brought an application complaining of the way in which the law affected electoral expenses. The Commission ruled the application by SPUC inadmissible because it was not directly affected by the law – only Mrs. B had been prosecuted. On the other hand, in *Council of Civil Service Unions v. the UK*, the Commission accepted that the CCSU was itself a victim of the GCHQ ban and could therefore bring an application, although it was rejected on different grounds. An NGO may represent its members in certain contexts and, in that case, it needs to identify them and produce the evidence of authority. In such circumstances, the NGO does not, however, thereby become a party itself.

Our courts will develop their own jurisprudence on the issue, taking account of Strasbourg cases and the Strasbourg jurisprudence. As a Government, our aim is to grant access to victims. It is not to create opportunities to allow interest groups from SPUC to Liberty – in which I must declare an interest because I am a member – to venture into frolics of their own in the courts. The aim is to confer access to rights, not to license interest groups to clog up the courts with test cases, which will delay victims' access to the courts. There is nothing undemocratic about conferring rights on victims, rather than interest groups that are non-victims. Interest groups can always support victims, and that is enough.

HC Committee 17.6.98, Cols 1086–1087

Robert Maclennan MP: Is not the protection against what the hon. Gentleman called frolicsome interventions by interest groups the discretionary power of the court itself in judicial review cases simply to deem that there is not a sufficient interest and to judge that matter in a way that would enable the court to decide whether it would be advancing the causes of justice to allow particular groups to be there?

7 Tribunals' powers in relation to Convention rights

[As a result of the following amendment section 7(11) was added to the HRA]

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Report 19.1.97, Cols 1360–1361

Lord Williams of Mostyn moved Amendment No. 30:

Page 5, line 8, at end insert –

("(9A) The Minister who has power to make rules in relation to a particular tribunal may by order give that tribunal jurisdiction –

(a) to determine such questions arising in connection with the Convention rights, or

(b) to grant in respect of acts (or proposed acts) of public authorities which are (or would be) unlawful as a result of section 6(1) such relief or remedy of a kind that it has power to grant,

as he considers appropriate.

(9B) An order made under subsection (9A) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.").

The noble Lord said: My Lords, in moving Amendment No. 30, perhaps I may deal also with the matters raised in Amendments Nos. 38, 66 and 73. As your Lordships know, the amendments to Clauses 7 and 20 respond to specific concerns expressed by the noble Earl, Lord Russell, in Committee. He referred to appeals in asylum cases heard by the special adjudicator under the Asylum and Immigration Appeals Act 1993. He pointed out that the jurisdiction of the adjudicator was restricted under that Act to considering claims under the 1951 Convention on Refugees and suggested that the adjudicators should be allowed also to consider claims dependent on the European Convention on Human Rights. On that occasion, I indicated our preliminary view that the noble Earl was probably right and I also indicated – I paraphrase, bearing in mind the lateness of the hour – that we would see what we could do to attend to his concerns. We concluded that the noble Earl's analysis of the 1993 Act is correct.

A person appearing in difficult circumstances before the special adjudicator would not be able to rely on the convention rights. He would not be left without any remedy under the Human Rights Bill, because he would be able to rely on those rights in separate proceedings under Clause 7(1)(a) of the Bill. The better course, however, would be for him to be able to rely on convention points at the time when the case was before the special adjudicator.

I explained in Committee that that was our intention and that we would consider the form of amendment.

The outcome of our deliberation is the amendments currently before your Lordships. The effect of Amendment No. 30 is to enable a Minister to confer jurisdiction on a tribunal to determine convention issues or to grant a remedy where a public authority has acted incompatibly with the convention rights. The jurisdiction is to be conferred by order. It will be in addition to the existing statutory provisions relating to tribunal jurisdiction. In the particular case of concern to the noble Earl, it will enable the Secretary of State to confer jurisdiction on the adjudicator to consider claims relating to convention rights, notwithstanding the restriction in the 1993 Act, and to provide a remedy if a public authority acts in a way which is incompatible with those rights.

The intention would be to use the order-making power to extend the jurisdiction of the special adjudicators who hear asylum appeals so as to allow a person appealing on one of the grounds set out in Section 8 of the 1993 Act to appeal also on the ground that his removal from the United Kingdom would be unlawful under Clause 6(1) of the Human Rights Bill. An appellant who succeeded on that ground would not be granted asylum but would be irremovable from the United Kingdom and eligible for exceptional leave to remain. Therefore, the effect of such an order would be to make the ECHR jurisdiction in asylum appeals consistent with that in non-asylum appeals under Section 19 of the Immigration Act 1971.

The order conferring jurisdiction is to be subject to affirmative resolution under the scheme that we propose. We sought to make general provision of this kind rather than to operate directly on the HRA of 1993. That is because we do not think it appropriate for a Bill of general application, such as this one, to remedy problems in a particular piece of legislation. Moreover, we are not certain that the problem identified by the noble Earl is necessarily confined to tribunal hearings in immigration appeals cases. We are not aware at present of similar problems arising from statutory restrictions on the jurisdiction of other tribunals, but if such problems do emerge we would look to a general provision which I hope the noble Earl can welcome because, although consonant with his approach, it goes beyond the ambit of his particular concern. We are looking for a general provision in order to deal with such problems.

I recognise that that is a short-term solution but, when a suitable opportunity arises, we will seek to amend the relevant primary legislation.

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 24.6.98, Cols 1055–1057

I remind the Committee that one of the Bill's key principles is that all courts and tribunals should take account of convention rights whenever they are relevant to the case before them. Otherwise, people would have no access to their rights unless they went to the European Court of Human Rights or to the Commission. We shall ensure that individuals can rely on their convention rights and have access to them at the earliest opportunity. We shall also make the convention rights an integral part of our legal system.

One of the many drawbacks of the current arrangements is that the convention rights are cut off from people in the United Kingdom and viewed as something alien to us. In bringing rights home, we want everyone in Britain to view the basic principles set out in the convention as part of their national heritage. We shall not achieve that by practicing an internal system of apartheid, keeping the convention rights as the exclusive preserve of the courts. That way, people will continue to see those rights as separate from their daily lives, not as something intrinsic to them.

It is in keeping with that principle that tribunals as well as courts are required by clause 3 to read and give effect to legislation as far as possible in a way that is compatible with the convention rights. It is also in keeping with that principle that tribunals should be able to take account of the convention rights when a person alleges that he or she has been the victim of an unlawful act by a public authority. Against that background, I shall deal with the detail of the amendments.

Amendment No. 49 is concerned with the definition of "legal proceedings" in clause 7(1)(b). It is our expectation that the great majority of cases in which the convention arguments are raised will fall within the scope of such proceedings. That is because, in most cases, it is likely that a victim of an act made unlawful by clause 6(1) will have available to him an existing course of action or other means of legal challenge, such as a judicial review.

Furthermore, in a significant proportion of such cases, a tribunal, not a court, will be the forum in which a case is brought. Social security, employment, housing and immigration are but a few of the many areas where tribunals handle the bulk of cases.…

Amendments Nos. 47 and 48 relate to cases brought under clause 7(1)(a) – that is, cases brought solely on convention grounds. As I have said, we expect that such cases will be relatively infrequent, but where they do arise, it is likely that a tribunal will sometimes be the most appropriate forum for hearing the case.…

If the case concerns a subject which is usually heard, in the first instance, by a tribunal, there is a good prima facie case for assuming that a tribunal will be the correct place in which to hear the convention case. The two amendments will prevent a tribunal from being designated for such a purpose.

We do not for one moment underestimate the amount of preparatory work that will have to be undertaken to ensure that both courts and tribunals are able to handle the convention issues that will come before them. I assure the Committee that the training issue is being taken very seriously, and that we will not bring the Bill into force until we are confident that the legal system is in a position to cope with the changes.

Parliamentary Under-Secretary of State for the Home Department Mike O'Brien MP,
HC Committee 24.6.98, Cols 1109–1111

The power conferred by clause 7(13) has been included to cater for situations where the grounds on which proceedings may be brought before a tribunal are extremely narrowly defined either by statute or by restrictive judicial interpretation of statutory provisions. In those rare cases, a tribunal would, unless its powers were suitably amplified, be precluded from determining issues relating to the convention rights. The issue that prompted the inclusion of clause 7(13) is the constraints placed on special adjudicators hearing appeals under the Asylum and Immigration Appeals Act 1993.

It was pointed out in another place that the terms of the 1993 Act are such that they would prevent a special adjudicator hearing an asylum case from determining whether an appellant's removal from the United Kingdom would breach his convention rights when such appeals were dealt with.

Even without subsection (13), an individual would not be left without a remedy under the Human Rights Bill, as he would be able to rely on the convention rights in a subsequent application for judicial review. The better course is for him to rely on convention rights at the time the case is before the special adjudicator. Clause 7(13) would allow that result to be achieved. In addition, as it has been cast in general terms, it could also be used to benefit other tribunals in the same position as the special adjudicator.

There is, however, a risk that the current wording will be misinterpreted. In particular, there is a possibility that some might read it as implying that no tribunal will be able to take account of the convention rights unless and until a Minister makes an order under clause 7(13). The argument might run that, since no tribunals have in their parent statute express authority to determine convention questions or to grant remedies in respect of convention violations, tribunals may conclude that they are not to have regard to the convention rights without being given express authority to do so.

That is not our intention. The great majority of tribunals would not be debarred from having regard to the convention rights. It is an important principle of the Bill that they should do so. The amendment simply seeks to achieve the purpose of clause 7(13) in a way which does not lead to any misunderstanding on that score. It makes it clear that the power to make an order applies only where it is necessary to ensure that the tribunal in question can provide an appropriate remedy in respect of an unlawful act. I should add that, by virtue of clause 20(4), any order would need to be approved in draft by both Houses of Parliament.

One other change to clause 7(13) to which I wish to draw the attention of the Committee is the removal of the reference to a tribunal's "jurisdiction". On reflection, we consider that the meaning of the term in this context is unclear. That adjustment leads to a consequential change in the wording of clause 8(1) on remedies. Amendment No. 129 accordingly substitutes a reference to "powers" in place of "jurisdiction".

I have already explained why the powers of a tribunal might need to be extended in some rare cases. The effect of amendment No. 58 would be to neuter those additional powers. It would still enable a tribunal to take account of convention points which it could otherwise not do, but it would not enable the tribunal to give practical effect to its determination.

The remedies that the tribunal would usually be able to deploy having reached its decision would arise from the primary legislation governing it. It follows that, if a tribunal is to be able to grant a remedy having determined a case involving a convention issue, specific provision needs to be made to do that. That is why we have put in place those changes.

I come now to the special adjudicators and the Opposition's amendment, which involves an important point. The concern which prompted the inclusion of clause 7(13) was our wish to ensure that provision should be made to permit an appellant in an appeal under section 8 of the Asylum and Immigration Appeals Act 1993 to appeal also on the ground that the decision in question would be unlawful under section 6(1) of the Human Rights Act. As things stand, unless the appeal is a mixed appeal, the special adjudicator lacks the power to entertain that appeal.

Clause 7(13) will enable the Secretary of State to confer power on the special adjudicator to consider claims relating to the convention rights, notwithstanding the restriction in the 1993 Act, and to provide a remedy if a public authority acts in a way that is incompatible with those rights. An appellant who succeeded in arguing that his removal from the United Kingdom would be unlawful under section 6(1) of the Human Rights Act would not be granted asylum, but would be irremovable from the United Kingdom and eligible for exceptional leave to remain.

The Opposition's amendment, by removing from clause 7(13) the scope to add to the remedies that a tribunal can grant, may in fact have a result which I imagine Opposition Members do not intend. It might require a special adjudicator to grant a successful appellant asylum even where his appeal was based on convention grounds, as the adjudicator would have no other remedy open to him.

8 Time limits
(Clause 7)

Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Cols 1094–1095

At present, the Bill makes no provision about limitation periods in which proceedings under clause 7(1)(a) – that is, proceedings brought on convention grounds alone and not under any pre-existing cause of action – have to be brought. We think, …that such proceedings should be no different from other civil proceedings in having a limitation period. What we differ on is how long the period should be and whether guidance should be given to the courts about when they should extend that period.

Before I discuss these points, I should, for the avoidance of any doubt, make the point that our amendment relates only to proceedings under clause 7(1)(a). If a plaintiff proceeded under clause 7(1)(b) – that is to say, he brought proceedings under an existing cause of action and relied on his convention rights as an additional argument in support of his case – the limitation period would be the one that applies in the normal way to the existing cause of action.

The Government amendment provides that proceedings under clause 7(1)(a) must be brought within one year, beginning with the date on which the act complained of took place, or within such longer period as the court or tribunal considers equitable, having regard to all the circumstances. However, that time limit is subject to any stricter time limit in relation to the procedure in question. The most obvious such case is judicial review. Assuming that the new rules of court that will be needed for the Bill provide that a procedure analogous to judicial review may be used for cases under clause 7(1)(a), it is reasonable that the time limit for that procedure – which is three months – should continue to apply. It would not be right for applicants who choose to bring their claims by way of judicial review to benefit from the longer 12-month period proposed for claims under the Bill.

In response to Dominic Grieve MP's observation that as the majority of proceedings brought simply for a breach, would be brought under 7(1)(a) and by judicial review, that a three-month (rather than a one year) limitation period would apply in the majority of cases:

Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Col 1095

I do not think that it is misleading, because I have just made the position clear; in addition, any court that has to interpret the legislation will understand the position and will be able to use *Pepper v Hart* in the normal way in order to deal with the issues. We want what we propose to do to be clear on the face of the Bill and I think that it is clear. I accept the thrust of the hon. Gentleman's point, but I do not think that the way in which we have done this is misleading.

Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Cols 1096–1097

We recognise, however, that there may be circumstances where a rigid one-year cut off could lead to injustice. Our amendment does not therefore seek to provide a rigid limit, but enables a court to extend the period where it is appropriate to do so. There will be cases in which an individual has a good reason for delay. In judicial review cases, for example, the courts have extended time where the applicant has been seeking redress by other proper means, such as by pursuing internal grievance procedures, or where he has had to apply for legal aid. I have no doubt that the courts will continue to exercise their discretion so as to prevent prejudice to one party or the other where an application is made to extend time.

The Government amendment provides that the limitation period is to be one year

"or such longer period as the court or tribunal considers equitable having regard to all the circumstances"

We have said no more than that because I think to expand on those circumstances might be likely to prove unhelpful to the court. We do not wish to narrow the range of circumstances which might influence the court.

It would be impossible to provide an exhaustive list of circumstances. We could provide a long list and then find that in the first case that came to court there was a special factor which had not been included in the list.

Amendment No. 139 would put into the Bill just two factors which the court should consider – the time when the complainant knew or ought reasonably to have known of the substance of the complaint and the time by which he was reasonably able to bring proceedings. I agree that these factors may well be taken into account by the court. Specifying these considerations would inevitably imply that more weight should be given to them than to other considerations which do not appear in the list. That might be a reasonable approach for a provision which deals with very specific causes of action, such as personal injury claims, but it is more problematic when we are dealing with the wide range of proceedings possible under clause 7(1)(a).

…The other part of amendment No. 139 would add special provision to deal with cases where the actor omission complained of did not take place on a single date, from which the limitation period would run, but over a period. The concept of an act which extends over several days, or longer, is not new, and the courts will be able to deal with such cases in an appropriate manner without special provision being made for them.

As for omissions, the Bill already provides, in clause 6, that an act includes a failure to act. This goes wider than deliberate failures: an unintentional failure to act by a public authority is to be open to challenge under the Bill in the same way as any other failure to act, if that failure is incompatible with convention rights. Also, there is no need to state that a "deliberate omission" shall be treated as being done at the end of that period."

As with on-going acts, our courts are familiar with the concept of on-going omissions and are able to deal with them in the appropriate way.

Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Cols 1099–1100

He [Dominic Grieve MP] is trying to ask whether we would be creating novel legal procedures to circumvent judicial review. In considering any application that sought to do that, the courts would take account not only of the wording of the Bill, but, under *Pepper v Hart*, what I said as the Minister presenting the Bill.

It is not our intention to create a vast array of novel features that would allow litigants to pursue cases in courts in a way that the courts and Parliament had not intended. However, someone with a genuine human rights grievance will be entitled to pursue it under clause 7(1)(a), whether or not he is within the time limit for judicial review. We accept that that should be so. The amendment seeks to insert a one-year time limit for clause 7(1)(a) so that the courts have time to make a judgment. We have not sought to constrain that time too much because paragraph (b) of our amendment allows the courts to decide when they wish to go beyond the 12-month period, should it be equitable to do so.

We are conscious that it is important that the person is allowed to pursue any action under clause 7(1)(a). We do not want to create an artificial time limit of three months, as the Opposition seek to do, without giving the level of flexibility that is needed. The amendment would tie the procedure too tightly to the judicial review procedure. The courts will develop their own jurisprudence on this issue, over time. I agree with the hon. Member for Beaconsfield that we want to keep matters simple and straightforward, but the courts will take note of what Parliament has said and will be able to consider the points that I have made as Minister at the Dispatch Box. They will understand that we are seeking not to create novel areas of litigation, but to continue to pursue matters in the proper and most appropriate way.

9 Remedies
(Section 8)

Effective remedies: the exclusion of Article 13

Home Secretary Jack Straw MP
HC Third Reading
21.10.98, Col 1367

Although Article 13 mentions a national authority, the truth is that it is there to provide a remedy for the international Court at Strasbourg. For that reason, the Government thought that it would be inappropriate to include Article 13 in the Bill to incorporate the principal operational parts of the convention that provide substantive rights.

Home Secretary Jack Straw MP
HC Third Reading
21.10.98, Col 1367

Judicial review and many other remedies have been developed, and the Government believes that the courts will be imaginative in developing other remedies if they are needed. If – as I do not think will happen – there turns out to be some gap in the remedies, the safeguard is that it will be possible for litigants to go to Strasbourg, where Article 13 will arise.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Second Reading
3.11.97, Col 1308

Our view, is quite unambiguously, that Article 13 is met by the passage of the Bill.

The Lord Chancellor Lord Irvine of Lairg,
HL Committee
18.11.97, Col 475

The Bill gives effect to Article 1 by securing to people in the United Kingdom the rights and freedoms of the convention. It gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts. To that end, remedies are provided in Clause 8. If the concern is to ensure that the Bill provides an exhaustive code of remedies for those whose convention rights have been violated, we believe that Clause 8 already achieves that and that nothing further is needed.

The Lord Chancellor Lord Irvine of Lairg,
HL Committee 18.11.97, Col 476

In response to a question (from Lord Lester of Herne Hill) as to whether the courts are to be permitted to take into account case-law on Article 13 emanating from the European Court of Human Rights:

One always has in mind *Pepper v Hart* when one is asked questions of that kind. I shall reply as candidly as I may. Clause 2(1) provides:

> 'A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account any…judgement, decision, declaration or advisory opinion of the European Court of Human Rights'.

That means what it says. The court must take into account such material.

The Lord Chancellor Lord Irvine of Lairg,
HL Committee 18.11.97, Col 477

My response to the second part of the question posed by the noble Lord, Lord Lester, is that the courts may have regard to Article 13. In particular, they may wish to do so when considering the very ample provisions of Clause 8(1).

…Knowing the remedial amplitude of the law of the United Kingdom, I cannot see any scope for the argument that English or Scots law is incapable within domestic adjectival law of providing effective remedies.

…to incorporate expressly Article 13 may lead to the courts fashioning remedies about which we know nothing other than the Clause 8 remedies which we regard as sufficient and clear.

Lord Ackner: [in reference to quotation immediately above] Perhaps my noble and learned friend the Lord Chancellor can identify what the remedies with which he is concerned might be and also how they might lawfully be fashioned in view of the terms of Clause 8, to which I shall seek at a later stage to move an amendment.

The Lord Chancellor Lord Irvine of Lairg,
HL Report 19.1.97, Col 1266

My Lords, I have not the least idea what the remedies the courts might develop outside Clause 8 could be if Article 13 was included. The noble and learned Lord has really made my point for me. Clause 8(1) is of the widest amplitude. No one is contending that it will not do the job. When we have challenged the proponents of the amendment on a number of occasions in Committee to say how Clause 8 might not do the job, they have been unable to offer a single example. Therefore, the argument is all one way. What we have done is sufficient.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 979

We decided it was inappropriate to include article 13, for the following reasons.

First and foremost, it is the Bill that gives effect to article 13, so there was an issue of duplication. The Bill sets out clearly how the convention rights will be given further effect in our domestic law, and what remedies are to be available when a court or tribunal finds that a person has been the victim of an unlawful act. We will be discussing those clauses in more detail later, but I will briefly summarise the relevant provisions.

Clause 3 requires legislation to be read and given effect, as far as possible, in accordance with convention rights. Clause 6 makes it unlawful for a public authority to act in a way that is incompatible with a convention right. Clause 7 enables the victim of an unlawful act to rely on his or her convention rights

in any legal proceedings, or to bring proceedings on convention grounds. Clause 8 provides that a court or tribunal, when it finds that a public authority has acted unlawfully, may grant the victim such relief or remedy, or make such order, within its jurisdiction as it considers just and appropriate.

Those are powerful provisions, as is acknowledged. In our judgment, they afford ample protection for individuals' rights under the convention. In particular, clause 8(1) gives the courts considerable scope for doing justice when unlawful acts have been committed. Indeed, no one has been able to suggest any respect in which the Bill is deficient in providing effective remedies to those who have been victims of an unlawful act.

The amendment – this was to some extent implicit in the right hon. and learned Gentleman's closing remarks – would add nothing to the Bill, which brings me to our second reason for opposing it. If we were to include article 13 in the Bill in addition to the remedies provided in clauses 3, 6, 7 and 8, the question would inevitably arise what the courts would make of the amendment, which, on the face of it, contains nothing new. I suggest that the amendment would either cause confusion or prompt the courts to act in ways not intended by the Bill – for example, by creating remedies beyond those available in clause 8. Whatever the outcome, the result would be undesirable.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 979

In considering article 13, the courts could decide to grant damages in more circumstances than we had envisaged. We had to consider that matter carefully, because of the effect on the public purse.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 980

We do not believe that those people will be denied an effective remedy. Indeed, as I said, very few people have suggested that the remedies we are providing will be ineffective – however, they must be balanced and proportionate. Ultimately, as the right hon. and learned Member for North-East Bedfordshire rightly said, courts will have to take account of jurisprudence laid down by the court in Strasbourg.

I accept that we are arguing a fine point, but I suspect that, if the right hon. and learned Member for North-East Bedfordshire had been pursuing the Bill in government, …he would have come to the same judgment as we did – that there is little point including in a Bill additional wording whose probable effect would be not to make any difference, but whose possible effect would be to add uncertainty.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 981

In response to a question from Sir Nicholas Lyell as to whether the Lord Chancellor in stating that the courts 'may have regard to Article 13' empowered the courts to use the Lord Chancellor's words to have regard to Article 13 or whether they should 'simply read the Bill, which makes no such reference'?:

…I think that he had in mind no more but no less than the fact that the courts would apply clause 2(1), which says:

> "A court or tribunal determining a question which has arisen under this Act in connection with a Convention right must take into account" –

not "have regard to" –

> "any…judgment, decision, declaration or advisory opinion of the European Court of Human Rights…whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen."

Of course, there is convention jurisprudence on article 13, as on other articles. Lord Lester made that point in respect of the Chahal case, which turned on article 13, and said that it would be taken into account and that regard would be had to it.

The Lord Chancellor Lord Irvine of Lairg,
HL Report 29.1.98, Cols 387–388

I have no hesitation in advising your Lordships that the similar expressions in two parts of the Bill will bear the same meaning. The intention of Clause 8 is that people should, so far as is possible, receive the same remedies from our domestic courts – albeit with much less delay – as they would receive if the case went to Strasbourg. For that to happen it is necessary that our courts should take into account the principles adopted by the European Court of Human Rights.…the phrase, "take into account", allows the courts to use their discretion where appropriate in applying Strasbourg jurisprudence generally to cases before them. It would be unnecessary and confusing to have a different phrase in Clause 8 from that in Clause 2. It would suggest that the courts were to apply a different test in questions of damages, which is contrary to our intentions.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 981

Let me try again to answer the point. The convention has been international law for 50 years, and any tribunal will consider the bare text of any original convention by considering the way in which its application has developed – there is, indeed, a requirement to do so – so, in practice, the courts must take account of the large body of convention jurisprudence when considering remedies. Obviously, in doing so, they are bound to take judicial notice of article 13, without specifically being bound by it.

That is my judgment about the way in which the law will work. I wish future Judicial Committees of the House of Lords luck in working through these debates. One sometimes wonders about the wisdom of the Pepper Hart judgment in terms of the work that it has given the higher judiciary. It is a fine point, but since we saw that there was no purpose, and indeed that there were some dangers, in including article 13, we thought that it was best omitted.

Robert Maclennan MP: Surely, if the Government had wished no consideration to be given to the jurisprudence that has developed on article 13, it would have been necessary to include a specific derogation from the provisions of clause 2(1). Without that derogation, it seems inevitable that how the courts have developed article 13 rights will be a matter that the court not only may consider, but ought to consider.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 981

With respect, that is the point that I sought to make. The distance between us is small.

Edward Garnier MP: If the Home Secretary agrees with the point just made by the right hon. Member for Caithness, Sutherland and Easter Ross (Mr. Maclennan), why not include article 13 so that there is no doubt? Then the House of Lords Judicial Committee would not have a Pepper Hart problem.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 981

We think that it would create doubt. We believe that we are adequately covering the issue of remedies in clauses 3, 6, 7 and 8. We are specifically providing remedies that are understandable in English and Scots law. In determining whether a particular remedy is to be granted in respect of any action, the courts must interpret convention rights as laid down in clause 2.

If I may labour the point, we do not believe that incorporating article 13 adds anything positive to the Bill that is not already there; that covers the point about the courts having to take judicial notice of article 13 as a basic text without being bound by it. We believe that it could create unnecessary doubt, and that is why it is not sensible to accept the amendment…

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Col 986

It is far more difficult to predict the financial effect of this Bill than of almost any other Bill coming before the House, because we are charting new waters and do not know exactly how it will develop. Our concern was to ensure that the courts applied themselves to the jurisprudence of the convention and that they did not, for example, develop awards of damages that exceeded the convention. It was for that reason that we took the view that the best way of applying article 13 in the context of incorporating the convention was to spell out in specific clauses how those remedies should be made available. Therefore, we take from article 13 that

> "Everyone whose rights and freedoms…are violated shall have an effective remedy"

and then set out in the Bill what those effective remedies should be and how they can be accessed.

The hon. Member for Beaconsfield (Mr. Grieve) is to some extent right to say that the argument is about semantics and that it is probable that, at the end of the day, we shall have been arguing about a distinction without a difference. On balance, we came to the view that it was better and created more certainty to omit the precise text of article 13 from the Bill, but to apply it in the ways set out, not only in the clauses that provide for remedies, but through the force of clause 2. As I said, it is a finely balanced judgment.

Sir Nicholas Lyell: I seek clarity in legislation. The Home Secretary invites me to withdraw the amendment that would insert article 13 into the Bill and I am minded to withdraw it, but I do not think that Parliament or the country should be left with article 13 having been kept out of the Bill – quite expressly, because the Committee has discussed it and I have withdrawn the amendment – but, at some later date, it being said to be effectively within the Bill because of things that Ministers said in the course of the debate. If the right hon. Gentleman can give me the assurance that we are legislating by black-letter law on the face on the Bill and not by what one can cull from the pages of Hansard, I shall feel much happier about withdrawing the amendment.

Home Secretary Jack Straw MP,
HC Committee 20.5.98, Cols 986–987

As far as I am concerned, we are indeed legislating by black-letter law on the face of the Bill.

We could have a separate debate about the wisdom of the decision in *Pepper v Hart*: I know why the Judicial Committee made that decision and, to some extent, there is common sense in seeking to tease out the meaning of words where they are ambiguous, but I have always taken the view that what Parliament passes is not what Ministers say, but what is on the face of a Bill. That is of profound importance to the manner in which we make legislation.

Reliance on Convention rights (Section 13)

HL Committee 18.11.97, Cols 509–510

Lord Lester of Herne Hill: If I am right on that point, it seems to me that the convention rights are to that extent part of our domestic law and can be relied upon, as Clause 13 states. Will the noble and learned Lord the Lord Chancellor say whether I am right on that; or is the intention to cut down the existing position where, for example, common law as developed in the courts matches the convention rights and under this Bill treats the convention rights as part of our law?

The Lord Chancellor,
HL Committee 18.11.97, Col 510

…Clause 13 means only that a person may rely on the convention right in the way in which the Bill provides that individuals may rely upon convention rights, but his convention rights are, as it were, a floor of rights; and if there are different or superior rights or freedoms conferred on him by or under any law having effect in the United Kingdom, this is a Bill which only gives and does not take away.

The Lord Chancellor,
HL Committee 27.11.97, Cols 1157–1158

It appears to me that it is for the court in question, and for individual judicial decision in any particular case, to decide when the point, based on convention law, is to be adjudicated upon. It is a matter to decide in its discretion whether the argument that is put before it, based on the convention, is one upon which it should decide, as, for example, a preliminary issue at the outset.

Nothing I shall say on the Motion that Clause 13 stand part should be relied upon as standing in the way of the court's discretion within its own independent sphere to decide when it is appropriate, in particular proceedings, to adjudicate upon a convention point.

10 Damages
(Section 8)

Consistency with decisions of the European Court of Human Rights

The Lord Chancellor Lord Irvine of Lairg,
HL Second Reading 3.11.97, Col 1232

We have concluded that if a court is considering an award of damages for an act which is incompatible with the convention, then it should have regard to the principles applied by the European Court of Human Rights. Our aim is that people should receive damages equivalent to what they would have obtained had they taken their cases to Strasbourg.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Col 1114

It may help if I say something about the principles applied by the European Court of Human Rights in relation to the award of compensation. Article 50 of the convention, which will become article 41 when protocol 11 comes into force later this year, provides that in the event of a finding of a violation,

> "the decision of the Court shall, if necessary, afford just satisfaction to the injured party".

There is no entitlement to an award, and the court's discretion is guided by the particular circumstances of each and every case. On many occasions, the court has held that no award should be made because the finding of a violation itself constituted just satisfaction. It appears from the court's judgments that matters such as the applicant's conduct and the limited nature of the breach are relevant factors. An interesting case in that regard, and one that most of us would remember, is the 1995 judgment in the case of McCann and others v. UK, in which the court had regard to the fact that the three terrorist suspects who were killed had intended to plant a bomb in Gibraltar in dismissing the applicants' claim for damages.

In our view, therefore, the requirement to take into account the principles applied in Strasbourg already allows the court to have regard to the conduct of the applicant, and it is unnecessary to amend the Bill to insert a specific reference to it. Also, it would be undesirable to do so, because the purpose of the Bill is to reflect Strasbourg thinking on the award of compensation, and the insertion of an additional condition of this kind could imply only that we wanted to gloss the court's thinking in some way. That is not our purpose. Our purpose is to use the way in which those decisions are reached to guide our courts.

Civil courts' powers to award damages

Lord Lester of Herne Hill: …one needs to be clear whether, …the Bill permits… compensation for what I call public law wrongdoing as distinct from normal private law tort in the context which the convention would require it.

The Lord Chancellor Lord Irvine of Lairg,
HL Committee
24.11.97, Col 855

So as to make the intention plain, it is not the Bill's aim that, for example, the Crown court should be able to make an award of damages where it finds, during the course of a trial, that a violation of a person's convention rights has occurred. We believe that it is appropriate for an individual who considers that his rights have been infringed in such a case to pursue any matter of damages through the civil courts where this type of issue is normally dealt with; in other words, to pursue the matter in the courts that are accustomed to determining whether it is necessary and appropriate to award damages and what the proper amount should be.

…We believe that it is appropriate that the civil courts, which traditionally make awards of damages, should, alone, be enabled to make awards of damages in these convention cases.

Lord Lester of Herne Hill: my question is: what happens with a judicial review court, which is only entitled to grant damages if there is a tort which could give rise to a damages claim in a civil court?…What happens under the convention in a judicial review court where the convention requires the payment of damages for what is really the Government tort of breaking the convention – notably, where there is a breach of expectations but that may not be the only example? Will the position be that the damnified applicant has first to go to the judicial review court and then bring a Government tort claim in an ordinary civil court or will he be able to get his remedy under the convention for damages for public law wrongdoing in the judicial review court?

The Lord Chancellor Lord Irvine of Lairg,
HL Committee
24.11.97, Cols 855–856

I certainly do not undertake to give the noble Lord an answer to that either extempore or in writing. I have grave reservations about giving legal advice from the Dispatch Box, which of course the noble Lord is well able to give to himself, which will then be transmuted by the doctrine of Pepper v. Hart into what the Government intended as a result of this provision of the Bill. I am very self-restrained about doing that. I am tempted simply to rely upon the answer that in the circumstances to which the noble Lord alludes an award of damages will be made if – I quote from Clause 8(3) –

> "the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made".

I feel a moderate degree of confidence that the noble Lord could argue both sides of that question depending upon the client who instructed him.

11 Remedial orders (to amend legislation declared incompatible with a Convention right)

(Clauses 10–12)

Compelling reasons' to make a remedial order

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Report 21.10.98, Col 1330

The requirement for compelling reasons in clause 10 (2) is itself a response to concern expressed here and in another place about the remedial order provisions. It is there to make absolutely clear that a remedial order is not a routine response in preference to fresh primary legislation. We would not want to go further, and as amendment no. 40 and limit "compelling reasons" to the three categories mentioned. There may be other circumstances sufficient to justify a remedial order: for example, a decision of the higher courts in relation to basic provisions of criminal procedure affecting the way, in which, perhaps, all criminal cases must be handled. An example is a provision that might invalidate a crucial part of the codes of practice under the Police and Criminal Evidence Act 1984, or provisions relating to the detention of suspects. Therefore, there a number of issues where we would want to proceed with care. We might also need to respond very quickly simply to avoid the criminal justice system in such cases either collapsing or not being to deliver justice and proper convictions.

"Compelling" is a strong word. We see no need to define it by reference to particular categories. In both the outstanding cases that the hon and learned Member for Harborough [Edward Garnier MP] has put to me, our view is likely to be that those would not create the compelling reasons that would justify a remedial order. In any event, on those issues – electoral law and chastising children – everyone would expect primary legislation rather than a remedial order. I hope that gives some reassurance.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Report 21.10.98, Col 1331

Therefore, the document [see Schedule 2 of the Human Rights Act] is bound to explain why the Government believe that there are compelling reasons for making a remedial order and what those are. The document must be laid before Parliament and will be available for debate in each House on the motion for affirmative resolution, which will be necessary before a draft remedial order can be made, or in order for an urgent remedial order to continue in existence, so amendment no 41 [amendment to require Secretary of State to lay before Parliament a written statement of reasons as to why there are compelling reasons to proceed by way of a remedial order] is unnecessary.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Report 21.10.98, Col 1331

The power to make a remedial order is there for cases where there is a very good reason to amend the law following a declaration of incompatibility of a finding by the Strasbourg court, but no suitable legislative vehicle is available. Where a remedial order is made or proposed, we accepted that the procedures for parliamentary scrutiny needed to be strengthened. That is why the requirement to provide a document containing all the relevant information and a statement providing a summary of any representations on an order or draft order was added to schedule 2 in Committee.

The Lord Chancellor
HL Committee 27.11.97, Col 1139

As I have made clear, we expect that the Government and Parliament will in all cases almost certainly be prompted to change the law following a declaration. However, we think that it is preferable, in order to underpin parliamentary sovereignty, to leave this on a discretionary basis. The decision whether to seek a remedial order is a matter for government to decide on a case-by-case basis. It would be wrong for a declaration automatically to lead to a remedial order.

The Lord Chancellor
HL Committee 27.11.97, Col 1139

It is clear from Clause 10(2) that a Minister will be empowered to make only such changes (apart from any consequential changes) as are appropriate to remove the incompatibility. As the Lord Chancellor said during the Second Reading debate,

> "the power to make a remedial order may be used only to remove an incompatibility or a possible incompatibility between legislation and the convention." [Official Report, 3/11/97; col 1231]

The Select Committee on Delegated Powers and Deregulation noted the Lord Chancellor's remarks about the strictly limited circumstances under which the order-making powers will be used, and did not express any need for the amendments being proposed.

The Government's intention therefore is perfectly plain. I am bound to say that, having listened to the argument (always fatal) in particular relating to the amendment proposed by the noble Baroness, Lady Williams – which, if I may say without disrespect, is designed to ensure that both the belt and the braces are worn on every appropriate occasion – we do not at present believe that there are inadequate safeguards. If reflection shows that there may be a case for a further safeguard, we will reconsider and return at a later stage.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1121

In most cases, a Minister's view is endorsed by Parliament, and if a Minister decides that it is not appropriate for the Government to take action in respect of the declaration of incompatibility, no action need be taken. In controversial cases, the Minister's decision might have to be endorsed by the House. Indeed, the Opposition could force it to be endorsed, so it would always be subject to that possibility, which is right.

Nor is there any obligation on the Government to remedy any incompatibility by means of a remedial order. We expect that the Government will generally want to do so, just as successive Governments have sought, as we will discuss on the next group of amendments, to put right any declaration by the Strasbourg court by way of legislation or Executive action in the United Kingdom. That is the effect of clause 10, and it is the logical consequence of our decision that the courts are not to have a power to set aside Acts of Parliament under this Bill.

HC Committee 24.6.98, Col 1121

Robert Maclennan MP: Obviously this is hypothetical, but in the event of the circumstance that he described arising and a Minister recommending that no action be taken, does the right hon. Gentleman assume that the Government would feel obliged to derogate from the relevant provision of the European convention?

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1121

No, I do not. That would arise only if there had been an adverse judgment by the court – I was about to deal with that. Normally in such a circumstance, if the Government had refused to accept a clear declaration of incompatibility – for example, by the Judicial Committee of the other place, the highest court of the land – the victim, who would be the applicant in the action, would take the matter to the Strasbourg court. In practice, in most cases, an appeal to the European court in Strasbourg would naturally follow.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1122

Of course it is correct to say that parties to the proceedings may voluntarily decide to take a case to the Strasbourg court. Even if there is a declaration of incompatibility, and a remedial order amending primary legislation is put through the House of Commons and the other place, it is still open to the other party to the proceedings to take the matter to the court, although I suggest that they would get short shrift if they sought to do so.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1123

There will be no logjam. If there had been a declaration of incompatibility, and the Government and Parliament had decided not to act on it, I would guess that, in most cases, the applicant would take the case to Strasbourg. That almost certainly follows. However, in the rare examples where that did not happen, the status quo ante would obtain because of clause 4(6), which makes it clear that:

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

If the issue before the Judicial Committee of the House of Lords was, say, whether a statutory instrument was ultra vires, the Committee could use its existing powers to deal with that issue. If, however, the issue was a piece of primary legislation that was incompatible with the convention, on which the Judicial Committee had made a declaration that the Government and Parliament had decided not to accept, and on which there had been no appeal to Strasbourg, the original piece of primary legislation would stay in force. There would be no logjam, and that is why the new clause is not necessary.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Cols 1137–1138

Having decided on the concept of declarations of incompatibility, we had to determine what procedures to put in place where such a declaration was made. One option available to Government and Parliament is simply to ignore the declaration of incompatibility, and we have discussed the possibilities that can arise in such a circumstance when no action is taken. However, in most cases when there is a declaration of incompatibility, any Government who are committed to promoting human rights will want to do something about that part of the law that the Judicial Committee in another place has declared outwith the convention….

The power to make a remedial order exists for cases – we do not think that there will be very many – when there is a very good reason to amend the law following a declaration of incompatibility or a finding by the Strasbourg court, but no suitable legislative vehicle is available….

A declaration of incompatibility might arise where the legislation in question had touched on the liberty of the subject. In most cases, the Judicial Committee in another place has said that primary legislation here is outwith the convention because it has taken the view that the rights of the subject spelled out in the convention have been unjustifiably interfered with by the primary legislation of this Parliament. Therefore, a remedial order aims to restore, or to give to the subject for the first time, liberties that the subject had previously been denied by Parliament. In those cases, I believe that Parliament would wish to act swiftly, but it could well be that there was no criminal justice Bill before the House through which amendments could be made. In those circumstances, the power to make specific and necessary amendments by means of a remedial order could be useful.

…I should like to refer to the case of Mr. Chahal, in which the European Court declared that the arbitrary powers of the Home Secretary to deport an individual on the ground that his presence here was not conducive to the public good was not acceptable and that there had to be a judicial element in the decision. Primary legislation has now been passed, but, because of the time that it took, individuals were left in limbo with no proper procedure for making decisions on whether people could be deported. Mr. Chahal was released, but in other circumstances such an individual would have to continue to be detained, perhaps for many months or a year, before primary legislation was passed. That is not acceptable and a remedial order would be right for such a case.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1138

We are deleting the word "appropriate" in clause 10 and saying that a remedial order can be brought forward only if there are compelling reasons. We are setting a very high test. Only the changes necessary to remove the incompatibility will be possible. We have also made provision for representations to be made about non-urgent orders. The appropriate Minister will have to bring before Parliament a clear statement of those representations and whether they have been accepted, with a provision for amending the original remedial order if appropriate.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1140

I am answering ad lib and without the benefit of a legal dictionary, but the situation that I described in the Chahal case, where the liberty of a subject would be adversely affected by a delay in producing primary legislation, was a compelling case. I am not certain that it would be an exceptional case, because one could ask, "To what is it exceptional?" but it would certainly be a compelling case. Frankly, only in that situation would remedial orders be necessary and appropriate.

Home Secretary Jack Straw MP,
HC Committee 24.6.98, Col 1141

There will be circumstances in which a speedier process is necessary – we should not have brought forward this power if we did not think so – but those circumstances will be limited and constrained. I also accept that Parliament and the judiciary must engage in a serious dialogue about the

operation and development of the rights in the Bill. I am sure that the Bill will develop, perhaps, as Machiavelli instructed us – and as the hon. and learned Member for Harborough (Mr. Garnier) reminded us – in ways that we do not fully anticipate. That dialogue is the only way in which we can ensure that the legislation is a living development that assists our citizens.

Remedial orders: parliamentary scrutiny

The Lord Chancellor
HL Committee
27.11.97,
Cols 1145–1146

The conclusion we have come to thus far is that Clause 12 of the Bill is adequate. In the present Bill remedial orders are limited specifically to amendments to legislation which are necessary to remove an incompatibility with the convention. The incompatibility will have been identified very, very precisely by a higher court or it will have emerged plainly from a judgment of the European Court of Human Rights. The cause of the incompatibility will have been very precisely identified. The remedial order will have the sole purpose of improving human rights by removing a closely defined incompatibility. We have therefore thought thus far that there is no need for an amendment-making mechanism.

In the last resort, if the proposed method of dealing with the incompatibility was considered by Parliament to be unacceptable, it would be able, under the existing terms of Clause 12, to withhold its approval to the order being made, or, in the case of an order made under Clause 12(1)(b), ensure that it ceases to have effect after 40 days. In practice, that would oblige the Government to make a fresh order.

This does, as at present advised, seem to us to be a sufficiently strong form of parliamentary control and one tailored to the needs of the Bill. On the other hand, we will ponder what has been said on the basis that, although it is possible to get the remedial order wrong, the scope for error in the circumstances I have described is really so little that we took the view that the provision for amendment was not necessary in the particular situation we were addressing. Similarly, I doubt whether inserting a minimum period of 60 days before remedial orders can be made under Clause 12(1)(a) would have any beneficial effect. There might well be occasions when a much shorter period for considering a draft order would suffice. What we have in mind is that an unnecessarily long fixed minimum period would unnecessarily delay the making of a remedial order and, accordingly, the removal of incompatible provisions of legislation for the purpose of enhancing human rights. Nonetheless, I have said that we will ponder; and we will.

The Lord Chancellor
HL Committee
27.11.97, Col 1150

The remedial order will be intended to achieve no more and no less than is necessary to improve the incompatibility. Therefore I seriously question… whether there is much point in an undefined period for scrutiny, and therefore delay in removing an incompatibility which is causing a continuing denial of human rights.

12 Costs and legal aid

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Second Reading
3.11.97, Col 1308

The proposals that he [*The Lord Chancellor*] has to deliver on legal aid will take full account of the need to ensure that people who have strong cases to bring under the Bill should continue to be able to do so.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Committee
18.11.97, Cols 559–560

We do not believe that it is reasonable or sensible to insert a specific provision in the Bill that in every case the Crown should bear the costs of the Minister. There are likely to be cases – one recognises this – where the Crown would be required to meet its own costs. For instance, a tribunal might feel that the point behind the declaration of incompatibility was so plain that the Minister in question had behaved irrationally or unreasonably in contesting the matter. It might be thought that the interest of the Crown was so marginal that the relevant Minister might perhaps never have applied to be joined, on the powers given him in the Bill.

…We do not see any grounds for moving away from the general well-known position that the allocation of costs in individual cases is a matter for the courts to determine in the light of individual and particular circumstances.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Committee
18.11.97, Col 560

It would be quite improper for me to give any indication of Crown policy generally which would attempt to bind my colleagues for the future. After all, any government is the steward of public funds and ought not legitimately to say, "This is going to be our policy in these matters".

However, I reiterate – and I should have thought it would be a source of comfort – what the…Lord Chancellor said in his Cardiff speech and has reiterated today, and what was said by me on his authority in winding up at Second Reading; namely, of course we regard these cases as important. One signpost of that is his fund, about which he is consulting, which would be devoted entirely to this class of case. Beyond that I do not believe that any Minister ought properly and prudently to go.

See also section: The requirement to be a victim of an unlawful act/ involvement of third parties (interest groups) in Convention cases

13 A Human Rights Commission

The Lord Chancellor Lord Irvine of Lairg,
HL Second Reading 3.11.97, Col 1233

We do not rule out a human rights commission in future, but our judgement is that it would be premature to provide for one now.

The Parliamentary Under-Secretary of State, Home Office, Lord Williams of Mostyn,
HL Committee 24.11.97, Col 850

We do not wish to bully through a human rights commission without the fullest consultation with the Equal Opportunities Commission and the Commission for Racial Equality, to name but two.

…As we said in *Rights Brought Home* we have not ruled out the idea of a commission for the future.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Committee 24.6.98, Cols 1087–1088

…the Government have considered the issue of a human rights commission very carefully and consulted various organisations about it. It became clear that there was no consensus on the issue, and that if we decided to establish such a commission through the Bill, we would end up not with a discussion of how to secure access to rights at Strasbourg but with a big debate and campaign about a commission and its terms of reference.

The Government do not have a closed mind on a commission – we have made our position clear. Different interest groups – the Commission for Racial Equality, the Equal Opportunities Commission and so on – have different views on whether a human rights commission would be a good thing, so the best that we can do at the moment is to ensure that the convention is accepted as part of our law. After that, the need for a human rights commission may be the subject of a future debate – we shall have to see how that develops.

The Parliamentary Under-Secretary of State, Home Office, Mike O'Brien MP,
HC Report 21.10.98, Col 1322

A commission is not essential to ensure compliance with convention rights by the Government or public authorities, or to ensure that Parliament can properly carry out its functions of scrutinising legislation. The Bill provides for Ministers to make statements about the compatibility of Government Bill with convention rights, which we believe will enhance the scrutiny of such Bills within the Government. We have also said that we would support the creation of a parliamentary human rights committee with a range of functions relating to human rights.

14 Government task force

Home Secretary Jack Straw MP,
HC Third Reading
21.10. 98,
Cols 1360–1361

The task force will be chaired by my noble Friend the Lords Williams of Mostyn and will include my hon Friends the Solicitor-General and the Minister of State, Lord Chancellor's Department. The membership will also include those non-governmental organisations which have made extremely valuable contributions to the project and have continued to offer their advice as the Bill has proceeded through Parliament. They will include Francesca Klug, from the Human Rights Incorporation Project; Anne Owers, from Justice; Andrew Puddephatt, from Charter 88; Sarah Spencer, from the Institute of Public Policy Research; Veena Vasista, from the 1990 Trust and John Wadham from Liberty.

The task force will help us to create the human rights culture to which I referred. Its tasks will include maintaining a dialogue between the Government and non-governmental organisations on the readiness of Departments, other public authorities and the legal profession for implementation and on its timing; working together to heighten public awareness of the Bill relating to responsibilities as well as rights; providing training opportunities for public authorities outside Government, and co-operating with other organisations in disseminating awareness, particularly among young people, of the rights and responsibilities inherent in the convention.

We are preparing guidance on the Bill which is designed to assist Government Departments and others, and I expect the task force to take a keen interest in that.

Home Secretary Jack Straw MP,
HC Third Reading
21.10. 98, Col 1364

As I explained earlier, it is my intention to bring clause 19 into force as soon as possible, and well before the rest of the Bill.

Appendix 1
Practice direction (Hansard extracts)

The following practice direction was issued by the Lord Chief Justice on December 20. 1994 [1995] 1 WLR 192; [1995] 1 All ER 234

17A–69/1 *1. Authority* – The Practice Direction was issued with the concurrence of the Lord Chancellor by the Lord Chief Justice, the Master of the Rolls, the President of the Family Division and the Vice-Chancellor. It applied throughout the Supreme Court, including the crown court and the county courts.

17A–69/2 *2. Application* – The Practice Direction concerned both final and interlocutory hearings in which any party intended to refer to the reports of parliamentary proceedings as reported in the official reports of either House of Parliament, *Hansard*. No other report of parliamentary proceedings was to be cited.

17A–69/3 *3. Documents to be served* – Any party intending to refer to any extract from *Hansard* in support of any such argument as was permitted by the decisions in *Pepper v. Hart* [1993] A.C. 593; [1992] 3 W.L.R. 1032, and *Pickstone v. Freemans plc* [1989] A.C. 66; [1988] 3 C.M.L.R. 221, HL., or otherwise, must unless the judge otherwise directed, serve upon all other parties and the court copies of any such extract together with a brief summary of the argument intended to be based upon such report.

17A–69/4 *4. Time for Service* – Unless the judge otherwise directed, service upon other parties to the proceedings and the court of the extract and summary of arguments referred to in paragraph 3 was to be effected not less than five clear working days before the first day of the hearing. That applied whether or not there was a fixed date. Solicitors had to keep themselves informed as to the state of the lists where no fixed date had been given.

17A–69/5 5. *Methods of service* – A service on the court was to be effected in accordance with Order 65, rule 5 of the Rules of the Supreme Court appropriately addressed as the circumstances might demand to:

(i) In the Court of Appeal, Civil Division, three copies to the Registrar, Room E325, Royal Courts of Justice, Strand, London WC2A 2LL;

(ii) In the Court of Appeal, Criminal Division, three copies to the Registrar of Criminal Appeals, Room C212, Royal Courts of Justice;

(iii) In the Crown Office list, two copies to the Head of the Crown Office, Room C312, Royal Courts of Justice;

(iv) In the Queen's Bench Division in cases to be heard in London, the Clerk of the Lists, Room W16, Royal Courts of Justice. In the Queen's Bench Division cases to be heard out of London, the chief clerk of the relevant district registry;

(v) In the Chancery Division in cases to be heard in London, the Clerk of the Lists, Room TM 8.13, Thomas More Building, Royal Courts of Justice. In the Chancery Division in cases to be heard out of London, the chief clerk of the relevant district registry;

(vi) In the Family Division in cases to be heard in London, the Clerk of the Rules, Room WC4, Royal Courts of Justice. In cases to be heard out of London, the chief clerk of the relevant district registry;

(vii) In the Principal Registry of the Family Division, the assistant secretary, Somerset House, London SW1R 1LP;

(viii) In the crown court, the chief clerk of the relevant crown court centre;

(ix) In the county court, the chief clerk of the relevant county court.

N.B. Service upon other parties was to be effected in accordance with Order 65, rule 5 of the Rules of the Supreme Court, or otherwise as might be agreed between the parties.

17A–69/6 *6. Failure to serve* – If any party failed to comply with this Practice Direction the court might make such order, relating to costs and otherwise, as was in all the circumstances appropriate.

Appendix 2

The Tom Sargant Memorial Lecture

Given by Lord Irvine of Lairg, the Lord Chancellor, 16 December 1997[1]

The development of human rights in Britain under an incorporated convention on human rights

This lecture was given on 16 December 1997 in the Law Society Hall, London. Notes are the Lord Chancellor's.

On 23rd October [1997] I introduced the Human Rights Bill into Parliament. It will incorporate into the domestic law of the United Kingdom the rights and liberties guaranteed by the European Convention on Human Rights. It will mean that our citizens can secure their rights from our own UK courts. They will not have to take the long slow road to the Court in Strasbourg. It is one of the major constitutional changes which this Government is making.

I am sure Tom Sargant, in whose memory this Lecture is given, would have approved. Tom Sargant was not a lawyer. Nor even had he gone to University. His family's financial difficulties stood in his way. So he did not take up the scholarship he had won at Cambridge. His memorial is Justice, which he made the conscience of the legal profession. He was the first Secretary of Justice, for 25 years from its creation in 1957. It was he who took up – contrary to instructions – the cases of prisoners complaining of wrongful convictions. So began Justice's proud and successful tradition of case work. Tom Sargant demonstrated throughout his life a strong and firm belief in a just society. He always stood up for ordinary people. He would have applauded, I believe, the commitment to stand up for ordinary people, their rights and liberties, which the Government demonstrates in making the Human Rights Bill one of its first acts of legislation.

I want to speak this evening about the significance the Human Rights Bill has for individuals; but also to go beyond the extensive area in which the Act will bite and to consider how the Human Rights Bill will influence and mould the process of law making and the content of the law in other and wider areas. It will be a constutional change of major significance: protecting the individual citizen against evosion of liberties, either deliberate or grandual. It will also help develop a process of justice based on the promotion of positive rights.

I start with a little history.

Today we talk readily of Human Rights law. There is now a corpus of law, international and national, recognising fundamental freedoms. It is called International Human Rights law. Fifty years ago it would not have been possible to talk of such a body of law.

Until then very few issues would have been regarded in any way as the province of international law. Piracy and slavery were the major exceptions. For many years the existence of internationally recognised norms of human rights was simply inconsistent with central propositions of international law, the positivist doctrines of State sovereignty and domestic jurisdiction.

This view was particularly expounded by John Austin in his Lectures on Jurisprudence, delivered at the newly founded University College London between 1828 and 1832. He brought together many of the ideas scattered through Bentham's own voluminous works.[2] Law, according to Austin's definition, was a body of rules fixed and enforced by a sovereign political authority. There could be no such thing as international law,

1 I am indebted to Peter Goldsmith QC for the great assistance he has given me in the preparation of this Lecture.

2 See Sabine *A History of Political Theory* 3rd ed Harrap p684

it followed, since there was no sovereign political authority over the individual sovereign States themselves to set or enforce any rules of conduct. It also followed that under the doctrine of State sovereignty, individuals received no protection under International law. Their protection had to come in courts of purely domestic jurisdiction. It was a breach of international law for one State to intervene in another State's sphere of exclusive domestic jurisdiction, unless authorised by permissive rules to the contrary.[3]

The idea of state sovereignty was not new. The Dutch lawyer, Hugo Grotius, usually, but not universally[4] recognised as the father of contemporary international law, had in his great work on the Law of War and Peace[5] accepted the sovereign State as the basic unit of international law over 200 years before. Yet the exaggerated importance Austin was to attach to the theory of sovereignty was easily exploitable by despots to justify resisting outside 'interference' in their oppressive domestic conduct towards their own peoples. It can be powerfully argued that the acceptance by lawyers of this view of State sovereignty did much to hold back the development of international norms of human rights.[6]

It took the horrors of the Second World War and the Holocaust to start a decisive transformation in international law. The United Nations Charter recognised specifically an international obligation to secure human rights. Its Preamble identifies one of the United Nations' own primary purposes as '*Promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion*'[7] The enlightened draftsmen of the Charter, determined to do all in their power to remove the threat of a return to conflict and genocide, saw the need for these fundamental freedoms not only as common justice but also as part of the process of guaranteeing peace. And so Article 55 of the Charter placed on the United Nations an obligation to promote '*Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*';[8] and to do so, in the words of the Charter '*With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly nations based on respect for the principle of equal rights and determination of peoples*'. The members themselves pledged co-operation with the United Nations and to take joint and separate action to achieve those purposes.[9]

In the five years that followed the agreement of the Charter, international law moved in a decisive new direction. The Genocide Convention,[10] the Geneva Conventions for the Protection of Victims of War,[11] Relative to the Protection of Civilian Persons in Time of War[12] and in relation to Condition of Wounded servicemen[13] were all promulgated and agreed during this fertile legislative period. So also was the Universal Declaration of Human Rights itself.[14] It celebrates its half centenary in 1998.

Two other important events occurred in the same period.

First, the judgement at the Nuremberg Trials, presided over by Lord Justice Lawrence, gave concrete evidence that victims of crimes against humanity committed even by their own Governments were entitled to the protection of international criminal law.[15] The significance of those trials cannot be underestimated. Yet the decision to stage them had not been lightly reached. Churchill, for one, had been against them. But the Allies had committed themselves in the Declarations of St James of 1942 and the Moscow Declarations of November 1943.[16] The United Kingdom has been a strong supporter of the successors to that first international war crimes tribunal, now sitting to deal with events in the former Yugoslavia and Rwanda. The present Government showed our own strong commitment to this process when earlier this year British soldiers were involved in the arrest of suspected war criminals.

3 Schwarzenberger op cit p 65

4 See for example Schwarzenberger *A Manual of international law* 5th ed. Stevens p19

5 Dr Jure Bellis ac Pacis (1625)

6 For example by F.S. Nariman, Chairman of the Executive Committee of the International Commission of Jurists in an address to the International Bar Association given at the United Nations, New York in June 1977

7 Charter of the United Nations preamble 3; UNTS xvi; UKTS 67 (1946) cmd. 7015

8 Articles 55 and 56 ibid.

9 Article 56 ibid

10 Convention on the Prevention and Punishment of the Crime of Genocide 1948 78 UNTS 277; cmnd 2904

11 Geneva III, (1949) 75 UNTS 31

12 Geneva IV (1949) 75 UNTS 31, Cmnd 550

13 Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field (1949); Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea (1949) Geneva II

14 General Assembly Resolution 217A(III), UN Doc A/810 at 71 (1948)

15 See generally Davies, *Europe, A History*, Pimlico 1997

16 Rights Brought Home: The Human Rights Bill Ch 3872

It was during the same fertile period that the Council of Europe, established as part of the Allies' programme to rebuild Europe, produced the European Convention on Human Rights. As the White Paper introducing the Human Rights Bill records, the simple power of the language of its articles led Sir Edward Gardner QC, the Conservative MP, to say in 1987, when introducing an earlier attempt to incorporate the Convention:

> 'It is language which echoes down the corridors of history. It goes deep into our history and as far back as the Magna Carta'.[17]

The history of the United Kingdom's quickness to ratify the Convention but slowness to adopt the jurisdiction of the Court of Human Rights for individual petition, and even greater slowness to incorporate its provision into domestic law, have been chronicled by Lord Lester of Herne Hill QC. I pay tribute to his long campaign to see the Convention given greater effect in the UK.

So, spurred by the urgent need to reconstruct civilisation after the winter of World War II, in this short period legal innovation had turned the individual citizen into a subject of international law. In 1950 the distinguished international lawyer, Hersch Lauterpacht, later Judge of the International Court of Justice, was able to assert that 'The individual has now acquired a status and a stature which have transformed him from an object of international compassion into a subject of international right'.[17]

I have dealt with this background because it is right to remind ourselves of our history and of the roots of the Convention. It is right to remind ourselves that these rights are part of the bedrock laid down after 1945 for a safe and just society. It is also right to remind ourselves of the strong justification for recognising in domestic law international human rights obligations.

A rights based system

Against this background, I turn to the Human Rights Bill and its effects.

A major change which the Act will bring flows from the shift to a rights based system. Under this system a citizen's right is asserted as a positive entitlement expressed in clear and principled terms. For example, under Article 5 of the Convention 'Everyone has the right to liberty and security of person.' Whilst there are reservations to that right, the reservations take effect as explicit exceptions and derogations which must be justified according to the terms of the Article. They represent exceptions which, in the public interest, are justified and reasonable. For example, the basic right in Article 5 is qualified by a list of the defined and circumscribed cases where a person may be deprived of his liberty. So, where a national authority wants to justify a detention, it will need to show how the facts fit into one of those defined categories and how it has met other requirements of the Convention; for example, the fair trial guarantees in Article 6.

This approach contrasts with the traditional common law approach to the protection of individual liberties. The common law approach, described by the great constitutional lawyer, Albert Venn Dicey, Vinerian Professor, in his Introduction to the Study of Law of the Constitution[19] first published in 1885, treats liberty only as a 'negative' right. As explained by Lord Donaldson MR in one of the Spycatcher cases[20] this negative approach means that 'the starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law or by Statute.' The liberty of the subject is therefore the 'negative' right of what is left over when all the prohibitions have limited the area of lawful conduct. There are numerous examples of prohibitions either by the common law (for instance, the law of libel limiting the extent of free speech to prohibit defamatory statements or the law of nuisance limiting the activities in which a person may engage on his own land) or by Statute (of which the examples are too obvious to merit illustration).

17 Hansard 6 February 1987, col 1224

18 Lauterpacht; *International Law and Human Rights* (1950)

19 (10th ed), Macmillan 1959

20 *AG v Guardian Newspapers* (no 2) [1990] 1 AC 109

Dicey saw merit in this negative approach. He believed that the absence of writing lent the common law a flexibility to develop to meet changing conditions. But the approach has disadvantages which are greater. By proposing this law the Government has decisively demonstrated its view that the more serious threat to liberty is an absence of written guarantees of freedom. For the negative approach offers little protection against a creeping erosion of freedom by a legislature willing to countenance infringement of liberty or simply blind to the effect of an otherwise well intentioned piece of law. As Professor Dworkin, Professor of Jurisprudence at the University of Oxford argued in an important article in 1988, the challenge to liberty is not only from despots. A Government may show 'a more mundane but still corrupting insensitivity to liberty, a failure to grasp its force and place in democratic ideals.'[21] The Human Rights Bill is our bulwark against that danger.

When he was Prime Minister John Major used to say:

> 'We have no need of a Bill of Rights because we have freedom.'

What that demonstrated was an enervating insularity. The traditional freedom of the individual under an unwritten constitution to do himself that which is not prohibited by law gives no protection from misuse of power by the State, nor any protection from acts or omissions by public bodies which harm individuals in a way that is incompatible with their human rights under the Convention.

Our legal system has been unable to protect people in the 50 cases in which the European Court has found a violation of the Convention by the United Kingdom. The proposition that because we have liberty we have no need of human rights must be rejected.

The implications of the change

What then are the practical implications of this change to a rights based system within the field of civil liberties?

First, the Act will give to the courts the tools to uphold freedoms at the very time their infringement is threatened. Until now, the only remedy where a freedom guaranteed by the Convention is infringed and domestic law is deficient, has been expensive and slow proceedings in Strasbourg. They could not even be commenced until after all the domestic avenues of complaint and appeal had been exhausted. The courts will now have the power to give effect to the Convention rights in the course of proceedings when they arise in this country and to grant relief against an unlawful act of a public authority (a necessarily widely drawn concept). The courts will not be able to strike down primary legislation. But they will be able to make a declaration of incompatibility where a piece of primary legislation conflicts with a Convention right. This will trigger the ability to use in Parliament a special fast-track procedure to bring the law into line with the Convention.

This innovative technique will provide the right balance between the judiciary and Parliament. Parliament is the democratically elected representative of the people and must remain sovereign. The judiciary will be able to exercise to the full the power to scrutinise legislation rigorously against the fundamental freedoms guaranteed by the Convention but without becoming politicised. The ultimate decision to amend legislation to bring it into line with the Convention, however, will rest with Parliament. The ultimate responsibility for compliance with the Convention must be Parliament's alone.

That point illustrates the second important effect of our new approach. If there are to be differences or departures from the principles of the Convention they should be conscious and reasoned departures, and not the product of rashness, muddle or ignorance. This will be guaranteed both by the powers given to the courts but also by other provisions which will be enacted. In particular, Ministers and administrators will

21 I cited this in a speech in the House of Lords on 23 May 1990

be obliged to do all their work keeping clearly and directly in mind its impact on human rights, as expressed in the Convention and the jurisprudence which attaches to it. For, where any Bill is introduced in either House, the Minister of the Crown, in whose charge it is, will be required to make a written statement that, either, in his view, the provisions of the Bill are compatible with the Convention rights; or that he cannot make that statement but the Government nonetheless wishes the House to proceed with the Bill. In the latter case the Bill would inevitably be subject to close and critical scrutiny by Parliament. Human rights will not be a matter of fudge. The responsible Minister will have to ensure that the legislation does not infringe guaranteed freedoms, or be prepared to justify his decision openly and in the full glare of Parliamentary and public opinion.

That will be particularly important whenever there comes under consideration those articles of the Convention which lay down what I call principled rights, subject to possible limitation. I have in mind Articles 8–11, dealing with respect for private life; freedom of religion; freedom of expression; and freedom of assembly and association; which confer those freedoms subject to possible limitations, such as, for instance in the case of Article 10 (freedom of expression):

> 'are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

In such cases, administrators and legislators, will have to think clearly about whether what they propose really is necessary in a democratic society and for what object it is necessary. Quite apart from the concentration on the Convention and its jurisprudence this will require, the process should produce better thought-out, clearer and more transparent administration.

The important requirements of transparency on Convention issues that will accompany the introduction of all future legislation will ensure that Parliament knows exactly what it is doing in a human rights context. I regard this improvement in both the efficiency and the openness of our legislative process as one of the main benefits produced by incorporation of the Convention.

Substantive rights

Thirdly, the Convention will enable the Courts to reach results in cases which give full effect to the substantive rights guaranteed by the Convention. It would not be appropriate for me to deal with individual aspects of the law which may come up for decision in the Courts in future, but some general observations are possible.

The Courts have not ignored the Convention rights. As long ago as 1972 in *Broome v Cassell* Lord Kilbrandon referred to the Convention as supporting the existence of '*A constitutional right to free speech*' when warning against holding the profit motive to be sufficient to justify punitive damages for defamation.

But the courts have only had limited ability to give effect to those rights. Lord Bingham of Cornhill, in his maiden speech in the House of Lords on taking the office of Lord Chief Justice, enumerated six ways in which the Courts have been able to take the Convention rights into account.[22] Of these, the first and the most important has been as an aid to construction. 'Where', as Lord Bingham explained, '*A United Kingdom statute is capable of two interpretations, one consistent with the Convention and one inconsistent, then the courts will presume that Parliament did not intend to legislate in violation of international law*.' A further instance is in developing the common law where it is uncertain, unclear or incomplete.[23]

22 3 July 1996, Hansard column 1465

23 See eg the Court of Appeal in *R v Secretary of State for the Home Department ex p Brind* [1991] 1 AC 696

But the Courts are not enforcing the Convention when they act in this way. They are enforcing statutory or common law. It follows – and it is emphasised in all the authorities – that recourse cannot be had to the terms of he Convention unless the terms of the Statute, or the content of the common law[24] is uncertain or ambiguous.

If Parliament has spoken with sufficient certainty, in terms that exclude or contradict the Convention, the latter has no place. The decision of the House of Lords in *ex parte Brind*[25] is a case in point. That concerned a challenge by a group of broadcasters to the restrictions then imposed preventing the broadcast of the voices of members of proscribed organisations, notably Sinn Fein. The Secretary of State had acted under a power broadly drawn in the Broadcasting Act 1981[26] empowering him to prohibit the broadcast of 'any matter or classes of matter specified in the notice.' The Applicants tried, unsuccessfully, to persuade the Court to impose a limitation on those words to make them consistent with the right of freedom of expression in Article 10 of the Convention. The House of Lords could find no ambiguity allowing them to read in such words of limitation.

It is moreover likely – although individual cases will be for the Courts to determine and I should not attempt to prejudge them – that the position will in at least some cases be different from what it would have been under the pre-incorporation practice. The reason for this lies in the techniques to be followed once the Act is in force. Unlike the old Diceyan approach where the Court would go straight to what restriction had been imposed, the focus will first be on the positive right and then on the justifiability of the exception. Moreover, the Act will require the Courts to read and give effect to the legislation in a way compatible with the Convention rights 'so far as it is possible to do so..'[27] This, as the White Paper makes clear, goes far beyond the present rule. It will not be necessary to find an ambiguity. On the contrary the Courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so. Moreover, it should be clear from the Parliamentary history, and in particular the Ministerial statement of compatibility which will be required by the Act, that Parliament did not intend to cut across a Convention right. Ministerial statements of compatibility will inevitably be a strong spur to the courts to find means of construing statutes compatibly with the Convention.

Whilst this particular approach is innovative, there are some precedents which will assist the Courts. In cases involving European Community law, decisions of our Courts already show that interpretative techniques may be used to make the domestic legislation comply with the Community law, even where this requires straining the meaning of words or reading in words which are not there. An illustrative case is *Litster* concerning the construction of the Transfer of Undertakings Regulations. The issue was whether protection in the Regulations, limited to those employed in the business 'Immediately before' the time of the transfer, extended to employees unfairly dismissed very shortly before the transfer. The applicants had clearly not been employed in the business immediately before the transfer as those words would normally be interpreted. Nor were the words ambiguous. Yet the House of Lords interpreted the Regulations (so as to accord with the European Court's existing interpretation of the underlying Community obligation which the Regulations were intended to implement) by implying additional words 'or would have been so employed if they had not been unfairly dismissed [by reason of the transfer]'.

This implication of appropriate language into an apparently unambiguous provision is the sort of tool which could have led to a different result in a case like *Brind*. It shows the strong interpretative techniques that can be expected in Convention cases.

Guidance may also be found in the jurisprudence of the New Zealand Courts. Under the New Zealand Bill of Rights[28] a meaning consistent with the rights and freedoms

24 'Courts in the United Kingdom should have regard to the provisions of the [Convention]…where our domestic law is not firmly settled' *AG v BBC* [1981] AC 303 at p 352 per Lord Fraser.

25 *R v Home Secretary ex parte Brind* [1991] 1 AC 696

26 Section 29(3)

27 Clause 3(1)

28 New Zealand Statute 1990 no 109

contained in the Bill of Rights is to be given in preference to any other meaning 'wherever an enactment can be given [such] a meaning..' The existing New Zealand decisions seem to show that the only cases where the legislation will not be interpreted consistently with the protected rights is where a statutory provision contains a clear limitation of fundamental rights.[29] The difference from the approach until now applied by the English courts will be this. The Court will interpret as consistent with the Convention not only those provisions which are ambiguous in the sense that the *language* used is capable of two different meanings but also those provisions where there is *no* ambiguity in that sense, unless a *clear* limitation is expressed. In the latter category of case it will be 'possible' (to use the statutory language) to read the legislation in a conforming sense because there will be no clear indication that a limitation on the protected rights was intended so as to make it 'impossible' to read it as conforming.

The morality of decisions

The fourth point may be shortly stated but is of immense importance. The Courts' decisions will be based on a more overtly principled, indeed moral, basis. The Court will look at the positive right. It will only accept an interference with that right where a justification, allowed under the Convention, is made out. The scrutiny will not be limited to seeing if the *words* of an exception can be satisfied. The Court will need to be satisfied that the *spirit* of this exception is made out. It will need to be satisfied that the interference with the protected right *is* justified in the public interests in a free democratic society. Moreover, the Courts will in this area have to apply the Convention principle of proportionality. This means the Court will be looking *substantively* at that question. It will not be limited to a secondary review of the decision making process but at the primary question of the merits of the decision itself.

In reaching its judgment, therefore, the Court will need to expand and explain its own view of whether the conduct is legitimate. It will produce in short a decision on the *morality* of the conduct and not simply its compliance with the bare letter of the law.

The influence on other areas of law

I believe, moreover, that the effects of the incorporation of the Convention will be felt way beyond the sphere of the application of the rights guaranteed by the Convention alone. As we move from the traditional Diceyan model of the common law to a rights based system, the effects will be felt throughout the common law and in the very process of judicial decision-making. This will be a healthy and dynamic development in our law.

There is good precedent for this sort of influence on the common law in the effect which European Community law has already produced. Under the European Communities Act, the precedence accorded to European law can lead to legislation being suspended[30] or disapplied[31] or declared to be unlawful.[32] As I pointed out in a Lecture I delivered in October 1995[33] British Courts are as a result now required to perform a number of tasks which would have been unthinkable even 20 years ago.

Although the legislative technique adopted under the Human Rights Bill is different from that under the European Communities Act, the effect on the general process of deciding cases will, I believe, be as influential. Courts will, from time to time be required to determine if primary or secondary legislation is incompatible with the Convention rights.[34] They will decide if the acts of public authorities are unlawful through contravention, perhaps even conscious contravention, of those rights.[35] They may have to award damages as a result.[36]

These are all new remedies for our courts to apply and, as they begin to develop the tools and techniques to apply them, an influence on other areas of law and judicial decision making is, I believe, inevitable.

29 See especially *R v Laugalis* (1993) 10 CRNZ; and also *Ministry of Transport v Noort* [1992] 3 NZLR 260; *R v Rangi* [1992] 1 NZLR 385

30 *K v Secretary of State for Transport exp. Factortame Ltd (No 2)* [1991] 1 AC 603

31 For example *Marshall v Southampton and South West Area Health Authority (No 2)* [1994] 2 WLR 292

32 *R v Secretary of State for Employment ex parte Equal Opportunities Commission* [1995] 1 AC 1

33 The 1995 Administrative Law Bar Association lecture published in [1996] Public Law 59 under the title *Judges and Decision-makers – The Theory and Practice of Wednesbury Review*

34 under Clause 4

35 under Clause 6

36 under Clause 8(2)

This spillover effect has been seen already from the application here of European Community law. Cases may be seen where the very exposure of practitioners and judges to a new body of law presents new solutions even for purely domestic problems. A good example, was the reliance by Lord Goff of Chieveley on principles of German law in deciding in the House of Lords the question of the responsibility to the disappointed beneficiary of an English solicitor who failed to draw up a will before the demise of the would-be testators.[37] Another example is *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[38] The House of Lords had to decide whether the Inland Revenue was liable to pay interest when it returned tax originally paid by the tax payer under regulations held to be invalid. This was a purely domestic question and no issue of Community law arose. Classic common law principles suggested interest would only be payable where the tax had been paid under compulsion or mistake of fact and not (as here) through a payment made voluntarily through a mistake of law. Yet the majority of the House concluded that interest was payable by the Revenue by extending the categories of obligation to repay money to cases where money was paid pursuant to an unlawful demand by a public authority. A comparison with community law seems to have played a part in this decision to change the common law of England.

Lord Goff of Chieveley noted in terms that the European Court of Justice had held[39] that a person who pays charges levied by a member State contrary to community rules is entitled to repayment of the charge. He went on to say:

> '…at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law'[40]

The spillover influence of Community law in the field of procedure and judicial decision making is as marked. In *Pepper v Hart*[41] the long established convention that the courts do not look at Hansard to discover the parliamentary intention behind legislation was reversed. It is strongly arguable that this was a consequence of the influence of Community law where it is common to look for the purpose of a law in order to interpret that law and to look for that purpose in the legislative history. That Community influence can be seen when examining how *Pepper v Hart* came to be decided. Its direct precursor was the earlier decision in *Pickstone v Freemans*.[42] That was a Community law case. There the House of Lords referred to passages in Hansard to understand national regulations made by the UK Parliament to give effect to Community law. The justification for that unusual approach was the special position of Community law. Yet the very basis of allowing that exceptional approach in *Pickstone*' was discarded in *Pepper v Hart* as being 'logically indistinguishable from the similar exercise of statutory interpretation of purely national legislation.[43]

So too it is becoming increasingly hard not explicitly to recognise in English administrative law the Community law doctrine of proportionality.

That doctrine, drawn from German Administrative law principles, is a tool for judging the lawfulness of administrative action. It amounts to this. Excessive means are not to be used to attain permissible objects. Or, as it was more pithily put by Lord Diplock, 'a steam hammer should not be used to crack a nut'.[44] There has been much argument whether this principle now forms a part of the criteria for review of public decisions generally since Lord Diplock opened that door in 1985.[45] It seemed to have been slammed shut in *Brind* in 1991. This is not the occasion to trace those developments. Yet, by whatever name, it seems undeniable that the traditional common law concepts converge with their continental cousins. This is but another example of the inevitable incremental effects of introducing another system of law to be applied alongside traditional common law principles.

37 *White v Jones*

38 *Woolwich Equitable Building Society v IRC* [1993] AC 70

39 In case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595

40 *Woolwich Equitable Building Society v IRC* [1993] AC 70 at p 177

41 [1993] AC 593

42 *Pickstone v Freemans plc* [1989] AC 66

43 *Pepper v Hart* [1993] AC 593 at p 635 per Lord Browne-Wilkinson

44 In *R v Goldstein* [1983] 1 WLR 151 at 155

45 In *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374

One other example will illustrate the point. In *M v Home Office*[46] a contempt application was made against the Secretary of State for failure to procure the return of an applicant for political asylum. The Court had to consider the extent of its powers over the Executive. In purely domestic cases these were traditionally narrow. But in cases where Community law obligations were at issue it had been shown that the powers were wider. They extend to granting interlocutory injunctions against the Crown as shown in the *Factortame* case.[47] This distinction troubled the Court. Although both the Court of Appeal (and ultimately the House of Lords[48] found a way round the concerns, Lord Donaldson MR was driven to condemn as 'anomalous and…wrong in principle' distinctions in the powers of the court to hold the ring by interlocutory injunctions which depended on the identity of the defendant. And even more anomalous that the extent of those powers over central government should depend on whether the obligation in question arose under Community law or purely domestic law.

This illustrates the difficulty of maintaining a rigid distinction between two differing sets of principles of law, co-existing side by side.[49] Nor would I want in all cases to maintain rigid distinctions. The greatness of the common law lies in its flexibility and ability to adapt to changing economic and social conditions. It is enriched by drawing on the principles and solutions found in other developed legal systems.

The emergence of a new approach

I have referred to the effect the introduction of European Community law has had on the development of our own domestic law. I believe that incorporating into our own law the Convention rights will have an equally healthy effect.

Any court or tribunal determining any question relating to a Convention Right will be obliged to take into account the body of jurisprudence of the Court and Commission of Human rights and of the Council of Ministers.[50] This is obviously right; it gives British courts both the benefit of 50 years careful analysis of the Convention rights and ensures British Courts interpret the Convention consistently with Strasbourg. The British courts will therefore need to apply the same techniques of interpretation and decision-making as the Strasbourg bodies. I have already mentioned recourse to Parliamentary materials such as Hansard – where we are now closer in line with our continental colleagues. I will mention three more aspects. As I do so, it should be remembered that the courts which will be applying these techniques will be the ordinary courts of the land; we have not considered it right to create some special human rights court alongside the ordinary system; the Convention rights must pervade all law and all the courts systems. Our courts will therefore learn these techniques and inevitably will consider their utility in deciding other non-Convention cases.

First there is the approach to statutory interpretation. The tools of construction in use in mainland Europe are known to be different from those the English courts have traditionally used. I will refer to just one: the so-called teleological approach which is concerned with giving the instrument its presumed legislative intent. It is less concerned with the textual analysis usual to the common law tradition of interpretation.[51] It is a process of moulding the law to what the Court believes the law should be trying to achieve[52] It is undoubtedly the case that our own domestic approach to interpretation of statutes has become more purposive. Lord Diplock had already identified this trend 20 years ago when he noted that:

> '*If one looks back to the actual decisions of the [House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions*'.[53]

46 *M v Home Office* [1992] QB 270

47 Op cit.

48 *M v Home Office* 3 WLR 433

49 See further on this topic the valuable discussion in O'Neill *Decisions of the European Court of Justice and their Constitutional Implications* 1994 Butterworths, Chapter 5

50 See Clause 2

51 The Court of Human Rights also adopts a dynamic approach which enables it to take account of changing social conditions.

52 See Lord Denning's description in *James Buchanan v Babco* [1977] 2 WLR 107 @ 112

53 *Carter v Bradbeer* [1975] 1 WLR 1204 at 1206–1207

This trend has not diminished since then, although there are cases where the Courts have declined to adopt what was in one case described as an 'over purposive' approach.[54]

Yet as the Courts, through familiarity with the Convention jurisprudence, become more exposed to methods of interpretation which pay more heed to the purpose, and less to whether the words were felicitously chosen to achieve that end, the balance is likely to swing more firmly yet in the direction of the purposive approach.

Secondly, there is the doctrine of proportionality, to which I have already referred. This doctrine is applied by the European Court of Human Rights.[55] Its application is to ensure that a measure imposes no greater restriction upon a Convention right than is absolutely necessary to achieve its objectives. Although not identical to the principle as applied in Luxembourg, it shares the feature that it raises questions foreign to the traditional *Wednesbury*[56] approach to judicial review. Under the *Wednesbury* doctrine an administrative decision will only be struck down if it is so bad that no reasonable decision-maker could have taken it.

Closely allied with the doctrine of proportionality is the concept of the margin of appreciation. The Court of Human Rights has developed this doctrine which permits national courts a discretion in the application of the requirements of the Convention to their own national conditions. This discretion is not absolute, since the Court of Human Rights reserves the power to review any act of a national authority or court; and the discretion is more likely to be recognised in the application of those articles of the Convention which expressly include generally stated conditions or exceptions, such as Articles 8–11, rather than in the area of obligations which in any civilised society should be absolute, such as the rights to life, freedom from torture and freedom from slavery and forced labour that are provided by Articles 2–4.

This 'margin of appreciation', was first developed by the Court in a British case, *Handyside v U*.[57] It concerned whether a conviction for possessing an obscene article could be justified under Article 10(2) of the Convention as a limitation upon freedom of expression that was necessary for the 'protection of morals'. The court said:

> 'By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements [of morals] as well as on the 'necessity' of a 'restriction' or penalty' intended to meet them…'[58]

Although there is some encouragement in British decisions for the view that the margin of appreciation under the Convention is simply the *Wednesbury* test under another guise[59] statements by the Court of Human Rights seem to draw a significant distinction. The Court of Human Rights has said in terms that its review is not limited to checking that the national authority 'exercised its discretion reasonably, carefully and in good faith'. It has to go further. It has to satisfy itself that the decision was based on an 'acceptable assessment of the relevant facts' and that the interference was no more than reasonably necessary to achieve the legitimate aim pursued.[60]

That approach shows that there is a profound difference between the Convention margin of appreciation and the common law test of rationality. The latter would be satisfied by an exercise of discretion done 'reasonably, carefully and in good faith' although the passage I have cited indicates that the Court of Human Rights' review of action is not so restricted. In these cases a more rigorous scrutiny than traditional judicial review will be required. An illustration of the difference may be found in the speech of Simon Brown LJ in *ex p. Smith* (the armed forces homosexual policy case)

54 By Dillon LJ in *R v Poplar Coroner ex p Thomas* [1993] 2 All ER 381 @ 387; and see the criticism by Bennion in *The All England Reports Annual Review 1996* of the House of Lords decision in *R v Preddy* [1996] 3 All ER 481

55 See eg *Soering v UK* (1989) Series A, vol 161

56 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1KB 223

57 (1976), Series A, vol 24

58 Ibid, paras [48]–[49]

59 See eg *R v Home Secretary exp. Patel* [1995] Imm AR 223; *R v Home Secretary exp. Mbatube* [1996] Imm AR 184

60 *Vogt v Germany* Series A, No 323 (1996) para 52; (1996) 21 EHRR 205, 235

> 'If the Convention for the Protection of Human Rights and Fundamental Freedoms were part of our law and we were accordingly entitled to ask whether the policy answers a pressing social need and whether the restriction on human rights involved can be shown proportionate to its benefits, then clearly the primary judgement (subject only to a limited 'margin of appreciation') would be for us and not for others; the constitutional balance would shift. But that is not the position. In exercising merely a secondary judgement, this court is bound, even though adjudicating in a human rights context, to act with some reticence'.

The question I pose is how long the courts will restrict their review to a narrow *Wednesbury* approach in non-Convention cases, if used to inquiring more deeply in Convention cases? There will remain distinctions of importance between the two categories of case which should be respected. But some blurring of line may be inevitable.

I have expressed my views in my Administrative Law Bar Association Lecture in 1995 on how the Courts ought properly to regard the dividing line between their function and that of Parliament. But the process is not one way. British influence or the application of the Convention rights is likely to increase. British officials were closely involved in the drafting of the Convention. When our British courts make their own pronouncements on the Convention, their views will be studied in other Convention countries and in Strasbourg itself with great respect. I am sure that British judges' influence for the good of the Convention will be considerable. They will bring to the application of the Convention their great skills of analysis and interpretation. But they will also bring to it our proud British traditions of liberty.

The shift from form to substance

So there is room to predict some decisive and far reaching changes in future judicial decision making. The major shift may be away from a concern with form to a concern with substance. Let me summarise the reasons.

In the field of review by judges of administrative action, the courts' decisions to date have been largely based on something akin to the application of a set of rules. If the rules are broken, the conduct will be condemned. But if the rules are obeyed, (the right factors are taken into account, no irrelevant factors taken into account, no misdirection of law and no out and out irrationality) the decision will be upheld, usually irrespective of the overall objective merits of the policy. In some cases much may turn – or at least appear to turn – on the form in which a decision is expressed rather than its substance. Does the decision as expressed show that the right reasons have been taken into account? Does it disclose potentially irrational reasoning? Might the court's review be different if the reasoning were expressed differently so as to avoid the court's *Wednesbury* scrutiny?

Now, in areas where the Convention applies, the Court will be less concerned whether there has been a failure in this sense but will inquire more closely into the merits of the decision to see for example that necessity justified the limitation of a positive right, and that it was no more a of a limitation than was needed.[61] There is a discernible shift which may be seen in essence as a shift from form to substance. If, as I have suggested, there is a spillover into other areas of law, then that shift from form to substance will become more marked.

This may be seen as a progression of an existing and now long standing trend. In modern times, the emphasis on identifying the true substance at issue has been seen in diverse areas: in tax where new techniques have developed to view the substance of a transaction overall rather than to be mesmerised by the form of an isolated step, or in the areas of statutory control of leases, where the Courts are astute to prevent form being used to obscure the reality of the underlying transaction. In what may

61 Albeit within the margin of appreciation left to the public authority

seem at first blush a very different area, that of interpretation of contracts, recent decisions also emphasise the need to cast away the baggage of older years where literal and semantic analysis was allowed to override the real intent of the parties.[62]

In a very broad sense we can see here a similarity of approach: to get to the substance of the issue and not be distracted by the form.

These are trends already well developed but I believe they will gain impetus from incorporation of the Convention. In addition the Courts will be making decisions founded more explicitly and frequently on considerations of morality and justifiability.

This Bill will therefore create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike; and a culture in judicial decision making where there will be a greater concentration on substance rather than form.

If that is so, we will more readily be able to refute T.S. Eliot's sardonic version of the lawyers' motto cited by one of my predecessors:

> 'The spirit killeth, the letter giveth life'[63]

62 See *Mannai v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945 and *Investors Compensation Scheme v West Bromwich Building Society* 24 June 1997 (as yet unreported)

63 *The Brtish Legal System Today* (1983 Hamlyn Lectures) p49