COLLECTION DROITS FONDAMENTAUX

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE UNITED KINGDOM IN 2003

January 2004

Reference : CFR-CDF.repUK.2003

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE UNITED KINGDOM IN 2003*

January 2004

Reference : CFR-CDF.repUK.2003

* submitted to the Network by Jeremy McBride.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lithuanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), M. Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par O. De Schutter, assisté par V. Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), M. Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxemburg), Pavel Sturma (Czeck Republic), Ineta Ziemele (Latvia). The Network is coordinated by O. De Schutter, with the assistance of V. Verbruggen.
The documents of the Network may be consulted on :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

Table of Contents

Preliminary remarks

The survey that follows is inevitably incomplete given the difficulty of encapsulating all the developments relating to three discrete jurisdictions with four legislative bodies and numerous actors, governmental and non-governmental. Furthermore it is always likely to be very difficult in a period of such considerable activity relating to a wide range of issues – evident in the discussion below – to discern either the entire significance of particular measures or the way in which they interact with each other, whether positively or negatively. Moreover the need in such a survey to rely predominantly on evident occurrences in the form of the adoption of legislation, the rulings of courts or the pronouncements of different bodies (official and private, national and international) means that other developments and problems – no matter how significant - are less likely to be discerned. This is most obviously true of the practice of discrimination and the actual economic and social conditions of groups within a country but it is also likely to be the case when it comes to the effective exercise by some of civil and political rights. Nonetheless it is posible to see a good number of potentially positive legislative and case law developments in the course of 2003. These include the strengthening of measures to protect children against sexual abuse and exploitation, the establishment of bodies with a specific remit to promote the rights of children, the enlargement of the grounds on which discrimination is prohibited to cover religion and sexual orientation together with the enhancement of existing prohibitions on racial discrimination, the opening up of some possibilities to secure flexible working arrangements, the efforts to secure the widest possible access to modern means of communication and the introduction of more effective guarantees for the independence and impartiality of various courts and tribunals, as well as the making of various adjustments to satisfy the rulings of international supervisory bodies. However, all these developments are counterbalanced by the continuation of the existence of problems in safeguarding the well-being of all those coming into contact with or under the custody of various public bodies, the delay in obtaining a comprehensive response to the clear need for prompt, effective and transparent investigations of the deaths that occur in those situations, the continued increase in the prison population and the particular problems and risks that this creates for children, the failure to respond to all the concerns of various international bodies as to the adequacy of measures adopted to secure certain social and economic rights, the postponement of the introduction of protection against age-related discrimination and in strengthening that available to deal with discrimination against the disabled, the reliance on an extremely tough approach to the treatment of asylum-seekers with the risk that this may lead to inhuman consequences that can only be stopped at a very late stage and the continued reliance on the indefinite detention of suspected terrorists in circumstances when such a measure is not seen as necessary by other EU Member States and there is good reason to be worried about its impact on those concerned, particularly as a result of the circumstances in which they are held. Although these are not all matters for which a resolution that is both speedy and satisfactory can be realistically expected, they ought to be a continuing focus of attention in the course of 2004.

CHAPTER I : DIGNITY

Article 1. Human dignity

International case law and concluding observation of international organs

See the entries under Article 4.

National legislation, regulation and case law

See the entries under Articles 3 and 4 and the discussion under Article 12 of the Local Government Act 2003.

Practice of national authorities

See the entries under Articles 3 and 4.

Reasons for concern

None additional to those cited under Articles 3 and 4.

Article 2. Right to life

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination recalled its previous concerns about the disproportionately high incidence of deaths in custody of members of ethnic or racial minority groups in the Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic reports (CERD/C/63/CO/11, 10 December 2003) and it invited further information on the operation of the new police complaints system (para 18). See also the discussion of the observations under Article 21.

A lawyer involved in a number of high profile cases arising from the conflict in Northern Ireland had been shot dead by masked men with the alleged collusion of security personnel. The proceedings for investigating his death were found in Eur.Ct.H.R., *Finucane v United Kingdom*, 1 July 2003, not to have provided a prompt and investigation into the allegations of collusion as (a) there was a lack of independence, which also raised serious doubts as to the thoroughness or effectiveness with which the possibility of collusion was pursued, attaching to those aspects of the investigative procedures conducted by officers that were part of the police force suspected by the deceased's widow and other members of the community of issuing threats against him since they were all under the responsibility of the chief constable who played a role in the process of instituting any disciplinary or criminal proceedings, (b) the inquest into the death failed to address serious and legitimate concerns of the family and the public and could not be regarded as providing an effective investigation into the incident or a means of identifying or leading to the prosecution of those responsible since it was only concerned with the immediate circumstances into the shooting and did not inquire into or allow submissions regarding threats made by the police against the lawyer, (c) two of the three inquiries, headed by a senior police officer from outside Northern Ireland, into alleged collusion between paramilitary organisations and the security forces - however useful in uncovering information - did not appear to be concerned with investigating the death and in any event the necessary elements of public scrutiny and accessibility of the family since the reports were not made public and the deceased's widow had never been informed of their findings, (d) the third such inquiry was squarely concerned with the death but, taking place

some 10 years after the event, could not comply with the requirement that effective investigations be commenced promptly and with due expedition and it was not apparent to what extent, if any, the final report would be made public, though a summary overview had been published, and (e) notwithstanding the suspicions of collusion, no reasons were forthcoming at the time for the various decisions not to prosecute possibly implicated in the death and no information was made available either to the applicant or the public which might have provided re-assurance that the rule of law had been respected. This failure to comply with the procedural obligation imposed by the right to life thus entailed a violation of ECHR Article 2.

National legislation, regulation and case law

The Fireworks Act 2003 extends the power of the Secretary of State to make regulations with respect to fireworks so as to cover not only their supply but also their use. In relation to the latter provision may be made for securing that there is no risk that the use of the fireworks will have the consequence of death, injury or distress to persons or animals, alarm or anxiety to persons or destruction of (or damage to) property (s 2).

In reinstating a declaration that an independent public investigation should be held into the death of a young offender killed by his cellmate - whose institutional behaviour was known to the Prison Service to be dangerous - where there had been an internal inquiry by that service (in which the family had played no part and whose report had not been published), an inquest had been adjourned pending the cellmate's trial, police investigations had led to advice by counsel that there was insufficient evidence to provide any realistic prospect of securing any conviction of anyone other than the cellmate, the latter's trial did not explore cell allocation procedures or other events before the murder, the coroner declined to resume the inquest after the cellmate's conviction and a formal investigation by the Commission for Racial Equality focused only on race-related issues, it was held in *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2003] 4 All ER 1264 that, although there was a measure of flexibility in selecting the means of conducting the investigation to satisfy ECHR Article 2, the investigation had to be independent, effective, reasonably prompt, have a sufficient element of public scrutiny and involve the next of kin to an appropriate extent and in the instant case the investigations conducted had not, either singly or together, met the minimum standards required by this provision. Moreover an inquest into the death of the claimant's 3 year old daughter, who died from a heart attack while undergoing haemodialysis in hospital, was held in *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 to be incapable of fulfilling the state's obligations under ECHR Article 2 unless the claimant had legal representation as he was in no fit state to take part in it himself.

Under the Railways and Transport Safety Act 2003 provision is made for the creation of an independent body - the Rail Accident Investigation Branch - tasked with establishing the causes of accidents on the railways. Its inspectors will have the power to enter all railway property, land adjoining railway property and other places connected to an accident or incident if they think that there may be evidence relevant to the investigation. In order that people feel that they can talk freely to the inspectors without fear that what they say may be used against them in another way (such as legal proceedings), there is power to make regulations providing that statements obtained by them may only be disclosed to a third party (such as a prosecutor) if a court orders that such disclosure is in the public interest or if the person who has made the statement releases it him or herself. The Act also introduces alcohol limits and related measures for crews on water-borne vessels and certain aviation personnel that broadly replicate drink/driving legislation already applying to motorists and certain railway workers.

See also the discussion under Article 6 of the Extradition Act 2003, the discussion under

Article 7 of *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2004] 4 All ER 903, the discussion under Article 35 of *Simms v Simms* [2002] EWHC 2734 (Fam), [2003] 2 All ER 669 and the discussion under Article 47 of the Criminal Justice (Scotland) Act 2003.

Practice of national authorities

The main findings of a study (*Review of shootings by police in England and Wales from 1998 to 2001*) published by the Authority with regard to the use of firearms by the police in 24 incidents (11 of which were fatal) were that the overall picture was positive given the small number of weapons discharged in relation to the total number of armed deployments but that there lessons for police practice and organisation that needed to be heeded in order to ensure that the demanding standard set by ECHR Article 2 was fully met in the future. In particular it made some 48 recommendations relating to further research, the command structure and management of incidents, the availability and use of less lethal options and existing alternative tactics, containment and speed of resolution, characteristics of the individual shot, training in mental health awareness, the conduct of investigations into shootings which cause death or injury and the reductions of delays to which they are subject, assistance to the family members of persons shot, record-keeping, the role of the Authority and the dissemination of recommendations made following an investigation. The Police Ombudsman for Northern Ireland has recommended that a policy should be considered for the deployment of semi-automatic weapons after rioters almost managed to seize a police officer's gun, that officers' existing training be supplemented by training about risks from ricochet and cross-fire, that there should be wider use of video recording of situations in which baton guns have been deployed, that there should be accurate recording of the issue of ammunition, that the training and appointment of Post Incident Officers - to facilitate the interview of officers involved in critical incidents - should be considered and that warning should be given before the discharge of baton rounds subsequent to the discharge of one where the circumstances made the issue of such a warning impractical (*Annual Review*). The Police Complaints Authority has also published a report, *Safer Restraint*, on a conference concerned with the use by the police of restraining measures for detainees, together with the recommendations made by those taking part in it. These related to measures designed to prevent restraint-related deaths (including planning to cover operational issues on the ground, avoiding the use of phenthiazine drugs for agitated people and planning for resuscitation where they are used and the minimum requirements for training) and the investigation of restraint-related deaths (including the need for these to be robust, independent and transparent, with families of victims being involved as much as possible and being given appropriate emotional and legal support, the giving of a swift and genuine apology from senior officers or managers whether or not there is evidence of wrongdoing and the adoption of a mechanism to ensure that coroners' recommendations are monitored, disseminated and acted upon).

The Northern Ireland Human Rights Commission has stated that it believes that not enough is being done following Eur.Ct.H.R., *Jordan v United Kingdom*, 4 May 2001 to ensure that thorough, impartial and effective investigations are being conducted into all killings in Northern Ireland, especially (but not exclusively) those allegedly perpetrated by or with the connivance of members of the security forces, and described the inquest system as being in a 'chaotic state'; *Annual Report 2002-03*. In addition it noted that it had not been able to verify whether two deaths in prison were suicides as it had not been given sight of the internal reports into them and was worried that various schemes for the protection of key persons were not being applied in a way which is fully consistent with ECHR Article 2.

The present arrangements for the investigation of deaths occurring in police custody, prisons and mental health institutions are analysed and found to be inadequate in a study published by Liberty; G S Vogt & J Wadham - *Deaths in Custody: Redress and Remedies*. It concludes that there is a need for deaths in police custody to be investigated independently and that there is a need to treat them as a possible homicide. Furthermore coroners should be given a more

judicial role and that means testing for legal aid in inquests should be abolished. In addition there is seen to be a need to simplify procedure, ensure pre-inquest disclosure, make more use of recommendations and deal with the process more speedily, with the privilege against self-incrimination being abolished. These recommendations are in many ways reflected in a much more wide-ranging official review that has been presented to Parliament - *Death Certification and Investigation in England, Wales and Northern Ireland The Report of a Fundamental Review 2003* (Cm5831) - which makes proposals for the organisation of the coroner service, new procedures concerning the reporting of deaths to a coroner, support for (and audit of) certification of deaths by doctors, the investigation of deaths (with families having a right to be involved in it and to have a copy of the report), a requirement of public inquests into the deaths of people in custody or compulsorily detained under mental health powers, at the hands of law and order services, traumatic work place deaths, deaths occurring in public transport crashes or commercial vessel sinkings or collisions and some deaths of children, an inquest analysing whether the authorities had taken or failed to take reasonable steps to prevent death with its findings being sent to relevant bodies and arrangements made for feedback to the coroner and the victim's family, the existence of a presumption in favour of disclosing evidence from an investigation and a requirement that all questions be asked with protection against use of the testimony in a subsequent prosecution.

New guidelines were introduced in April by the Home Office for the reporting of deaths of members of the public during, or following, police contact. They are intended to draw a distinction between those deaths where there was some real or potential control by the police resulting from the person's contact with them and those where there was not. The latter will no longer be described as a 'death in custody', to avoid misrepresenting the true number of people 'dying in police custody'. Four specific categories are introduced in the new definitions: fatal road traffic incidents involving the police; fatal shooting incidents involving the police (covering only those who died as a result of being shot by the police); deaths in police custody (covering those who die following arrest or detention by the police and deaths that occur while a person is being arrested or taken into custody); and deaths during or following other types of contact with the police that did not amount to detention and where there is a link between that contact and the death (which may occur in a public place or the person's home). The number of deaths falling into these categories in the year 2002-03, as reported in the *Annual Report and Accounts of the Police Complaints Authority 1 April 2002-31 March 2003*, were 38, 3, 20 and 18 respectively. The Authority has expressed disappointment that some police forces still lack CCTV cameras in their custody suites as these systems are seen as protecting detainees from abuse and staff from malicious or ill-founded complaints, speeding investigation of complaints and enabling proper supervision of the custody function. It also pointed out that, despite the issue of guidance by the Home Office, the Metropolitan Police had still not introduced the practice of removing a detainee's shoelaces so that they could not be used for the purpose of hanging him or herself. A preliminary study published by the Authority - arising out of the fact that approximately 25% of the 54 deaths on average each year in police custody can be attributed in some degree to intoxication through either alcohol or drugs - found weaknesses in current safety procedures and working practices in custody suites that relate primarily to resource and staffing limitations. The procedures were considered to be neither extensive enough nor appropriately applied and custody personnel were seen as being placed under considerable pressure as a result of training, resource and support deficiencies; *Sleeping it off: Safety issues in detaining intoxicated individuals in custody suites*. The Police Ombudsman for Northern Ireland has also recommended that a health and safety audit of police custody suites be carried out, that custody officers should be first aid trained and that custody suites should not be left unattended (*Annual Review*).

Following the death of an elderly couple apparently linked to the disconnection of their gas supply for non-payment, the Information Commissioner issued a statement that, whereas the routine notification of all disconnections to an organisation like social services without

consent would be precluded by the Data Protection Act 1998, it would not prevent an energy supplier from notifying the relevant body in any circumstances (eg, age or infirmity) where there are grounds for believing that cutting a particular household off would pose significant risk (24 December 2003). Furthermore in response to concern that the destruction by a police force of data about a suspect in cases that did not result in prosecutions may have impeded the investigation into his possible role in other offences (including murder), the Information Commissioner issued a statement making it clear that the Act did not impose set time limits for the destruction of particular types of information and that it was for the police to decide what information should be kept, and for how long, for their job of preventing or detecting crime. There was a requirement to strike a balance between the need to catch offenders and protect the public from crime and the need to ensure that those who are innocent or only guilty of misdemeanours are treated fairly (17 December 2003).

Amnesty International, British Irish Rights Watch, the Committee on the Administration of Justice, Human Rights Watch and the Lawyers Committee for Human Rights have called for the publication of a report by a retired Canadian Supreme Court judge into the deaths of four human rights lawyers in Northern Ireland (including Patrick Finucane, see 'International case law') which had been submitted over two months previously; Amnesty International press release, 18 December 2003.

See also the discussion under Article 4 of baton rounds, under Article 21 of 'Practice'.

Reasons for concern

The incidence of deaths occurring where persons come into contact with or are in the custody of law enforcement and custodial agencies, the adequacy of arrangements to prevent persons taking their own lives or being exposed to harm by others and the failure always to secure prompt, effective and transparent investigations of the circumstances in which such deaths occur.

Article 3. Right to the integrity of the person

International case law and concluding observation of international organs

None directly applicable but see the entries under Article 4.

National legislation, regulation and case law

The Sexual Offences Act 2003 has been enacted in order to reform the law on such offences and to strengthen measures to protect the public from sexual offending. Part 1 covers the non-consensual offences of rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. In addition it defines 'consent' and 'sexual' and sets out evidential and conclusive presumptions about consent; thus it will be presumed unless the defendant proves otherwise that there was no consent where violence and threats of violence were used and the lack of consent cannot be disputed where deceit had been used. It also covers child sex offences – including the meeting, or travelling with the intention of meeting where part of the travel is in the United Kingdom, a child in any part of the world after having 'groomed' the child for sexual purposes - and offences involving an abuse of a position of trust towards a child, as well as familial child sex offences, offences involving adult relatives and offences designed to give protection to persons with mental disorder. In addition to the grooming offence, some of the child sex offences will be committed if they occur abroad where the perpetrator is a British citizen or a United Kingdom resident so long as they are also offences in the country concerned. The age of a 'child' is amended to 18 but defences are provided for in limited cases where the child is 16 or over and the defendant is

the child's partner. This Part also covers offences relating to prostitution (causing or inciting prostitution for gain, controlling prostitution for gain and keeping a brothel), child pornography and trafficking into, within or out of the United Kingdom for sexual exploitation, as well as preparatory offences (such as administering a substance with a view to commit a sexual offence) and others concerned with voyeurism and intercourse with an animal. Part 2 re-enacts with amendments existing legislation which requires sex offenders to notify certain personal details to the police, with the length of the requirement varying with the offence but potentially being for life. In particular it creates a notification order enabling the notification requirements to be applied to offenders with convictions abroad. In addition it combines sex offender orders and restraining orders have been combined into a new sexual offences prevention order (whereby the offender could be prevented from contacting victims or taking part in activities that involve close contact with children) and enables risk of harm orders to be made against a person who has on at least two occasions engaged in sexually explicit conduct or communication with a child or children and as a result there is reasonable cause to believe that the order is necessary to protect a child from harm arising out of future such acts by him or her. This Part also allows foreign travel orders to be made so that an offender with a conviction for a sex offence against a child could be prevented from travelling to countries where he or she is at risk of abusing children.

The Criminal Justice (Scotland) Act 2003, s 51 provides that any punishment involving a blow to the head or shaking or the use of an implement will never be 'reasonable' for the purpose of the defence of reasonable chastisement. It also specifies the factors to be considered in deciding whether or not something which is claimed to have been done to a child by way of physical punishment was justifiable, including; the nature of what was done to the child, the reason for it and the circumstances in which it took place; the duration and frequency of the punishment; any effect (physical or mental) on the child; and the child's age; the child's personal characteristics (including sex and health).

See also the entries under Article 4 and the discussion under Article 6 of the Extradition Act 2003.

Although the United Kingdom is opposed to reproductive cloning, it considers that therapeutic cloning - the creation of an embryo through cell nuclear replacement for the purpose of research into serious disease – has the potential to revolutionise medicine in the twenty-first century. As it is seen as too early to say which type of stem cell research will deliver the maximum benefits, the government believes that all types of such research – including therapeutic cloning – should be encouraged and indeed that it would be indefensible to deny millions of people the chance of new treatments which could save their lives through stopping it. However, while it does not wish to impose this view on others, it would not be party to any convention which aimed to introduce a global ban on therapeutic cloning (statement to the United Nations – Sixth Committee, 21 October). The potential benefits of stem cell research had been reviewed by the Chief Medical Officer in *Stem Cell Research: Medical Progress with Responsibility* (2000) and this report recommended that it be permitted subject to: the Act's controls; the inability of other means of meeting the research's objectives; the consent of those providing eggs or sperm; monitoring of its benefits; and a prohibition on mixing human adult cells. The government accepted this recommendation and therapeutic cloning is now permitted under the Human Fertilisation and Embryology Act 1990 (as amended). Pursuant to this Act all embryo research in both the public and private sector is subject to a case by case review and is only licensed for limited purposes. Moreover no research is allowed on embryos over 14 days old. See also the discussion under Article 35 of R *(on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2002] EWHC 2785 (Admin), [2003] 2 All ER 105.

Practice of national authorities

The Police Ombudsman for Northern Ireland has published *A study of complaints involving the use of batons by the police in Northern Ireland* reported that there had been 419 such complaints between 6 November 2000 and 31 March 2002, 94% of the complainants having alleged that they had been struck. The usage was seen as considerably higher than that in England and Wales where CS spray had been introduced in 1998. It was recommended that the training in conflict resolution skills by the Police Service should be reviewed with reference to its content, its timing, the level of resources devoted to it and the lack of refresher training. In addition it was recommended that an updated code on baton use should be completed and promulgated and that clear and consistent recording of the use of physical violence by police officers should be encouraged, with the issue of central recording and monitoring of such use also being examined.

The Northern Ireland Human Rights Commission has also published a report on the baton rounds currently being used in Northern Ireland; *Baton Rounds: A Review of the Human Rights Implications of the Introduction and Use of the L21A1 Baton Round in Northern Ireland and Proposed Alternatives to the Baton Round*. It concludes that they travel faster and hit harder than those they replaced and that their lack of accuracy in use makes them potentially more lethal. The report notes that some children have already been hurt by it and that the UN Committee on the Rights of the Child had called for them to be withdrawn from use in riot control. In addition the report detailed shortcomings in the system of accountability in relation to the use of the rounds by the army, with no effective investigation being undertaken when they are fired by soldiers. It recommends that the Government should commit to a binding timetable for the withdrawal of the baton round in Northern Ireland. It also recommends an investigation by the Policing Board into why the numbers of people arrested in public order incidents are so low and the making of appropriate recommendations aimed at redressing this situation and reducing reliance on baton rounds.

See also the entries under Article 4.

Reasons for concern

The circumstances in which baton rounds are being used, particularly given the availability of less dangerous techniques of control.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

International case law and concluding observation of international organs

Following a visit by a delegation of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in February 2002, its report (CPT/Inf (2003) 18) was released at the request of the Government in February 2003 and its response (CPT/Inf (2003) 19) was published at the same time. The visit had examined the situation of persons detained pursuant to the Anti-terrorism, Crime and Security Act 2001, ss 21-23, which provides for an indefinite period of foreigners believed to pose a risk to national security and suspected of being international terrorists who, for legal or practical reasons, cannot be removed from the United Kingdom. In the report it is recommended that steps be taken to ensure that, in case of any further detentions pursuant to the Act that the right of access to a lawyer be guaranteed from the very outset. The Committee also recommended a review of the situation of detained persons as regards access to activities, the imposition of further limitations on the already modest out-of-cell time because of 'operational requirements', the ability to receive only a limited number of radio stations and none in Arabic, the fact that they have not been accused or convicted of any concrete criminal offence

and that their detention is indefinite. In addition the Committee recommended that immediate steps be taken to ensure that all prisoners are guaranteed the basic requirement of at least one hour of outdoor exercise every day. Furthermore it recommended that health care arrangements for persons detained under the 2001 Act be reviewed as regards delays in access to health care staff, the discontinuance of treatment initiated before their detention, medical consultations in the presence of custodial staff and the provision of psychological support and/or psychiatric treatment given that some have been victims of torture or inhuman or degrading treatment or punishment, others have a psychiatric history and considerable distress was being caused by the inability to contest the broad accusations against them and by the indefinite nature of their detention, as well as regards the absence of any indication in the records of the reasons for prescribing psychotropic drugs, their dosage or the person who had prescribed them. It particularly recommended that steps be taken to ensure that detainees received appropriate care in order to meet their needs for psychological support and/or psychiatric treatment and that medical confidentiality was ensured. The Committee also recommended that prison officers in the High Security Unit at Belmarsh Prison - where some of the detainees are being kept - be reminded that force should only be used as a last resort and must be no more than necessary and trusted those dealing with the detainees would bear in mind that all forms of ill-treatment, including verbal abuse, are not acceptable. It also recommended that, in assigning staff to custodial duties, the need for well-developed qualities in the field of interpersonal communication, familiarity with different cultures and language skills, as well as the ability to recognise possible symptoms of stress reactions, be borne in mind. Moreover there were shortcomings as regards the provision after admission to prison of interpretation (including during medical examinations) and of written information in a language that was understood should be remedied. The Committee encouraged the United Kingdom to explore the possibility of providing one visit per week to persons detained under the Act and invited them to verify that the visiting time - in principle of about two hours duration - is not being reduced unduly. In respect of persons detained on criminal charges of a terrorist nature the Committee asked for comments on accounts that persons whose custody had been extended by judicial decision had not been brought physically before a judge while being detained by the police and that recommended that the authorities strive to develop regime activities for these prisoners.

The medical care of a heroin addict, whose nutritional state and general health were not good on admission to prison and who subsequently suffered serious weight loss and was dehydrated after a week of largely uncontrolled vomiting symptoms and an inability to eat or hold down fluids causing her distress and suffering and posing serious risks to her health, was found (6-1) in Eur.Ct.H.R., *McGlinchey and Others v United Kingdom*, 29 April 2003, to violate the prohibition against inhuman and degrading treatment in ECHR Article 3 where there had been a failure of the prison authorities to provide accurate means of establishing her weight loss (which was a factor that should have alerted the prison to the seriousness of her condition but was largely discounted due to the discrepancy of the scales used on admission and in the health centre), a gap in the monitoring of her condition by a doctor over the weekend when there was a further significant drop in weight and a failure of the prison to take more effective steps to treat her condition (such as admission to hospital to ensure intake of fluids intravenously or to obtain more expert assistance in controlling the vomiting). The absence of any remedy providing a mechanism to examine the standard of care given to the prisoner in prison and the possibility of obtaining damages for the foregoing suffering and distress was also unanimously found to constitute a violation of the right to an effective remedy under ECHR Article 13. However, a complaint about the failure of a local authority to protect the welfare of child whilst she was in foster care and about the inability to obtain redress for her complaints against the local authority was the subject of a friendly settlement in Eur.Ct.H.R., *Z W v United Kingdom*, 29 July 2003 in which the Government undertook to pay the applicant GBP 77,000 for pecuniary and non-pecuniary damage. Similar complaints had led to findings of violation of Article 13 in Eur.Ct.H.R., *Z v United Kingdom*, 10 May 2001 and in Eur.Ct.H.R., *D P and J C v United Kingdom*, 10 October 2002.

National legislation, regulation and case law

The present offences connected with female genital mutilation - established by the Prohibition of Female Circumcision Act 1985 - have been restated in the Female Genital Mutilation Act 2003 so that it is now clear that they apply not only to acts committed by anyone within the United Kingdom but also to those committed elsewhere by a non-United Kingdom national or permanent resident outside the United Kingdom. It is also an offence to aid, abet, counsel or procure someone who is not a United Kingdom national or permanent resident to perform an act of female genital mutilation outside the United Kingdom on someone who is a United Kingdom national or permanent resident. The 2003 Act maintains the exceptions in respect of surgical operations by approved persons that are needed for physical or mental health or for purposes connected with labour or birth.

It was held in *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796 that the effect of the Human Rights Act 1998 was that it was no longer legitimate to rule that, as a matter of law, no common law duty of care was owed to a child in relation to the investigation of child abuse and the initiation and pursuit of care proceedings. Furthermore, in the context of suspected child abuse, breach of the duty of care in negligence would frequently also amount to a violation of ECHR Articles 3 and 8 but there could be circumstances where the rights under the latter were violated and the tort of negligence was not made out. However, there were cogent reasons of public policy - given the potential conflict between the interests of the child and those of the parents - for concluding that, where consideration was being given to whether the suspicion of child abuse justified taking proceedings to remove a child from the parents, a duty of care could be owed to the child without any common law duty of care being owed to the parents. In addition it was held that no violation of ECHR Article 6 was involved in the procedure of determining, by way of preliminary issues, whether the test of what was fair, just and reasonable precluded the existence of a duty of care.

The imposition of an automatic life sentence on a defendant who was known to be mentally ill but was not unfit to be tried because - pursuant to the Powers of Criminal Courts (Sentencing) Act 2000, s 109 (which also precluded the making instead of an unlimited restriction order under the Mental Health Act 1983, s 37) - he had then been convicted of a second 'serious offence' and who had been transferred 8 days later to a hospital under s 47 of the 1983 Act because his mental condition required treatment there which prison could not provide was held in *R v Drew* [2003] UKHL 25 not to be incompatible with ECHR Article 3 as: a sentence of imprisonment could be passed on a mentally disordered defendant who was criminally responsible and fit to be tried and the effect of s 109 was not to deny a mentally disordered defendant qualifying for an automatic life sentence the medical treatment which his condition required as the Secretary of State was obliged to act compatibly with the ECHR and s 47 of the 1983 Act empowered him to transfer the defendant for the treatment needed and the ill effects caused by the interruption of his medication were not of sufficient severity to engage the operation of Article 3. Furthermore, in the case of a defendant who appeared to present no danger to public, the court could the 'exceptional circumstances' provision in s 109 of the 2000 Act so as to relieve it of the need to impose an automatic life sentence and, in the case of a mentally disordered defendant, to allow it to make an order under s 37 of the 1983 Act. Furthermore in upholding an award of damages in respect of the strip search of two persons when visiting someone in prison only as regarded the battery involved in touching the penis of one of them, it was held in *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969 that the conduct of the searches - which were carried out in a matter-of-fact way without any wish to humiliate and which entailed only 'sloppiness' as regards failures to comply with the rules - came nowhere the degree of humiliation which had been held by the European Court of Human Rights to be degrading treatment contrary to ECHR Article 3. Furthermore, while ECHR Article 8 might justify a monetary remedy for intentional invasion of privacy, it was doubtful that a merely negligent act could give rise to a claim for damages for distress

because privacy was affected. In any event there was no common law tort of invasion of privacy.

See also the discussion under Article 3 of the Criminal Justice (Scotland) Act 2003, the discussion under Article 6 of the Extradition Act 2003 and the Mental Health (Care and Treatment)(Scotland) Act 2003, the discussion under Article 18 of *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 2 All ER 905, the discussion under Article 35 of *Simms v Simms* [2002] EWHC 2734 (Fam), [2003] 2 All ER 669 and the discussion under Article 47 of the Criminal Justice (Scotland) Act 2003.

Practice of national authorities

See the discussion under Article 6 on mental health and detention under the Anti-terrorism, Crime and Security Act 2001, under Article 18 on the detention of asylum-seekers, under Article 19 of a report by the Home Affairs Select Committee and under Article 24 of the annual report of the Northern Ireland Human Rights Commission and of the report of the Joint Committee on Human Rights.

Reasons for concern

The effect of the indefinite nature of the detention to which suspected terrorists who are not British citizens are being subjected, the source of the evidence being used to justify such detention, the conditions in which those detained are being held and the adequacy of medical care for prisoners in general.

Article 5. Prohibition of slavery and forced labor

National legislation, regulation and case law

The Sexual Offences Act 2003 has made it an offence to arrange or facilitate the movement of someone into, within or out of the United Kingdom in order to sexually exploit them. This extends a stop-gap measure adopted in the earlier Nationality, Immigration and Asylum Act 2002, ss 145.and 146. The Criminal Justice (Scotland) Act 2003, s 22 has created new offences of trafficking for the purposes of sexual exploitation (control over an individual for prostitution or involvement in the making or production of obscene or indecent material) in order to implement the terms of the European Council Framework Decision on Trafficking in Human Beings.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

International case law and concluding observation of international organs

Following the ruling in Eur.Ct.H.R., *Stafford v United Kingdom*, 28 May 2002, the fact that the continued detention of prisoners subject to mandatory sentences of life imprisonment after the expiry of the tariff (ie, the minimum period to be served to satisfy the requirements of retribution and deterrence and to benefit from the exercise of discretion to release on licence) was subject only to reviews by a body - the Parole Board - which did not have any power to order their release but could only make recommendations to the Secretary of State and which did so without any oral hearing or opportunity to cross-examine witnesses was found in Eur.Ct.H.R., *Von Bülow v United Kingdom*, 7 October 2003 and Eur.Ct.H.R., *Wynne v United Kingdom (no 2)*, 16 October 2003, to be violations of ECHR Article 5(4). In the case of *Wynne* it was also found that the impossibility at the time of obtaining compensation in respect of this breach of the ECHR was a violation of Article 5(5). Following the ruling in *Stafford* the Secretary of State announced interim measures applicable to the release of mandatory life sentence prisoners applicable to reviews from 1 January 2003, namely, that the recommendation of the Parole Board at the end of the review process - in which prisoners whose tariff had expired could apply for an oral hearing at which they may have representation, receive full disclosure of material relevant to the question of release and be able to examine and cross-examine witnesses - would normally be accepted.

The placing of the burden of proof on a detained person to show that he was not now suffering from a mental disorder of a nature or degree which made it appropriate for him to be liable to be detained in a hospital for medical treatment was found in Eur.Ct.H.R., *Hutchinson Reid v United Kingdom*, 20 February 2003 to be incompatible with the right to challenge the lawfulness of one's detention under ECHR Article 5(4). A violation of this right was also found as a result of the delay of three years, nine months and twenty-five days before the final determination - involving two appeals of his application for release.

See also the discussion under Article 4 of the February 2002 report on a visit by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the discussion under Article 11 of the Committee of Ministers' ruling with regard to Eur.Ct.H.R., *Steel and Others v United Kingdom*, 23 September 1998 and the discussion under Article 47 of *R (on the application of KB) v Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2003] 2 All ER 209.

National legislation, regulation and case law

The detention of resident aliens under the Anti-terrorism, Crime and Security Act 2001, s 23 - which gave the Secretary of State power to detain such persons where they could not be expelled in the ordinary way (eg, because of the risk of inhuman and degrading treatment to which removal would expose them) if he suspected they were terrorists - and the making of an order derogating from ECHR Article 5(1) was held in *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 1 All ER 816 not to be incompatible with the ECHR as there was ample material on which the Secretary of State could conclude that an emergency of the requisite quality existed and there were objectively justifiable and relevant grounds for either detaining or deporting only terrorist suspects who were aliens which did not involve impermissible discrimination since aliens who could not be deported had no legally enforceable right to remain, the Secretary of State's approach involved detaining them for no longer than was necessary before they could be deported or until the emergency resolved or they ceased to be a threat to the safety of the United Kingdom and the rational

connection between their detention and the purpose which the Secretary of State wished to achieve could not be applied to nationals. The Special Immigration Appeal Commission has ruled that the Secretary of State had reasonable grounds for forming his belief and suspicion that eight persons detained under s 23 for more than 20 months - 2 others detained around the same time had left the United Kingdom voluntarily after their initial arrest - were suspected international terrorists and national security risks. In so ruling it was held that the standard of proof was not the criminal one of beyond reasonable doubt but was even lower than the civil one of the balance of probabilities. Amnesty International has expressed concern that the rulings may have relied on evidence extracted under torture as there are reports that it included statements obtained in such circumstances from persons under American custody; press release, 29 October 2003. The continuation of the powers conferred by ss 21-23 of the 2001 Act has been authorised by the Anti-terrorism, Crime and Security Act 2001 (Continuation in Force of sections 21-23) Order 2003.

In Part 12 of the Criminal Justice Act 2003 a new scheme is established - responding to the rulings in Eur.Ct.H.R., *Stafford v United Kingdom*, 28 May 2002 (see above) and *R (on the application of Anderson v Secretary of State for the Home Department*, [2002] UKHL 46, [2002] 4 All ER 1089 - under which the court, rather than the Secretary of State, will determine the minimum term to be served in prison by a person convicted of murder. The length of this minimum term is to be determined by reference to a new statutory framework. Once the minimum term has expired the Parole Board will consider the person's suitability for release and, if appropriate, direct his release.

The Criminal Justice (Scotland) Act 2003, ss 27 and 28 remove the remaining ministerial discretion over the release of prisoners where release on licence has been recommended by the Parole Board. Section 40 also provides for the remote monitoring of prisoners released on licence.

Pursuant to the national jurisdiction established for magistrates by the Courts Act 2003 - see the discussion under Article 47 - s 43 of this Act now enables any magistrate to issue a summons requiring a person to appear before a magistrates' court or a warrant to arrest a person and bring him before a magistrates' court.

The Criminal Justice Act 2003, s 4 enables the immediate grant of bail from the scene of arrest where there is no immediate need to deal with the arrested person at a police station; the police have a discretion to decide when and where an arrested person should attend a police station for interview. Section 6 enables reviews of the continuing need for detention without charge to be conducted over the telephone - with a preference for video conferencing where available - rather than in person at the police station as is currently the case. The provisions in the 1984 Act enabling officers to detain a person after charge to test for specified class A drugs are extended by s 5 to persons who are aged 14 and above, with an appropriate adult being required for the testing of those under the age of 17. In addition s 7 extends the time for which someone may be detained without charge under the authority of a police superintendent from 24 to 36 hours for any and not just serious arrest able offences. Part 2 f the Act repeals the provision which purports to make it an exception to the right to bail that an offence appears to have been committed while the defendant was on bail for another offence and replaces it with a presumption that bail will not be granted in these circumstances to a defendant aged 18 or over unless the court is satisfied that there is no significant risk of his re-offending on bail. It also establishes a presumption that a defendant aged 18 or over who without reasonable cause has failed to surrender to custody will not be granted bail unless the court is satisfied that there is no significant risk that he would so fail if released. There is also a presumption that bail will not be granted for a person aged 18 or over who is charged with an imprisonable offence and tests positive for a specified Class A drug, if he refuses to undergo an assessment as to his dependency or propensity to misuse such drugs or following an assessment refuses any relevant follow-up action recommended unless the court is satisfied

that there is no significant risk of his re-offending on bail. In addition the bail appeals system is simplified by removing the High Court's jurisdiction where it is concurrent with that of the Crown Court and the prosecution's right of appeal against a grant of bail is extended to all imprisonable offences. Part 4 of the Act provides that, where a custody officer decides that there is sufficient evidence to charge a suspect who is in police detention, he is to have regard to guidance issued by the DPP in determining whether the suspect should be released without charge but on bail, released without charge and without bail or charged, with remand in custody then being sought from a court. Where, pursuant to that guidance, a case is referred to the Crown Prosecution Service to determine whether proceedings should be instituted (and if so on which charge) the defendant will be released on police bail with or without conditions. There is provision in ss 88-91 with regard to the grant of bail or the remand in custody of an acquitted person who has been charged with the same offence after new evidence becomes available (see the discussion under Article 50). After their arrest such persons must be brought before the Crown Court within 24 hours (excluding Sundays and bank holidays) for this purpose.

The Criminal Justice (Scotland) Act 2003, s 66 gives prosecutors a right of appeal against the grant of bail to a convicted person.

The Anti-Social Behaviour Act 2003, s 91 allows a local authority to request a power of arrest to be attached to any provision of an injunction obtained under the Local Government Act 1972, s 222 where the injunction is to prohibit behaviour which is capable of causing nuisance or annoyance to any person. Such a power may be attached if there is the use or threat of violence, or a significant risk of harm - including emotional or psychological harm, as in cases of racial or sexual harassment - to any person.

The Aviation (Offences) Act 2003 has extended the list of arrestable offences (ie, those for which an arrest can be made without a warrant) to any offence of contravening a provision of an air navigation order - made or to be made under the Civil Aviation Act 1982, s 60 - where such provision either prohibits specified behaviour by a person in an aircraft towards or in relation to a member of the crew or prohibits a person from being drunk in an aircraft, in so far as it applies to passengers, as well as in the case of Scotland only, where such provision prohibits specified behaviour by a person, being behaviour which is likely to endanger an aircraft or a person in an aircraft. The Railways and Transport Safety Act 2003 provides powers to arrest aviators and mariners reasonably suspected of performing aviation or maritime functions when their abilities are impaired because of drink or drugs or of having committed that offence and still being under the influence of drink or drugs. See also the discussion under Article 7 of this Act.

The Police (Northern Ireland) Act 2003, s 30 enables the Chief Constable to designate suitably skilled and trained civilians as investigating, detention and escort officers, with the relevant powers of arrest, entry, search and seizure, fingerprinting, photographing, taking non-intimate samples without consent, accessing confidential material, interrogation and transporting arrested persons to and between police stations or other locations. Where a power allows for the use of reasonable force when exercised by a constable, a person exercising that power under a designation has the same entitlement to use reasonable force. However, the exercise of the power to force entry to premises is limited to occasions when the designated person is under the direct supervision of a police officer except when its purpose is to save life or limb or to prevent serious damage to property. Provision to similar effect is made by s 31 enabling the Chief Constable, where a contract has been entered into with the private sector for the provision of services relating to the detention or escort of persons who have been arrested or are otherwise in custody, to designate an employee of the contractor as either a detention officer or an escort officer. S 38 makes it an offence to assault, resist, obstruct or impede a designated person in the execution of his or her duty. Similar provision to the foregoing is also made for Scotland by the Criminal Justice (Scotland) Act 2003, s 76.

There was held in *R (on the application of Morley) v Nottinghamshire Health Care NHS Trust* [2002] EWCA Civ 1728, [2003] 2 All ER 784 to be no duty for the Secretary of State to permit or consider representations from a prisoner before making a direction that a discretionary life sentence prisoner suffering from a psychopathic disorder should be returned from a secure hospital to prison after the responsible medical officer had given notification that no effective treatment for the prisoner's disorder was possible. It was also held that the transfer from prison to hospital and back to prison, as part of a high-security custodial regime, could not in the present circumstances breach ECHR Article 8, notwithstanding the differences in medical treatment which might occur. Furthermore the refusal of an oral hearing before the Parole Board for a prisoner who had served half a sentence of 7 years' imprisonment - which had been imposed by the judge in exercise of the power under the Criminal Justice Act 1991, s 2(2)(b) to pass a custodial sentence which was longer than the sentence which would be commensurate with the seriousness of the offences in order to protect the public from serious harm - and had become eligible for release on the Board's recommendation was held in *R (on the application of Giles) v Parole Board* [2003] UKHL 42, [2003] 4 All ER 429 to be justified as the review required by ECHR Article 5(4) had been incorporated in the sentence imposed by the judge because he had fixed the period of his sentence which was needed to protect the public from serious harm and, having been able to take that decision at the outset in the light of the information before the court, there was no risk that detention for the minimum period fixed by the sentence would become arbitrary.

Provision is made under the Crime (International Co-operation) Act 2003, ss 47 and 48 for both the transfer of prisoners from the United Kingdom to a participating country in the Convention on Mutual Legal Assistance in Criminal Matters and from such a country to the United Kingdom to assist with an investigation. In both cases such transfers must be with the consent of any prisoner concerned.

The law governing the treatment of the mentally ill in Scotland has been substantially reformed with the enactment of the Mental Health (Care and Treatment)(Scotland) Act 2003. Part 2 of the Act makes provision for the Mental Health Commission for Scotland to carry out investigations into a patient's case if it appears that he or she is being unlawfully detained in a hospital or that he or she may be or may have been subject or exposed to ill-treatment, neglect or some other deficiency in care or treatment and then make appropriate recommendations. Part 4 imposes obligations on local authorities with regard to the care and support of persons who are not in a hospital and who have or have had a mental disorder. It also imposes on them similar responsibilities and powers for investigation as apply to the Mental Health Commission in respect of persons with a mental disorder who are not being detained. Parts 5-7 makes provision for emergency detention in hospital for up to 72 hours on the certification of a medical practitioner, short-term detention for up to 28 days, the possibility of the latter detention being extended pending an application for a compulsory treatment order, the making of such orders by the Mental Health Tribunal for Scotland, the adoption of care plans for persons in respect of whom such orders have been made, as well as the procedures governing these and various requirement to review periodically the need for the detention and the abilities of the Commission to refer cases to the Tribunal and of the patient to seek revocation of orders. Persons not in detention but subject to a compulsory detention order who fail to attend for their treatment may be taken into custody for up to 6 hours for the purpose of obtaining it or, in the case of repeated failure, for up to 72 hours for the purpose of a making a medical examination. There is provision in Part 8 for the assessment of persons charged with an offence who appear to have a mental disorder and then to obtain a treatment order in respect of them. Such orders interrupt the running of time for the purpose of determining whether a prosecution is barred because of delay. In addition there is provision in Parts 9-11 for the detention of convicted persons who have a mental disorder and reviews of the orders made for this purpose, the transfer of prisoners for treatment for mental disorder and the urgent detention of acquitted persons who have a mental disorder. Part 16 regulates

the circumstances in which electro-convulsive therapy and certain other treatments may be used, both with and without the patient's consent. In Part 17 there is provision for the 'named person' - who performs various functions under the Act on behalf of a person suffering from a mental disorder - to be nominated by that person and for this role to be played by the person's nearest relative in the event of no one being nominated or that person declines to act. However, the definition of such a relative is broadened to include someone living with the person as husband and wife or in a same-sex relationship. This part also makes provision for persons with a mental disorder to have a right of access to independent advocacy and the provision of information to patients. It also regulates the use of special security for detained persons and the specification of the circumstances in which such security is to be regarded as excessive. In addition provision is made for the education of children unable to attend school because of measures taken under this Act, the mitigation of the adverse effect of compulsory measures on parental relations and the withholding of correspondence to and from persons detained under this Act where this is likely to cause distress or danger (although communications to and from certain correspondents including parliamentarians, ombudsmen, courts and legal advisers is specifically exempted from such control) .

The Extradition Act 2003 replaces existing legislation and makes provision for a simple fast-track extradition procedure for Member States of the European Union in order to give effect to the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). For this purpose two categories of states are elaborated, category 1 where the death penalty is not retained as a punishment under the general criminal law and category 2 comprising all others. The fast-track procedure applies to category 1. However, in respect of both categories the judge must decide whether the person's extradition would be compatible with his or her rights under the ECHR as incorporated by the Human Rights Act 1998 and must order his or her discharge if it would not be (ss 21 and 87). Furthermore the person must be discharged or the hearing adjourned if it appears to the judge that, by reason of his or her mental or physical condition, it would be unjust or oppressive to extradite him or her (ss 25 and 91). In addition provision is made for the determination of asylum claims by anyone in respect of whom an extradition request has been made, except in the case of a category 1 state which is the responsible state for determining asylum claims by the person concerned (ss 39, 40 and 121). Decisions on extradition requests from category 1 states are to be taken by the courts but the final responsibility for a decision rests with the Secretary of State in category 2 cases. In the latter cases a person's extradition must not be ordered if he could be, will be or has been sentenced to death unless the Secretary of State has received a written assurance which he or she considers adequate that a sentence of death will not be imposed or (if imposed, will not be carried out (s 94). Provision is also made in Part 4 for powers of entry, search and seizure and the taking of fingerprints, samples and photographs of persons arrested under an extradition arrest power, as well as for the extension to such persons of rights under criminal procedure to have someone informed when arrested and to have access to legal advice. Arrangements governing the grant of bail are set out in ss 198 and 199.

See also the discussion under Article 7 of *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin), the discussion under Article 24 of the Criminal Justice (Scotland) Act 2003, the discussion under Article 35 of *R (on the application of B) v Ashworth Hospital Authority* [2003] EWCA 547, [2003] 4 All ER 319, the discussion under Article 48 of *R (on the application of Mullen) v Secretary of State for the Home Department* [2002] EWCA Civ 1882, [2003] 2 All ER 613 and the discussion under Article 49 of the Criminal Justice (Scotland) Act 2003.

Practice of national authorities

The first *Anti-terrorism, Crime and Security Act 2001, Part IV Section 28 Review* (February 2003) has concluded that the Secretary of State has certified persons as international terrorists

only in appropriate cases and has exercised his independent judgement in each case, giving due regard to advice from officials. However, it recommended that substantive determination of appeals by Special Immigration Appeal Commission (SIAC) should not be adjourned pending the final determination of a challenge to the derogation under ECHR Article 15 (this has happened, see 'National legislation' above), consideration be given to removing the term 'links' from the definition of terrorism in s 21 and replacing it with supporting or assisting an international terrorist group, s 25 should be amended to ensure that appeals against certification may continue after the departure from the United Kingdom of a certified person, the effectiveness of and statutory inhibitions placed upon special advocates as protectors of the rights of detained persons should be kept under reviewed, the updating of the procedural rules of SIAC should not be delayed and steps should be taken to provide separate facilities more suitable to the special circumstances of executive detention of persons who have not been charged with any offences. It was also accepted that less intrusive measures such as electronic tagging should be considered as an alternative to detention.

After the Government laid a draft Order in Council to extend the powers under the Anti-terrorism, Crime and Security Act 2001, ss 21-23 to detain indefinitely without trial certain foreign nationals (see 'National legislation' above), the human rights implications of such an extension were examined by Parliament's Joint Committee on Human Rights. In its report, *Continuance in Force of Sections 21 to 23 of the Anti-Terrorism, Crime and Security Act 2001* (Fifth Report, 2002-03), the Committee found the safeguards - the availability of appeals to and reviews by SIAC and the rigorous review of the assessment of evidence of the threat to national security and terrorist links in individual cases required before an extension can be sought - to be sufficiently reliable to warrant the decision to seek Parliament's approval for the extension of the powers but drew attention to certain improvements that were needed in the operation of this power. It considered that the definition of 'international terrorist' in the Act could usefully be improved but was sufficiently clear as long as it can be shown that the power is being used in a justifiable way in all cases; the delay in commencing substantive hearings in respect of appeals before SIAC was a matter of considerable concern; there was a need for each House of Parliament to satisfy itself that legal assistance of appropriate quality was available to the detainees speedily so as to make effective the rights of appeal to and review by SIAC since any weakness in the provision of such assistance would tend to weaken the case for extending the operation of the detention provisions; the special advocate system to deal with 'closed' evidence before SIAC inevitably disadvantaged detainees and put a fair trial at risk and no piece of evidence should be considered as 'closed' unless withholding it from the detainee is strictly required by the exigencies of a public emergency threatening the life of the nation and the special advocate should be able to appear and make submissions about the 'closed' evidence as of right before the Court of Appeal and House of Lords, as well as before SIAC, in order to protect due process rights; and persons who have not been charged with any offence should have that status reflected in the circumstances of their detention, without compromising security. Amnesty International has issued a report condemning the indefinite detention that is possible under the Act and the failure to respect the presumption of innocence, the right to a defence and the right to counsel in the SIAC proceedings, as well as the possible use of evidence obtained by torture the low standard of proof (see 'National legislation ..'); *Justice perverted under the Anti-terrorism, Crime and Security Act 2001*.

The Privy Counsellor Committee required under the Anti-terrorism, Crime and Security Act 2001, s 122 to review the Act within two years of it being passed has issued its report, *Anti-terrorism, Crime and Security Act 2001 Review* (HC 100, 2003-04). The Committee recommended that the powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency by legislation which deals with all terrorism, whatever its origin or the nationality of its suspected perpetrators and not require a derogation from the ECHR. Furthermore it concluded that provisions in the Act which are not specifically targeted at terrorism - notably powers allowing public bodies to disclose

information to help investigations and prosecutions at home and abroad and open-ended powers to require phone and internet companies to retain billing information and call data for national security purposes - should be reconsidered, on their own merits, in the context of the mainstream legislation in which they belong. It also suggested that the blanket ban on the use of intercepted communications as evidence in court should be lifted, the scope for more intensive use of surveillance to prevent and disrupt terrorism should be examined and the Government's powers to amend any provision of the Act without primary legislation should be repealed. In addition, while supporting the strengthening of some specifically counter-terrorist powers related to the financing of terrorism, the freezing of assets of foreign individuals, the fingerprinting of terrorist suspects and the targeting of those who withhold information about terrorist offences, there was a need for better safeguards in some cases. In order to secure Parliamentary debate on all of the Act's provisions, it specified the whole Act for the purpose of s 123 so that it would cease to have effect after 6 months unless a motion is laid in each House considering the Report.

In a survey undertaken by the Institute of Race Relations - *Arrests under anti-terrorism legislation* - it appears that out of 304 arrests made under such legislation since 11 September 2001, only 40 have led to charges being brought and the 3 that resulted in convictions related to membership of banned organisations rather than to specific terrorist activity. Furthermore 6 of the 40 persons charged have been acquitted or had charges dropped and a further 31 are awaiting trial, with a significant number of the charges being for completely different issues, mainly immigration offences.

According to the latest monthly *Prison Population Brief*, the prison population in England and Wales in May 2003 was 72,632 (68,137 male and 4,495 female) which was an increase of 2% on the number in May 2002. There were 11,496 young prisoners (mainly 15-20), 2,261 juvenile prisoners (15-17) and 12,666 remand prisoners, representing decreases of 5%, 13% and 1% respectively. Of the sentenced prisoners, 7% were serving sentences of less than 6 months, 6% were serving sentences of 6-12 months, 36% were serving sentences of 1-4 years, 41% were serving sentences of over 4 years but less than life and 9% were serving life sentences. The prison population was 10% higher than the certified normal accommodation and 3,438 lower than the certified operational capacity. In the case of Scotland the average daily population for prisons was 6,404, an increase of 4%, of which 249 were female (representing an increase of 11%). The average daily remand population was 1,222, an increase of 27%, and of these 79 were female. There was an average of 597 sentenced young offenders (a decrease of 8%) and the number of long-term adult prisoners (ie, those sentenced to 4 years or more) increased by 3% to 2,487. The number of short-term adult prisoners (ie those sentenced to less than four years) increased by 1% to 2,038 and there was a fall from 7,216 to 7,074 in the number of receptions for persons who were imprisoned for defaulting on payment of a fine (*Prison Statistics Scotland, 2002*).

A report by the Northern Ireland Human Rights Commission - *Connecting Mental Health & Human Rights* - has concluded that the procedures for detention under mental health legislation in Northern Ireland do not appear to meet the standards of swiftness, independence and impartiality and has suggested the introduction of an automatic review of detention decisions by an independent tribunal. Furthermore it recommends that legislation should ensure that people with capacity to refuse treatment are no longer treated against their will, except in very limited circumstances, research should be carried out on the use of electro-convulsive therapy and other potentially irreversible treatments and the ending of the role of the nearest relative (see the discussion under Article 7 of *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin)) so that the individual with mental health problems can nominate a person he or she wishes to be consulted about their treatment. Concern was also expressed that people with mental health problems should be diverted from the criminal justice system to health and social services at the earliest possible point and it was stated that the services for children and young people with mental health problems are

inadequate. In its *Annual Report 2002-03* the Commission also stated that there had not yet been an adequate response to its concerns about the needs of children in custody.

Fair Trials Abroad has expressed concern the dangers of public panic in action to deal with terrorism, citing a case of an arrest in respect of terrorist offences where no evidence was ultimately offered in the prosecution for them after several weeks spent on remand, suggesting a flimsy basis for the initial deprivation of liberty; *Criminal Justice in the EU 2003*)

See also the discussion under Article 18 on the detention of asylum-seekers, the discussion under Article 19 of a report by the Home Affairs Select Committee, the discussion under Article 21 of the Prison Service and the discussion under Article 24 of the report of the Joint Committee on Human Rights.

Reasons for concern

The continued and indefinite nature of the detention without trial being used in respect of certain suspected terrorists, particularly given the possibility of using less restrictive surveillance techniques, the source and scope for challenging the evidence used to justify this detention in individual cases, the adequacy of judicial control over the detention of persons alleged to be mentally ill in some contexts and the size and continued rise of the prison population.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination expressed concern in its Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic about a disproportionately high number of 'stops and searches' being carried out by the police against members of ethnic or racial minorities (CERD/C/63/CO/11, 10 December 2003, para 19). It encouraged the United Kingdom to implement effectively its decision to ensure that all 'stops and searches' are recorded and to give a copy of the record form to the person concerned.

Violations of the right to respect for private life - on the basis that the impugned interferences were not 'in accordance with law' - were found in Eur.Ct.H.R., *Hewiston v United Kingdom*, 27 May 2003, Eur.Ct.H.R., *Chalkley v United Kingdom*, 12 June 2003 and Eur.Ct.H.R., *Lewis v United Kingdom*, 25 November 2003 as a result of the use of recording devices for the purpose of obtaining evidence for prosecutions when there was no statutory system to regulate their use. A statutory basis for such interferences has since been provided by the Police Act 1997 and the Regulation of Investigatory Powers Act 2000. The regulation by the police of a security camera so that it could take clear footage of someone who had refused to take part in an identity parade which was then inserted into a montage of film of other persons to show to witnesses for the purpose of seeing whether they identified that person as the perpetrator of robberies under investigation was also found in Eur.Ct.H.R., *Perry v United Kingdom*, 17 July 2003 to be a violation of the ECHR right that was not 'in accordance with law' since, although an appropriate legal basis for the taking of video film of suspects for identification purposes did exist, there had been a failure to comply with requirements to ask the suspect for his consent, to inform him of the video's creation and use in an identification parade and to inform him of his rights to view it, to object to its contents and to have a solicitor present when witnesses saw it.

The disclosure - directly to the public and for broadcasting - by a local authority of close-

circuit television footage relating to an attempted suicide in a public street by someone unaware that he was being filmed and in circumstances where his identity was not adequately (or at all) masked and his consent was not obtained was found in Eur.Ct.H.R., *Peck v United Kingdom*, 28 January 2003 to be an unjustified interference with his right to respect for private life, notwithstanding that it had the legitimate aim of public safety, the prevention of disorder and crime and the protection of the rights of others. It was also found that - given that at the time (prior to the entry into force of the Human Rights Act 1998) it was not possible for judicial proceedings to address the question of whether this interference answered a pressing social need or was proportionate to the aims pursued and that the media commissions were unable to award damages - there was no effective remedy for this violation of ECHR Article 8 and so there was also a violation of ECHR Article 13.

In Eur.Ct.H.R., *Beck, Copp and Bazeley v United Kingdom*, 22 October 2002, violations of ECHR Article 8 had been found in respect investigations concerning the homosexuality of three airmen and their subsequent dismissal from the air force, pursuant to a ban on homosexuals serving in the armed forces. The Committee of Ministers - having regard to measures taken to avoid new violations of the same kind, in particular through the introduction of *The Armed Forces Code of Social Conduct Policy Statement* lifting the ban on homosexuals serving in the military, and the sending of the judgment to the authorities directly concerned, as well as to the payment of the compensation awarded - has now declared that it has exercised its functions under ECHR Article 46(2). Similar investigations and inquiries into the sexual orientation of a serviceman and his subsequent discharge from the air force by reason of his homosexuality were the subject of a friendly settlement in Eur.Ct.H.R., *Brown v United Kingdom*, 29 July 2003.

See also the discussion under Article 47 of Eur.Ct.H.R., *Hatton and Others v United Kingdom*, 8 July 2003.

National legislation, regulation and case law

In rejecting claims for declarations that the consent given by the male partners of two couples who had sought fertility treatment and subsequently separated continued to be effective for the purposes of para 6(3) of Sch 3 to the Human Fertilisation and Embryology Act 1990 so that the stored embryos using the men's gametes could - notwithstanding their for them to be allowed to perish - be transferred to the women concerned to enable them to become pregnant, it was held in *Evans v Amicus Healthcare Ltd* [2003] EWHC 2161 (Fam), [2004] 4 All ER 903 that the only consent given by each of the male gamete providers had been for treatment 'together' with his partner and the time to ascertain whether a couple were being treated together was when the process of unfreezing and transfer of the embryos took place so neither couple was still being treated together and there was no effective consent by the male gamete providers to the continuing treatment of the women on their own. Although the provisions in Sch 3 of the 1990 Act permitting the male gamete providers to refuse access to the embryos by the women for transfer into them was an interference with the rights of both the female and the male gamete providers to respect for their private lives under ECHR Article 8, the right to family life was not engaged as the four adults lived separate lives and an embryo was not a person or individual with rights under the ECHR. However, this interference was necessary for the protection of the rights of all four and proportionate in its effect; the foundation of the legislation was a treatment regime based on the twin pillars of consent and the interests of the unborn child so it was entirely appropriate that it should be possible for either party to withdraw from the agreement about the treatment at any time before the created embryo was transferred into the female gamete provider. Furthermore the wider public interest of the proper operation of the scheme of licensed treatment under the 1990 Act did not allow the giving of an unequivocal consent to the use of embryos irrespective of any change of circumstances. However, following the Government's acceptance in court proceedings that it was incompatible with ECHR Article 8 that mothers

who have conceived children after the death of their husbands or partners using assisted conception techniques could not - pursuant to Human Fertilisation and Embryology Act 1990, s 28(6) - register the deceased husband or partner as the father on the child's birth certificate (as well as the *Review of the Common Law Provisions relating to the Removal of Gametes and of the Consent Provisions of theHuman Fertilisation and Embryology Act 1990*, July 1998), the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 now permits a man to be registered as the father of a child conceived after his death using his sperm or using an embryo created with his sperm before his death. Such registration will also be possible in the case of a child conceived after the father's death using an embryo created using donor sperm before his death in the course of treatment services provided for the woman and man together. In all cases such registration is dependent upon an election in writing by the woman not later than 42 days from the day on which the child was born, except in the case of children born before the coming into force of the Act where a period of 6 months from its coming into force applies. Registration entails a symbolic acknowledgement for the children of their father and does not confer upon them any legal status or rights.

The existing power in the Crime and Disorder Act 1998, s 8 to make parenting orders has been amended by Part 3 of the Anti-Social Behaviour Act 2003 (which only applies to England and Wales) by removing the restriction that guidance and counselling sessions cannot be provided more than once in a week, with the term 'sessions' being replaced by 'programme'. There is also a new power to allow a programme to consist of or to include a residential course provided the court is satisfied that this is likely to be more effective than a non-residential course and that any interference with family life is proportionate. Provision is also made by this Part of the 2003 Act for schools and local authorities to enter into parenting contracts where a pupil has been excluded from school for a fixed period or permanently or has failed to attend regularly at the school at which he or she is registered. A parenting contract is intended to improve the pupil's behaviour and/or to secure his or her regular attendance at school and is a document containing a statement by a parent that he or she agrees to comply with the requirements in it for the specified period and a statement by the local education authority or school governing body that they will provide or arrange support to the parent to help them comply with the requirements. Signing a contract will be voluntary for parents and non-compliance with it cannot lead to actions for breach of contract or for civil damages. Such contracts may also be arranged on the same basis by youth offending teams for parents of children who have engaged or are likely to engage in criminal conduct or anti-social behaviour. Existing powers to make parenting orders for parents convicted of school attendance offences have also been extended to cases where children have been excluded from school. Such an order will require compliance by the parent with the requirements in it for up to a year and in most cases to attend a counselling or guidance programme specified by the local education authority or school representative overseeing the order for up to three months. The programme may include a residential component where the court is satisfied that this is likely to be more effective than a non-residential course and where any interference with family life is proportionate. A parenting order may be sought by a local education authority as a first response or upon the parent's refusal to sign, or breach of, a parenting contract. A previous failure to sign or to comply with a parenting contract must in any event be taken into account by a court when deciding whether to make a parenting order. Any requirements in an order should not, as far as practical, conflict with the parent's religious beliefs or interfere with the parent's work or education. Non-compliance with requirements is an offence for which a fine may be imposed. Parenting orders may also be sought on the same basis by youth offending teams for parents of children who have engaged or are likely to engage in criminal conduct or anti-social behaviour. Although an offence is already committed by the parents of a registered pupil whose child fails to attend school regularly, the sanction of prosecution is supplemented in the 2003 Act by the authority given to local education authorities, school staff and the police to issue fixed penalty notices, discharging any liability to conviction by paying the penalty specified

The specification in the Mental Health Act 1983, s 26 of the 'nearest relative' of a patient detained under the Act by listing classes of relatives in order and providing that the person who is first described in the list should be appointed the nearest relative and the provision in s 29 for the removal or change of the nearest relative by the court without a patient being able to apply for such removal or change was held in *R (on the application of M) v Secretary of State for Health* [2003] EWHC 1094 (Admin) to be incompatible with the patient's right to respect for her private life under ECHR Article 8 insofar as she had no choice over the appointment, nor any means to change the appointment, of her nearest relative, one of the safeguards provided in the Act for persons deprived of their liberty (*cf* the Mental Health (Care and Treatment)(Scotland) Act 2003 discussed under Article 6).

The Courts Act 2003, s 52 gives court security officers - all of whom must be designated by the Lord Chancellor - power to search a person who is entering, or who is already in a court building and also any article in such a person's possession, powers that had previously been enjoyed by some persons performing this role. Such officers may require only removal of a coat, jacket, headgear, gloves or footwear but s 53 enables them to exclude or remove someone who has refused to submit to a search or who has refused their request for the surrender of an article where it is reasonably believed that such surrender is needed because it may jeopardise the maintenance of order in the court building or may risk the safety of a person in that building or because it may be evidence of or in relation to an offence. S 54 also enables a court security officer to seize an article where a request for its surrender has been refused and under s 55 this may be retained until the person concerned leaves the court building or, where it is reasonably believed to be evidence of or in relation to an offence, for 24 hours from surrender or seizure so that it can be drawn to the attention of a police officer.

The Railways and Transport Safety Act 2003 places the jurisdiction of British Transport Police over the railways entirely on a statutory basis. In addition it provides that provisions of of the Police Reform Act 2002 that relate to police powers and duties conferred on civilians shall apply to the British Transport Police so that the Chief Constable can designate suitably skilled and trained employees as community support officers, investigating officers (with the right to apply for and execute search warrants, to enter property and to seize and retain things for which a search has been authorised), detention officers (with power to require defined categories of persons to attend a police station to have their fingerprints taken, to carry out non-intimate searches of persons detained at police stations and to seize items found and to carry out intimate searches in the same limited circumstances applicable to police officers) and escort officers (with power to transport arrested persons to and between police stations, as well as to another location specified by the custody officer). British Transport police officers have the right to enter railway property (including stations and vehicles) - which is privately owned in order to ensure public safety and to prevent crime and disorder. Train companies can also be required to enter into agreements with the British Transport Police Authority with regard to transport policing and its funding. Under the Act a police officer in uniform may use reasonable force to board an aircraft or ship or enter any place if he or she reasonably suspects that he or she may wish to exercise the power conferred by it to administer a preliminary tests for drink or dugs. This Act provides for three preliminary tests - which are all made applicable also to motorists - in the form of taking a breath specimen by an approved device, a series of physical tests tasks and analysis of a specimen of sweat or saliva by an approved device. See also the discussion under Article 2 of this Act.

The Police (Northern Ireland) Act 2003, ss 41 and 42 confer the power to use reasonable force on doctors and nurses carrying out an intimate search and enable intimate samples - other than a sample of urine or a dental impression - to be taken by a registered health care professional as well as by a medical practitioner.

The Criminal Justice Act 2003, s 1 extends the definition of prohibited articles under the Police and Criminal Evidence Act 1984, s 1 so that it includes an article made, adapted or

intended for use in causing criminal damage so that the police can now stop and search a person reasonably suspected of carrying such an item. Section 2 allows persons who accompany constables executing search warrants actively to assist in searching premises. In addition the powers of the police are extended by ss 9 and 10 to enable them to take fingerprints and a DNA sample from a person whilst he is in police detention following his arrest for a record able offence Fingerprints taken under this provision will be subject to a speculative search across the crime scene database to see if they are linked to any unsolved crime and the DNA profile of an arrested person will be subject to a speculative search against the National DNA Database to see whether it matches a crime scene stain already held.

Under the Licensing Act 2003, s 97 a police officer may enter and search club premises where he or she has reasonable cause to believe that an offence in respect of controlled drugs has been, is being or is about to be, committed or there is likely to be a breach of the peace. Furthermore under s 179 of the same Act police officers or other authorised persons can enter premises to ensure that any licensable activities are being carried on under the appropriate authorisations and under s 180 police officers may enter and search premises where there is reason to believe an offence under the Act has been, is being or is about to be committed, and may use reasonable force to gain entry.

In upholding the quashing of checks by customs officers on three persons returning from a day-trip to France, it was held in *R (on the application of Hoverspeed Ltd) v Customs and Excise Commissioners* [2002] EWCA Civ 1804, [2003] 2 All ER 553, it was held that an inference of reasonable grounds - required by the Customs and Excise Management Act 1979, ss 163(1) and 163A for a check - could not be inferred from the fact that the officers had decided to check someone who, on checking, had proved to be in possession of cigarettes, alcohol and tobacco in excess of the quantities mentioned in Article 9 of Council Directive (EEC) 92/12 and the Schedule to the Excise Duty (Personal Reliefs) Order 1992 in circumstances where they could not provide any positive reason for suspicion. Although 'reasonable grounds to suspect' might in appropriate circumstances derive from information by way of profiles or trends, customs officers should always be careful not to succumb to sterile and unfounded stereotypes. However, it was also held that the powers of seizure under the Act were not dependent on the exercise of any power to stop and search provided in other sections so that decisions quashing decisions to seize the cigarettes, tobacco and alcohol found in the checks, as well as the car used to carry them, would be set aside.

The tribunal set up under the Regulation of Investigatory Powers Act 2000 to deal with complaints about unlawful surveillance has quashed rules made by the Home Secretary forcing it to hold all its hearings in secret; British Irish Rights Watch, *Annual Report 2003*.

Provision is made in the Crime (International Co-operation) Act 2003 for a foreign surveillance operation, initiated in one participating country in the Schengen Convention, to continue lawfully to keep an individual under surveillance for a period of up to 5 hours where the person travels unexpectedly to another participating country. Foreign police officers carrying out such surveillance are not subject to civil liabilities in relation to conduct which is incidental to surveillance which is lawful but NCIS will be liable for any damage they may commit or legal action to which they may be subject.

In allowing claims for damages in respect of the publication by a magazine of photographs of the wedding of two film stars that were taken without authorisation after eluding security arrangements designed to preserve the exclusive photographic rights of another magazine, it was held in *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996 that there was no presumptive priority given to freedom of expression when it was in conflict with another ECHR right or rights under the law of confidence and the effect of the Human Rights Act 1998, s 12 was that the court had to have regard to any relevant privacy code, in the

instant case that of the Press Complaints Commission, with ECHR Article 10(2) considerations of privacy trumping a claim to freedom of expression in the absence of any public interest. There had been an unjustified intrusion into individuals' private lives without consent of which the defendants knew or ought to have known and, regarding the case as either one of commercial confidence - the claimants being in a position akin to that of holders of a trade secret - or a hybrid in which, by reason of it having become a commodity, elements that would otherwise have been merely private became commercial, the defendants had acted unconscionably and by reason of breach of confidence were liable to the claimants to the extent of the detriment which was thereby caused to them.

In finding that a possession order could be granted to a housing authority in respect of a house where one of the joint tenants had given a valid notice to quit and the other sought to continue living, it was held (3-2) in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2003] 4 All ER 461 that, although the respondent's tenancy had come to an end, he continued to have sufficient and continuous links with it for it to be his home for the purposes of ECHR Article 8 but such interference with the right to respect for home as flowed from the application of the law which enabled a public authority landlord to exercise its unqualified right to recover possession, following service of a notice to quit which terminated the tenancy, with a view to masking the premises available for letting to others on its housing list did not violate the essence of the right.

See also the discussion under Article 3 of the Sexual Offences Act 2003, the discussion under Article 4 of *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796 and of *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, the discussion under Article 6 of the Mental Health (Care and Treatment)(Scotland) Act 2003, the Police (Northern Ireland) Act 2003 and of *R (on the application of Morley) v Nottinghamshire Health Care NHS Trust* [2002] EWCA Civ 1728, [2003] 2 All ER 784, the discussion under Article 10 in respect of *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1820, [2003] 1 All ER 3, the discussion under Articles 11 and 20 of the Communications Act 2003, the discussion under Article 12 of Parts 4 and 7 of the Anti-Social Behaviour Act 2003, the discussion under Article 17 of Part 1 of the Land Reform (Scotland) Act 2003, the discussion under Article 18 of *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 2 All ER 905, the discussion under Article 19 of in *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [2003] 3 All ER 1265, the discussion under Article 20 of the Communications Act 2003, the discussion under Article 23 of *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673, the discussion under Article 34 of Part 2 of the Anti-Social Behaviour Act 2003 and the discussion under Article 48 of *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 3 All ER 760.

Practice of national authorities

The Joint Council for the Welfare of Immigrants and five other national organisations have drawn attention to an 'alarming increase' in refusals of visit visa for those wishing to visit family members in the United Kingdom. Their analysis of the entry clearance figures for British embassies and high commissions abroad shows that, in the latter half of 2002, applications to visit relatives in Britain made at entry clearance posts in India and at others such as Cairo, Nairobi, Nicosia and Tehran were, on average, twice as likely to be turned down as they were in the first half of 2002. The refusal rates were highest in countries with large Muslim populations whereas those for countries in North and South America actually fell (JCWI press release, 21 May).

Black people are eight times more likely to be stopped than white people and for Asian people the ratio is three times; since 2000-01 searches of black and Asian people have increased by

an average of 6% and 16% (30% and 40% in London) respectively while those of white people have fallen on average by 2% (8% in London); Commission for Racial Equality press release, 17 March. However changes to the police stop and search code (Police and Criminal Evidence Act (PACE) code A) entered into force on 1 April, stressing that searches must be based on evidence and not hunches and requiring that comprehensive information about ethnicity (self-defined and police-perceived) be recorded so that monitoring can be undertaken.

An analysis of the surveillance of telecommunications shows that authorisations have more than doubled since 1997, rising from 1,370 to 3,427 in 2001, with the increase being obscured by the ending of the need to seek a new warrant for 'modifications' to an existing one. There has also been a lengthening of the periods for which warrants are valid, rising from 3 to 6 months in the case of serious crime and from 8 to 12 months for warrants concerned with national security and economic well-being (Statewatch, *Surveillance of communications goes through the roof*).

The Information Commissioner has published *Monitoring at* Work (11 June 20093), the third part of the Employment Practices Data Protection Code, providing clear and practical guidance for employers about monitoring employees in the work place. It does not impose any new legal obligations but makes it clear that if an employer has to check how employees are using computers at work, he or she should make sure they know how and why the checks will be carried out. Furthermore if any monitoring is to take place it must be open and transparent and with the knowledge of the employee; there would be only a few circumstances in which covert monitoring would be justified.

The Fifth Report of the House of Commons Culture, Media and Sport Select Committee (*Privacy and Media Intrusion*, HC 667) concluded that the door-stepping of people who have refused to be interviewed - and broadcasting of the result - should only be undertaken in important cases of significant public interest, that OFCOM and all the broadcasters should engage with the Press Complaints Commission and the press industry to develop ways of tackling the media scrums that gather at the scent of a story, the Code of Practice administered by the Commission should extend the ban on intercepting telephone calls to all modern forms of communication and should explicitly ban payments to the police for information, the lay membership of the Press Complaints Commission should be appointed under open procedures, press members who preside over persistently offending publications be required to stand down and an independent appointments commission be established, a publication required to publish a Commission adjudication should make a prominent reference to it on its front page, press archives should be annotated as to their accuracy and sensitivity and consideration should be given to agreeing a fixed scale of compensatory awards, possibly paid to a charity of the complainant's choice rather than directly. It firmly recommended that the Government bring forward legislative proposals to clarify the protection that individuals can expect from unwarranted intrusion by anyone - not the press alone - into their private lives so as fully to satisfy the obligations under ECHR Article 8. The Government has since indicated that it does not accept the case made by the Committee for introducing a privacy law; *The Government's Response …*, Cm 5985.

See also the discussion under Article 6 of the review by the Privy Counsellor Committee and the discussion under Article 19 of a report by the Home Affairs Select Committee and under Article 24 of a report of the Joint Committee on Human Rights.

Reasons for concern

The impact of the application of visa controls on the maintenance of family relationships, the disproportionate use of stop and search powers against persons belonging to ethnic minority

groups, the extent of intrusion into private life by public and private bodies - especially the media - and the adequacy of the remedies in respect of such intrusion were it is unjustified.

Article 8. Protection of personal data

National legislation, regulation and case law

The insertion of s 64(1A) in the Police and Criminal Evidence Act 1984 by the Criminal Justice and Police Act 2001 to enable the police to retain the lawfully-taken fingerprints and samples of unconvicted persons with the aim of prosecuting and preventing crime was, given its limited scope and consequential benefits, found in *R (on the application of S) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275, [2003] 1 All ER 148 to be a justifiable interference with the right to respect for private life. Furthermore the differential treatment between individuals from whom such material had been taken and those from whom it had not was fully justified as no harmful consequences would flow from the retention unless the fingerprints or samples matched those of someone alleged to be responsible for an offence.

The Criminal Justice (Scotland) Act 2003, s 56 provides a statutory basis for the police to take, retain and use fingerprints, other prints and impressions and samples with the written consent of an individual, either for the investigation of a particular offence or for any offence, depending on the consent given. There is also provision for the withdrawal of this consent, whereupon the print or sample and information derived therefrom must be destroyed but this will not affect the admissibility of evidence obtained before the withdrawal.

Part 1 of the Crime (International Co-operation) Act 2003 largely replaces the existing mutual legal assistance legislation, implementing the mutual legal assistance provisions of the Schengen Implementing Convention of 14 June 1985 that are not repealed and replaced by ones in the Convention on Mutual Assistance in Criminal Matters 2000 and those of the latter Convention itself. In particular it deals with the making of requests to obtain evidence from abroad in relation to a prosecution or investigation taking place in the United Kingdom and responding to requests to obtain evidence in relation to such proceedings taking place abroad. The latter includes provision for the issue and execution of a search warrant in the same circumstances as would be possible in relation to a domestic case. Pursuant to s 9, evidence obtained from an overseas authority may be used only for the purposes for which it was requested (unless the consent of that authority has been obtained). In addition Chapter 4 of Part 1 implements the 2001 Protocol to the 2000 Convention, which creates obligations for participating countries to respond to requests for assistance with locating bank accounts and to provide banking information relating to criminal investigations. Where an application for a customer information order has been authorised by the Secretary of State, a financial institution specified ion it must provide details of any accounts held by the person who is the subject of an investigation into serious criminal conduct. It is an offence for such an institution or employee thereof to inform customers of requests for this information. Provision is also made for requesting similar assistance - by way of a judicial authority - about accounts in participating countries where the investigation is in the United Kingdom. Part 3 of the Act makes provision for notifying a central authority of an EU Member State about driving disqualifications of persons normally resident there and for the enforcement of similar notifications in respect of persons resident in the United Kingdom. In addition it extends the permission of the Serious Fraud Office to disclose information for the purposes of any prosecution to an ability to make such disclosure for the purposes of any criminal investigation, whether in the United Kingdom or elsewhere. It also allows the Information Commissioner to inspect personal data recorded in the United Kingdom sections of three European information systems - the Schengen Information System, the Europol Information System and the Customs Information System - without warrant, so as to facilitate the Commissioner's independent power of supervision to ensure compliance with the processing

requirements of the Data Protection Act 1998. Furthermore authority is given for the driver and vehicle licensing bodies to disclose certain data relating to driver licensing for the purposes of the Schengen Information System. Part 4 of the Act implements additional measures set out in the Schengen Convention in the area of police co-operation and data protection.

Part 10 of the Criminal Justice (Scotland) Act 2003 amends the legislation concerned with the issuing of certificates showing criminal conviction and criminal record information. Applications for such certificates must be countersigned by someone listed on a register maintained for this purpose and it is now possible to refuse to include someone in it, or remove someone from it, where ministers consider that that person's registration is likely to make it possible for an unsuitable person to have access to criminal record information.

The Privacy and Electronic Communications (EC Directive) Regulations 2003 entered into force on 11 December 2003 superseding earlier regulations. They require that: public electronic communications service providers take appropriate technological and organisational measures to safeguard the security of its services and proactively inform subscribers about any significant risk remaining where such measures have been taken and about safeguards that can be taken; cookies or similar devices generally not be used unless the subscriber or user of the relevant terminal equipment is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information and is given the opportunity to refuse that storage or access; traffic data relating to subscribers or users which are processed or stored by a public communications provider be, when no longer required for the transmission of a communication, erased or modified so that they cease to constitute personal data of the subscriber or user unless processed or stored in connection with the payment of charges or the provision of value-added services; subscribers be entitled, upon request to receive bills which are not itemised; provision be made for the prevention of calling line identification in the case of outgoing and incoming calls; the processing of location data relating to a user or subscriber only occur where the person concerned cannot be identified from such data or where necessary for a value-added service; anything done to prevent the presentation of the identity of a calling line where the tracing of malicious calls has been requested and such overriding is necessary for this purpose. The regulations also prohibit the transmission by means of a facsimile machine of unsolicited communications to an individual subscriber for direct marketing purposes and unsolicited calls for those purposes where either notification has been given to the caller that such calls should not be made or the subscriber's number is listed on a register kept with that objective. In addition they require that organisations generally should collect email addresses on an opt-in basis and prohibit use of electronic mail for direct marketing purposes where the identity or address of the sender is concealed. Provision is also made for proceedings for compensation for failure to comply with the requirements of the regulations but it is also stipulated that nothing in the regulations shall require a communications provider to do, or refrain from doing, anything (including the processing of data) if exemption from the requirement in question is required for the purpose of safeguarding national security. A certificate signed by a Minister of the Crown shall be conclusive evidence of the fact that such an exemption is required.

The Local Government Act 2003, s 85 - through an insertion of a new paragraph 18A into Schedule 2 to the Local Government Finance Act 1992 - enables billing authorities to use information which it has obtained for the purpose of carrying out its council tax functions for the purpose of identifying vacant dwellings or taking steps to bring vacant dwellings back into use. The extent of the personal information which may be shared is limited to an individual's name or an address or number (eg, telephone number) for communicating with him. The Government considers that any data sharing permitted by this provision does not interfere with an individual's right to privacy as the data will be used only by the billing authority which collected it and it will only be used for public functions in the public interest; it does

not permit disclosure to third parties such as commercial organisations. In the event that there is any such interference, the Government takes the view that it is justified and proportionate to the policy aims relating to the economic well-being of the country.

See also the discussion under Article 11 of *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 22.

Practice of national authorities

The Information Commissioner has issued his *Policy on Handling Assessments* (8 January 2003) in which he explains his approach to the performance of the duty under the Data Protection Act 1998, s 42 to make assessments as to whether it is likely or unlikely that processing is in accordance with the provisions of the Act. It makes it clear that, where the Commissioner considers that action by a data controller is required, this should normally be sought through discussion and negotiation but that the use of formal enforcement powers should be considered where such an approach fails, the data controller is clearly in breach of basic requirements of the Act or the circumstances of the assessment make this approach inappropriate (para 2.10). The Commissioner has also launched a project which aims to identify ways of simplifying data protection regulation as its complexity is seen as getting in the way of ensuring that real protection is achieved in practice. The aim is to look for changes in policy and procedure, as well as revisions to secondary legislation, which add up to fewer burdens on business and better protection for ordinary people (16 July 2003).

See also the discussion under Article 2 about the Information Commissioner, the discussion under Article 6 of the review by the Privy Counsellor Committee and the discussion under Article 24 about the Protection of Children (Scotland) Act 2003.

Reasons for concern

The observance in practice of data protection requirements.

Article 9. Right to marry and right to found a family

National legislation, regulation and case law

There was held in *R (on the application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages* [2002] EWCA Civ 1661, [2003] 1 All ER 540 to be no public policy implication which entitled the grant of relief requiring the Registrar General not to issue a certificate allowing the solemnisation of the marriage between a remand prisoner awaiting trial for murder and the woman with whom he had been living for several years, whose witness statements were the major evidence against him, notwithstanding that she would then cease to be a compellable witness against him. Furthermore, in the absence of words making it clear that the director could object to the marriage, the matters which the prison director could take into account in the exercise of his discretion related only to the convenience and the availability of the establishment.

A ruling that a person correctly classified - in accordance with the chromosomal, gonadal and genital tests - and then registered as male at birth could not be regarded as female after undergoing gender reassignment treatment for the purposes of the Matrimonial Causes Act 1973, s 11(c) - which provided that a marriage was void unless the parties were 'respectively male and female' - was upheld in *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 All ER 593 as a conclusion to the contrary would represent a major change in the law, having far-reaching qualifications, which was pre-eminently a matter for Parliament. However, it was also held that the non-recognition of gender reassignment was not compatible with ECHR

Articles 8 and 12 and a declaration of incompatibility was issued pursuant to the Human Rights Act 1998, s 4, notwithstanding that the government was committed to giving effect to the ruling to that effect in Eur.Ct.H.R., *Christine Goodwin v United Kingdom*, 11 July 2002.

Although the Human Fertilisation and Embryology Act 1990, s 28(3) provides that a man could to be treated as the father of a child born as a result of IVF treatment where the creation of the embryo carried by a woman to whom he was not married was not brought about with his sperm, it was held in *Re R (a child)* [2003] EWCA Civ 182, [2003] 2 All ER 131 that such an unusual provision - conferring the relationship of parent and child on people who were related neither by blood nor by marriage - should only be applied in cases falling within the statutory language and the requirement that the embryo had to be placed in the mother at a time when treatment services were being provided for the woman and the man together was not fulfilled where she became pregnant when continuing treatment after they had separated.

See also the discussion under Article 35 of *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2002] EWHC 2785 (Admin), [2003] 2 All ER 105.

Article 10. Freedom of thought, conscience and religion

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination, in its Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic reports (CERD/C/63/CO/11, 10 December 2003), recommended that - given the recognition of the 'intersectional' of racial and religious discrimination seen in the prohibition of discrimination on ethnic grounds against such communities as Jews and Sikhs - religious discrimination against other immigrant religious minorities should likewise be prohibited (para 20). In addition it was concerned about reported cases of 'Islamophobia' following the 11 September attacks and also regretted that incitement to racially motivated religious hatred was not outlawed (para 21). It thus recommended that early consideration be given to the extension of the crime of incitement to racial hatred to cover offences motivated by religious hatred against immigrant communities.

See also the discussion under Article 7 of Part 3 of the Anti-Social Behaviour Act 2003.

National legislation, regulation and case law

Under the Local Government Act 2003, s68 the exemption from non-domestic rates for places of public religious worship is no longer dependent upon them being certified as places of religious worship under the Places or Worship Registration Act 1855 if they do not belong to the Church of England or the Church in Wales. This change anticipates plans to allow marriages to take place anywhere and the consequential abandonment of the requirement that certified places of religious worship be registered for the purposes of marriage.

The prohibition in the Education Act 1996, s 548(1) of the use of corporal punishment in both independent and state schools was held in *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1820, [2003] 1 All ER 385 not to infringe the rights of teachers and parents at certain independent schools either to freedom of religion or education in conformity with religious convictions as the punishment could be performed by the parents themselves. Furthermore the prohibition did not interfere with their right to respect for private and family life as participation in state-required education, albeit by means other than those provided by the state itself, took the child outside the private and family sphere. Moreover it was held that it would be completely artificial to regard the teachers when they inflicted corporal punishment, or the schools when - with the consent of

the parents - they included corporal punishment within the school regime, or the parents when they sent their children to such schools, as expressing or imparting information and, in any case, beliefs could still be imparted even if they could not be acted upon.

The Criminal Justice (Scotland) Act 2003, s 74 requires courts when sentencing to take account of the fact that the offence concerned was aggravated by religious prejudice not just on the basis of actual religious belief but on the accuser's perception of the religious, social or cultural affiliation of the individual or group targeted by the offender.

See also the discussion under Article 19 of *R (on the application of Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 3 All ER 1174 and the discussion under Article 21 of the implementation of an EC Directive.

Practice of national authorities

The House of Lords Select Committee on Religious Offences in its report on *Religious Offences in England and Wales* agreed that there should be a degree of protection of faith but there was no consensus amongst its members on the precise form that it might take. However, they were agreed that in any further legislation the protection should be equally available to all faiths through both the civil and criminal law, which is not the current position.

Reasons for concern

The incidence of religious discrimination and Islamophobia.

Article 11. Freedom of expression and of information

International case law and concluding observation of international organs

In Eur.Ct.H.R., *Steel and Others v United Kingdom*, 23 September 1998 violations had been found of ECHR Articles 5(1) and 10 as a result of the arrest and detention pending trial for causing a breach of the peace in the context of various demonstrations in which some of the applicants had taken part. The Committee of Ministers - having regard to the United Kingdom's statement that, on account of the specific circumstances of the case, new similar violations of the ECHR could be avoided by informing the authorities concerned of its requirements, with copies of the judgment having been sent to them and it being published in a legal journal - has now declared that it has exercised its functions under former ECHR Article 54 in this case (Resolution ResDH(2003)161, 20 October 2003).

See also the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003).

National legislation, regulation and case law

The Communications Act 2003 embodies a substantial reform of the regulatory framework for the communications sector, involving the transfer of functions from bodies that regulate telecommunications and broadcasting and manage the radio spectrum to a new Office of Communications (OFCOM) and giving effect to a significant proportion of the EC Communications Directives adopted in February 2002 (the remainder will be implemented by secondary legislation or administrative action). OFCOM's principal duty is to further the interests of citizens and to further consumer interests in relevant markets, where appropriate by promoting competition. In carrying out its functions it must secure: the optimal use of the radio spectrum; the availability throughout the UK of a wide range of electronic communications services; the availability in the UK of a wide range of television and radio

services, comprising high quality services of broad appeal; the maintenance of sufficient plurality of providers of different television and radio services; the application in television and radio services of standards that provide adequate protection to members of the public from any offensive and harmful material; and the application in television and radio services of standards that safeguard people from being unfairly treated and from unwarranted infringements of privacy. It must also have regard, wherever relevant, in the performance of its duties to: the desirability of promoting the fulfilment of the purposes of public service broadcasting; the desirability of promoting competition in relevant markets; the desirability of promoting and facilitating the development and use of effective self-regulation; the desirability of encouraging investment and innovation; the desirability of encouraging the availability and use of high speed data transfer services; the different needs of all existing and potential users of the radio spectrum; the need to guarantee an appropriate level of freedom of expression when applying standards relating to offensiveness, harm, unfairness and privacy to television and radio services; the opinions of consumers and of members of the public generally; the need to protect potentially vulnerable members of society such as children, the elderly, those with disabilities and those on low incomes; the desirability of preventing crime and disorder; and the interests of those living in different parts of the country, including rural and urban areas, and of different ethnic communities. In each case regard can also be had to the extent to which it is reasonably practicable for it to further the foregoing duties and OFCOM has a duty to resolve conflicts that may arise between their general duties but those under Community law should prevail. In the new regulatory framework for electronic communications networks, services and associated facilities there will be no need to apply for a licence; would-be providers need only notify OFCOM of their intention to do so and then comply with the regulatory conditions regarding service and access, including must-carry obligations relating to television services. It is an offence under s 127 to send a message or other matter that is grossly offensive or is of an indecent, obscene or menacing character (other than in the course of providing a programme service) by means of a public electronic network or to cause such a message or matter to be sent. It is also an offence to use such a network for the purpose of causing annoyance, inconvenience or needless anxiety. There is also provision for enforcement notifications to stop persistent misuse. Under s 132 the Secretary of State can direct OFCOM to issue a direction suspending or restricting - indefinitely or for a fixed period - a person's entitlement to provide an electronic communications network or service or facility where he or she has reasonable grounds for believing that it is necessary to do so to protect the public from any threat to public safety or public health or in the interests of national security. The television licensing regime covers cable, terrestrial and satellite services other than the BBC (apart from matters relating to unfairness and unwarranted infringement of privacy) but excludes Internet services, such as web-sites and web-casting, and puts some responsibilities in respect of broadcasting in Wales on the Welsh Assembly. Certain licensed services have public service broadcasting obligations and a requirement to carry certain channels or services. All public service channels can be required to secure that at least 25% of the time - a figure that can be altered by the Secretary of State - allocated to the broadcasting of qualifying programmes on that channel is allocated to the broadcasting of a range and diversity (judged both in terms of the types of programmes involved and of the cost of their acquisition) of independent productions. Conditions can also be included in the licences of public service channels to secure the inclusion of news and current affairs programmes in an appropriate proportion of the broadcasting time and in the case of certain channels of programmes that are regionally-made and produced for schools, with different ones being specified according to the channel concerned. Provision is also made for a code in respect of the use of subtitling, audio-description and sign language to promote understanding and enjoyment by the deaf and visually impaired. Conditions may also be set to maintain the character of sound broadcasting services and to secure local content. The duty of OFCOM to set standards for the content of television and radio services will be met through the adoption codes - together with appropriate conditions in licences - securing objectives relating to: the protection of minors; the prohibition of material likely to encourage crime and disorder; the impartiality of

television and radio services; the accuracy of news; the content of religious programmes (particularly to safeguard against the improper exploitation of any susceptibilities of the audience or the abusive treatment of the religious views and beliefs of those belonging to a particular religion or denomination); the protection of the public from offensive and harmful material; the exclusion of advertising contrary to a specific ban on political advertising (something which, following the ruling in Eur.Ct.H.R., *Vgt Verein gegen Tierfabriken v Switzerland*, 28 June 2001 precluded the making of a statement of compatibility under the Human Rights Act 1998, s 19(1)(b) with respect to this legislation); the prevention of misleading, harmful or offensive advertising and unsuitable sponsorship; compliance with the UK's international obligations with respect to advertising; the prevention of undue discrimination between advertisers; and the prohibition of broadcasts of subliminal material. The licence of public service channels and national radio services must include a requirement to broadcast party political broadcasts and referendum campaign broadcasts and to observe associated rules on the determination as to who may broadcast and for how long. The Secretary of State can require OFCOM to issue a direction to licence holders to include a particular announcement in their service at specified times or require it to direct licence holders to refrain from including any particular matter in their services. OFCOM may direct the broadcast of a correction or a statement of its findings in relation to a contravention of licence conditions, such a breach of its standards code. Provision is also made for the consideration of complaints by OFCOM regarding fairness and privacy but it will no longer be possible for complaints to be made with regard to standards (ie, involving the portrayal of violence or sexual conduct or infringement of standards of taste and decency).The Secretary of State can, after being notified by OFCOM that a foreign television or sound service repeatedly contains programmes with content that offends taste or decency, is likely to incite crime or disorder or is likely to be offensive to public feeling, issue a proscription order regarding its inclusion in any multiplex or cable package service where satisfied that this is in the public interest and compatible with the UK's international obligations. Licences for services can only be granted to fit and proper persons and can be revoked for breach of their terms. Religious bodies are disqualified from holding licences national public service television channels, national sound broadcasting, public teletext and radio and television multiplex. However, rules relating to newspaper ownership now only apply in respect of one of the two terrestrial public service licences that are not publicly-owned (for Channel 3) and these exclude persons from holding such a licence if he runs national newspapers with more than 20 per cent of the total national market and such a person cannot hold more than a 20 per cent share of a company granted such a licence. Moreover a license-holder cannot own more than a 20 per cent share of a national newspaper with more than a 20 per cent share of the total national market. One person cannot own more than one radio multiplex licence at the same time and there is a limit of one multiplex licence per owner in areas where there is an overlap of services where the audience of one service includes at least half the potential audience of the other. Limits may also be set by the Secretary of State on the holding of licences because of the degree of overlap, the size of the potential audiences, the extent to which there would be other persons with licences, the running of national or local newspapers. OFCOM is obliged to vary the conditions of a Channel 3 and 5 licences following a change of corporate control where this is seen as prejudicial to the quality and range of regional programming and the time for original productions and news respectively. Similar obligations apply in respect of changes of corporate control over the holders of sound broadcasting licences. A television receiver cannot be installed or used without a licence issued by the BBC. The 2003 Act also repeals the existing special newspaper merger regime, whereby the Secretary of State's prior consent was required for a transfer of a newspaper or newspaper assets to a newspaper proprietor whose tittles (Including those being acquired) have an average paid for circulation of 500,000 copies or more per day. The treatment of newspaper mergers is now integrated with that in the Enterprise Act 2002 whereby decisions on mergers are taken against a competition-based test of whether they result in a substantial lessening of competition but with a mechanism allowing the Secretary of State to intervene and decide on particular mergers that raise specified public interest considerations. National

security is the only one currently specified in the 2002 Act but the 2003 Act provides further ones in the case of newspapers, namely, the need for accurate presentation of news and free expression of opinion in newspapers and the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers). Further public interest considerations are also specified with respect to media and cross-media mergers, namely, the need for plurality of persons with control of media enterprises, the need for the availability of a wide range of broadcasting and the need for persons carrying on such enterprises to have a genuine commitment to the broadcasting standards objectives OFCOM is required to carry out regular reviews of the operation of all media ownership provisions and make recommendations as to whether provisions should be modified, repealed or revoked.

The refusal to broadcast on grounds of taste and decency - pursuant to the Broadcasting Act 1990, s 6(1) - a video which illustrated graphically, but honestly and unsensationally, what was involved in abortion processes and included clear images of aborted foetuses in a mangled and mutilated state and which had been prepared by a registered political party opposed to abortion as a party election broadcast was held (4-1) in *R (on the application of ProLife Alliance) v British Broadcasting Corporation* [2003] UKHL 23, [2003] 2 All ER 977 that, although ECHR Article 10 did not entitle a political party to make free television broadcasts, the principle underlying the article required that access to an important public medium of communication should not be refused on discriminatory, arbitrary or unreasonable grounds and a restriction on the content of a programme produced by a political party to promote its stated aims had to be justified otherwise it would not be acceptable. However, the court considered that it was for the broadcasters to apply the right standard and not for the court reviewing any decision to carry out its own balancing exercise between the requirements of freedom of expression and the protection of the public from being unduly distressed in their own homes as Parliament had decided where the balance should be held., with the latter interest prevailing over the former to the extent that the offensive material ban applied without distinction to all television programmes including party election broadcasts. In the present case none of the broadcasters had regarded the case as at the margin and they had taken into account the importance of the images to the party's political campaign so it followed that there was nothing wrong either in their reasoning or in their overall decisions to suggest an inappropriate standard had been applied.

Under the Licensing Act 2003, ss20 and 74 it is made mandatory for a condition to be included in a premises licence or a club premises certificate authorising the exhibition of a film which requires the admission of children to films to be restricted in accordance with recommendations given either by a body designated under the Video Recordings Act 1984, s 4 - currently only the British Board of Film Classification - or by the licensing authority (generally a local authority) itself. However, in the case of any premises licence or club premises certificate authorising the performance of a play, licensing authorities are prohibited by ss 22 and 76 from attaching conditions relating to the nature of the play performed or the manner of its performance unless they are justified as a matter of public safety.

The Local Government Act 2003 has repealed a prohibition on local authorities from intentionally promoting homosexuality or publishing material with the intention of doing so or from promoting teaching in schools of the acceptability of homosexuality and in the course of rejecting a claim for a declaration regarding the compatibility of the Treason Felony Act 1848, s 3 - which made it an offence to compass by publication 'to deprive or depose' the Queen from the Crown - with ECHR Article 10 because it was not a live, practical question, it was stated in *R (on the application of Rushbridger) v Attorney General* [2003] UKHL 38, [2003] 3 All ER 784 that the part of s 3 which appeared to criminalise the advocacy of republicanism was part of a bygone age and the idea that it could survive scrutiny under the Human Rights Act 1998 was unreal.

A finding of contempt of court was upheld in *Attorney General v Punch Ltd* [2002] UKHL

50, [2003] 1 All ER 289 in respect of the publication of an article by a former member of the security service against whom the Attorney General had obtained an interlocutory order restraining the disclosure to anybody of information obtained by him in the course of his employment with that service which related to, or could be construed as relating to it, its activities or to security or intelligence activities generally. It was considered that the editor of the journal concerned had to have appreciated that by publishing the article he was doing precisely what the order was intended to prevent, namely pre-empting the court's decision on the disputed issues of confidentiality in the proceedings in respect of which the restraining order had been granted, and that was knowing interference with the administration of justice. However, although it was not objectionable for such an order to include a proviso that it does not apply to information which the Attorney General states in writing is information the publication of which restraint is not sought, it would be better to avoid the appearance of delegating control of what may be published to him by making it plain, on the face of the order, that anyone whose conduct is affected by it has the right to apply to the court for a variation of its terms. Furthermore the hope was expressed that an improved formula could be devised for such orders, giving the protection sought in sufficiently certain terms but going no wider than necessary to restrain disclosure of information in respect of which the Attorney General has an arguable case for confidentiality.

Publication by a newspaper of confidential information about a model's treatment for drug addiction was found in *Campbell v Mirror Group Newspapers Ltd* [2002] EWCA Civ 1373, [2003] 1 All ER 224 to have been justified in order to provide a factual account of her drug addiction that had the detail necessary to carry credibility but also because was not sufficiently significant, in its context to amount to a breach of confidence owed to her. It was also held that, where a data controller was responsible for the publication of 'hard copies' (such as newspapers) which reproduced data that had previously been processed by means of equipment operating automatically, that publication formed part of the processing and thus fell within the scope of the Data Protection Act 1998. However, the exemption from certain of the data protection principles in s 32 which related to processing undertaken with a view to the publication by any person of any journalistic, literary or artistic material whose publication is reasonably believed by the data controller to be in the public interest applied not only to the period before publication but also protected journalists in relation to proceedings once publication had taken place so that the publishers in this case had not infringed the Act.

In upholding an injunction which banned press publication of alleged financial irregularities - but not the reporting of them to any criminal or regulatory authority - which involved breaches of confidentiality on the part of a company's former employee, it was held in *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] 2 All ER 318 that, pursuant to the Human Rights Act 1998, s 12(3), the threshold test to be applied when considering whether or not to grant an injunction to prevent publication is not that it is more probable than not that the applicant will establish at trial that publication should not be allowed but that of a real prospect of success - based on cogent evidence - notwithstanding the defendant's ex hypothesi conflicting right to freedom of expression, which was satisfied in the present case.

See also the discussion under Article 7 of *Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996, the discussion under Article 10 in respect of *R (on the application of Williamson) v Secretary of State for Education and Employment* [2002] EWCA Civ 1820, [2003] 1 All ER 3 and the discussion under Article 24 of *P v BW* [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074 and of the Criminal Justice (Scotland) Act 2003.

As is clear from the discussion of the Communications Act 2003, while regulation of actual broadcasting is directed at ensuring impartiality and fairness (amongst other considerations), there are also requirements in s 375 to control consolidation of media ownership insofar as reasonable and practicable to ensure a sufficient plurality of views in each market for

newspapers in the country (or part thereof), a sufficient plurality of persons with control of the media enterprises serving a particular audience, the availability of a wide range of broadcasting which (taken as a whole) is both of high quality and calculated to appeal to a wide variety of tastes and interests. However, the 20% thresholds for cross-ownership are less exacting than the previous 15% one.

Practice of national authorities

The Code of Practice administered by the Press Complaints Commission (a self-regulatory body) has been amended to prohibit payments to a witness in a criminal trial (or a person who may reasonably be expected to be called as a witness) once proceedings are 'active' for the purposes of the Contempt of Court Act 1981. Furthermore, where proceedings are not yet active but are likely and foreseeable, payments can only be made where there is a demonstrable public interest and under no circumstances should payment be conditional on the outcome of a trial.

See also the discussion under Article 7 of the report of the House of Commons Culture, Media and Sport Select Committee.

Reasons for concern

None but see the concerns expressed in respect of Articles 7 and 8.

Article 12. Freedom of assembly and of association

National legislation, regulation and case law

Pursuant to Part 4 of the Anti-Social Behaviour Act 2003 an officer of at least the rank of superintendent can authorise uniformed police officers and community support officers (civilian police employees) for up to 6 months in respect of a particular locality to disperse groups of 2 or more persons in a designated area where he or she has reasonable ground for believing that anti-social behaviour is a significant and persistent problem there and that members of the public have been intimidated, harassed, alarmed or distressed as a result of the presence or behaviour of groups in that locality. In giving directions the officer must have reasonable grounds for believing that the presence or behaviour of the group in any public place in the relevant locality has resulted, or is likely to result, in any members of the public being intimidated, harassed, alarmed or distressed and such directions may entail persons in the group dispersing (immediately or within a specified time), leaving the locality or part of it if their place of residence is not within it or not returning to the locality or part of it for up to 24 hours if their residence is not within it. Such directions may not be made in respect of lawful industrial disputes and public processions. It is an offence knowingly to contravene a direction and a person reasonably suspect of failing to comply with a direction may be arrested. In addition police officers may return to their homes young people under 16 who are unsupervised in public places covered by an authorisation between 9.00 pm and 6.00 am and in such an event the local authority should be notified. A code of practice about the exercise of the powers under this Part of the 2003 Act may be issued by the Secretary of State and regard must be had to this code by officers giving the authorisation and exercising these powers. In Part 7 of the Act the definition of 'public assembly' in the Public Order Act 1986, s 16 is reduced from '20 or more person' to '2 or more persons', thereby extending the power of a senior police officer under s 14 of the 1986 Act to impose conditions on public assemblies where he or she reasonably believes serious public disorder, serious damage to property or serious disruption to the life of the community might result or that their purpose is the intimidation of others with a view to compelling them to act in a particular way. This change does not affect peaceful picketing by members of a trade union at their place of work,

which is protected by the Trade Union and Labour Relations (Consolidation) Act 1992, s 220. Part 7 also expands the scope of various provisions in the Criminal Justice and Public Order Act 1994. Firstly it extend the powers in s 63 to remove persons attending or preparing for a rave - a gathering at which amplified music is played during the night - from ones where 100 or more persons are present to ones where only 20 or more persons are present, as well as to ones taking place in buildings if those attending it are trespassing. In addition it is made an offence for someone to make preparations for or attend a rave within 24 hours of being given a direction under s 63 of the 1994 Act to leave land where he or she was attending or preparing for another rave. Secondly the provisions relating to the offence of aggravated trespass are also extended to buildings, so that the offence will be committed where a person trespassing, whether in a building or in the open air, does anything which is intended to intimidate or deter persons from engaging in a lawful activity or to obstruct or disrupt that activity and it will be possible for a senior police officer to direct persons reasonably believed to be committing the offence to leave. The extension is seen as useful for dealing with activists who invade the building of a targeted company with the intention of conducting an intimidating and disruptive protest. Thirdly a new s 62A is inserted, creating a power for a senior police officer to direct someone to leave land and remove any vehicle with him or her on that land where there at least two persons trespassing on it one of whom has a vehicle, they have the intention of residing there and the occupier has asked the police to remove them, so long as there are relevant caravan sites with suitable pitches available for the trespassers to move to. It is an offence to comply with such a direction or, within 3 months of one being given, to return to any land in the area of the relevant local authority as a trespasser with the intention of residing there. The vehicle reasonably suspected by a constable to be owned or controlled by a person who has committed this offence can be seized and removed. Part 9 of the Act amends the Crime and Disorder Act 1998, s 1 - which enables the police, local authorities and registered social landlords to apply to courts for anti-social behaviour orders, prohibiting anything prescribed in it, against persons over the age of 10 years to protect others from further anti-social acts - so that they can be sought by housing action trusts and county councils. In addition local authorities are given a power of prosecution concurrent to that of the Crown Prosecution Service in respect of breaches of an order. Furthermore it will become possible to join someone who is not a party to the principal proceedings in county courts but whose anti-social behaviour is material to them so that an order can be applied for against that person. It is also made clear that an order may be made following a conviction either at the request of the prosecutor or of its own volition. Provision is also made for the penalty notice scheme for disorderly behaviour in the Criminal Justice and Police Act 2001 to be extended to 16 and 17 year olds, together with a power to make provision for a parent or guardian of an under 16 year old to be notified that a penalty notice has been given and for the parent or guardian to be liable to pay the penalty. It is intended to pilot the extension of the scheme to 16 and 17 tear olds and to revisit any further extension in the light of the outcome of these pilots.

See also the discussion of Part 1 of the Anti-Social Behaviour Act 2003 under Article 17.

There is no special provision governing the objectives or behaviour of political parties – other as regards the need to be registered in order to field candidates and the source and transparency of their funding under the Political Parties, Elections and Referendums Act 2000 - or enabling their dissolution. However, the Public Order Act 1936, s 2 makes it offence to organise, train, equip or support the members of an association for the purpose of enabling them to be used in usurping the functions of the police or the armed forces or to use or display physical force in promoting any political object or to give reasonable apprehension that that is their purpose. In addition Part 2 of the Terrorism Act 2000 makes it offence to belong or participate in the activities of designated terrorist organisations.

Practice of national authorities

Investigations into the policing of peace and anti-arms exports demonstrations show a clear policy of using search and other under the Terrorism Act 2000 to prevent persons taking part in protest, although any charges subsequently made are for public order and not terrorist offences; Liberty press releases, 15 July and 9 September.

The Parades Commission for Northern Ireland has issued 'Common Principles' relating to the exercise of its functions to regulate and ban processions under the Public Processions (Northern Ireland) Act 1997. They cover: communication by parade organisers (a favourable view will be taken of attempts to find accommodation); communication by residents' groups (requested restrictions will be less likely if no positive response to organiser's approaches); peaceful protest (previous lawful/peaceful protest is more likely to ensure sympathetic hearing); volume of parades (too many parades in sensitive areas may lead to curtailment); quality parades (engagement and good conduct may lead to some easing of historic restrictions); timings of parades (morning parades in contentious areas are preferable and late evening parades in generable are less acceptable); conduct of parades (restrictions are more likely following poor conduct or paramilitary displays); public disorder (threat of disorder is not automatically the only or overriding factor); and responsibility for parade (organiser is responsible for conduct and all participants).

See also the discussion under Article 4 of baton rounds and the discussion under Article 45 of restrictions during a visit by President Bush.

Reasons for concern

The use of anti-terrorism measures to deal with some demonstrations, the use of baton rounds for crowd control purposes and the potential use of new restrictions on public assemblies and powers to deal with 'anti-social' behaviour.

Article 13. Freedom of the arts and sciences

National legislation, regulation and case law

See the discussion under Article 11 of the Communications Act 2003 and the Licensing Act 2003, s 20.

Article 14. Right to education

International case law and concluding observation of international organs

The European Committee of Social Rights in *Conclusions XVI-2* has found that the situation regarding encouragement for the full utilisation of available facilities for vocational training is not in conformity with Article 10(4) of the European Social Charter because equal treatment for nationals of non-EU Contracting Parties to the Charter and of non-EU Parties to the Revised European Social Charter lawfully resident or regularly working in the United Kingdom with respect to fees and financial assistance for training is not guaranteed (p 35). However, it found that the promotion of technical and vocational training and the granting of facilities for access to higher technical and university education is conformity with Articles 10(1) of the Charter, pending receipt of detailed information on the entire training system, the secondary school vocational education, full figures about student's participation in further education at the national level and recognition of vocational qualifications and work

experience to get access to higher education. It also sought confirmation that nationals of the other Contracting Parties to the Charter and of the Parties to the Revised European Social Charter lawfully resident or regularly working in the United Kingdom are guaranteed equal access to education and training (pp 21-25).

See also the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003) and the discussion under Article 7 of Part 3 of the Anti-Social Behaviour Act 2003.

National legislation, regulation and case law

In dismissing a claim for damages by a child of compulsory school age who had been excluded from school during a police investigation into his involvement in starting a fire at the school and who had subsequently been removed from its roll after neither he nor his parents had turned up to a reintegration meeting after the discontinuance of criminal proceedings to discuss his return to the school, with neither the exclusion nor the removal complying with the requirements imposed on the school by the School Standards and Framework Act 1998 nor the relevant Department of Education circular, it was held in *A v Head Teacher and Governors of Lord Grey School* [2003] EWHC 1533 (QB), [2003] 4 All ER 1317 that, although unlawful, the exclusion until the termination of the prosecution and then until the holding of reintegration meeting were sensible and reasonable and did not give rise to liability for breach of ECHR Protocol 2, Article 2, and that, although the exclusion and removal were unlawful and could have been challenged by judicial review, they did not give rise to liability in damages for the education authority for breach of the child's rights under that provision as it had undertaken its responsibility for his education under the Education Act 1996, s 19(1) by the offer of tuition, which the family had declined.

See also the discussion under Article 6 of the Mental Health (Care and Treatment)(Scotland) Act 2003, the discussion under Article 12 of the Local Government Act 2003 and the discussion under Article 34 of the Education (School Meals)(Scotland) Act 2003.

Practice of national authorities

See the discussion under Article 24 of the annual report of the Northern Ireland Human Rights Commission and of a report of the Joint Committee on Human Rights.

Reasons for concern

The adequacy of arrangements for the education of children in prison and belonging to certain minority groups, as well as the use of powers to exclude pupils from school and the potential discrimination in access to certain forms of education.

Article 15. Freedom to choose an occupation and right to engage in work

International case law and concluding observation of international organs

In an Individual Observation published in 2003 concerning ILO Convention No 140, Paid Educational Leave, 1974, the Committee of Experts on the Application of Conventions and Recommendations dealt with three matters. Firstly, referring to comments of the Trades Union Congress that little paid educational leave negotiated collectively tended, in practice, to benefit non-manual workers in the professional categories, the Committee recalled that, under the terms of the Convention, it was the responsibility of the Government to formulate and apply a national policy designed to promote the granting of paid educational leave with a view to contributing to the objectives set out in Article 3 and that in this respect workers must

be able to benefit, among others, from such leave for the purpose of training at any level. It requested the provision of detailed information on the manner in which the national policy ensured the granting of paid educational leave to young workers for each of the objectives set out in Article 2, including extracts from reports, studies and inquiries and statistics showing the effect given in practice to this policy and the number of workers granted paid educational leave. Secondly, referring to a restriction placed by the Employment Act 1989 on the possibilities of granting leave for the purposes of trade union education, the Committee again recalled that such leave, as envisaged in Article 2(c) of the Convention, should, under the terms of Article 3(b), be designed to contribute 'to the competent and active participation of workers and their representatives in the life of the undertaking and of the community', requested the Government to indicate in its next report the manner in which it is ensured that the granting of leave for the purposes of trade union education is not reserved solely for trade union representatives. Thirdly the Committee expressed the hope that the next report would contain detailed information on the effective application of various programmes giving effect to the principle of lifelong learning, including the establishment of a learning network distributed through new information technologies (learn/direct), which were enumerated in the current report.

The European Committee of Social Rights in *Conclusions XVI-2* has found that the situation regarding vocational guidance, training and retraining and, in the case of persons with disabilities, guidance, education and vocational training to be in conformity with requirements in Articles 1(4) of the European Social Charter relating to the right to work (p5). It also found the situation with regard to vocational guidance to be in conformity with Article 9 (p 20). It also found that, pending receipt of information about the adequacy of apprentice places, the length of the apprenticeship and division of time between practical and theoretical learning, selection of apprentices, selection and training of trainers, remuneration of apprentices and termination of the apprenticeship contract, the situation with respect to the promotion of apprenticeship is in conformity with Article 10(2) (p 28). See also the discussion under Article 14.of the Committee's Conclusions.

See also the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003).

Reasons for concern

The adequacy of educational leave from work and vocational training.

Article 16. Freedom to conduct a business

National legislation, regulation and case law

Provision is made by the Co-operatives and Community Benefit Societies Act 2003 - which does not apply to Northern Ireland - to facilitate business dealings by and with such societies - the former are run by their members for their members and the latter are enterprises which benefit the community - which offer an alternative corporate structure to companies. At present they must limit themselves to activities permitted by their rules but this requirement creates a risk for those dealing with them that a particular transaction may be void if either the society or its committee entering into it has acted outside its powers. As this possibility may then either increase the costs and time involved in entering contracts - by requiring a check on the powers of the society or the committee - or deter some from conducting business with a society because they perceive there is a risk of the contract being void, s 3 seeks to mirror existing company law by ensuring that an act done by a society is not void simply because it is permitted by the society's rules or because the society's committee acted outside its powers in relation to the act. In addition a party to a transaction with a society is relieved of the

burden of having to enquire whether the transaction is permitted by the rules, or about any limitation on the powers of the committee to bind the society. Nonetheless these changes do not alter the duty of committee members to observe any limitation on their powers and they will remain liable to the society and the members to make good any loss resulting from acting outside those powers. Furthermore, in order to facilitate the making of contracts in the name of a society before it has been legally registered, s 4 allows such contracts to be enforceable against and by the person who has acted for or on behalf of the society. In addition provision is made by s 5 for the removal of the requirement that societies must operate through a common seal when entering into certain types of contracts or executing certain types of other documents, while at the same time enabling those societies with a common seal to have further official seals for use overseas. However, s 2 imposes an obligation on societies which are charities to ensure that their charitable status is clear in business documentation.

The Licensing Act 2003 has established a unified system of regulation of the sale and supply of alcohol, the provision of regulated entertainment (plays, the showing of films, indoor sporting events, outdoor boxing and wrestling matches, music and the performance of dance) and the provision of late night refreshment, with the provision of authorisations being made through personal licences, premises licences, club premises certificates and temporary event notices. In contrast to existing law there is no specification of when licensable activities may be carried on but this will be a matter of choice for those applying for the licence and the licence will be granted on those terms unless the licensing authority - generally the local authority for the area in which the applicant is resident or the premises concerned are situated - considers it necessary to reject the application or vary those terms for the purpose of promoting the licensing objectives, ie, the prevention of crime and disorder, public safety, the prevention of public nuisance and the protection of children from harm. There is provision for the licensing authorities, on a review of a premises licence and with a view to promoting the licensing objectives, to suspend or revoke the licence, to exclude specific licensable activities from the licence or to modify operating conditions attaching to the licence. Applicants for and holders of licences, certificates and notices - as well as responsible authorities and interested parties - all have rights of appeal to a magistrates' court against decisions of a licensing authority. There is also provision for a power for a magistrates' court - upon an application from a police officer of at least the rank of superintendent - to close for up to 24 hours all premises with a premises licence, or in respect of which a temporary notice has effect, which are located in a particular geographical area where this is thought necessary to prevent disorder. In addition a senior police officer can close specific premises for up to 24 hours either where there is actual or likely disorder to the extent that closure is necessary in the interests of public safety or where, owing to the noise emanating from the premises, closure is necessary to prevent a public nuisance. The closure of specific premises can be extended for further periods of 24 hours by the senior police officer but must also be brought before a magistrates' court which can order its revocation or extension until the licensing authority has conducted a review of the order.

The Railways and Transport Safety Act 2003 prohibits the carriage of certain dangerous goods by rail so as to permit ratification of the Protocol of Vilnius 1999, which modifies the Convention concerning International Carriage by Rail 1980.

See also the discussion of Part 1 of the Anti-Social Behaviour Act 2003 under Article 17.

The EU Code of Conduct on Arms Exports is implemented through the Export Control Act 2002 which replaces legislation in force since 1939. It is an enabling measure and the regulations made under it provide for controls on trade in items such as long range missiles, torture equipment and other military and paramilitary equipment. Licences granted and refused under the powers conferred will be the subject of an annual report on strategic export controls.

Article 17. Right to property

International case law and concluding observation of international organs

The refusal of a local authority to renew a company's lease - under an agreement requiring it to erect buildings that had been concluded with a predecessor authority which had given it an option of renewal subsequently established to be in excess of its powers and thus invalid - in circumstances where there was no possibility of obtaining compensation and where no statutory function or third party interests would have been prejudiced by the renewal was found in Eur.Ct.H.R., *Stretch v United Kingdom*, 24 June 2003, to be a disproportionate interference with the peaceful enjoyment of the company's possessions and a violation of ECHR Protocol 1, Article 1, particularly as later legislative changes to the powers of local authorities - removing the prohibition on granting options for renewal and relaxing the strictness of the principles applicable to contracts concluded beyond statutory powers - had demonstrated that there was nothing *per se* objectionable or inappropriate in them including such a term in lease agreements.

National legislation, regulation and case law

Under Part 2 of the Agricultural Holdings (Scotland) Act 2003 a tenant of a tenancy created under the Agricultural Holdings (Scotland) Act 1991 may apply to have registered an interest in acquiring the land comprised in the lease and where it is so registered he or she has the right to buy the land where the owner gives notice of a proposal to transfer the land, or any part of it, as well as the right to buy it from any person to whom it has been transferred. The tenant must make an offer to buy either at either a price agreed with the seller or as valued under procedures laid down by the Act. Rights to buy on similar terms is conferred by Parts 2 and 3 of the Land Reform (Scotland) Act 2003 on bodies representing rural communities in respect of non-rural land with which the community has a connection on bodies representing crafting communities in respect of eligible croft land and certain additional land and sporting interests.

In order for investors in a community benefit society - such as an agricultural society, a housing association or working men's club - to be certain that its assets will always be used for the purpose of serving the community (rather than, for example, being converted into a company which could then used the assets in any way it wished), the Co-operatives and Community Benefit Societies Act 2003, s 1 enables the Treasury to bring forward, in secondary legislation, provisions under which community benefit societies could - following a vote of its members - permanently prevent any use or dealing with their assets except for the benefit of the community It would then only be possible to transfer the assets of the society to another body that was also subject to such an asset 'lock-in' regime.

The Legal Deposit Libraries Act 2003 has re-enacted the existing obligation to deposit printed publications in six nominated depositories and enables the Secretary of State to make regulations extending the system of legal deposit progressively and selectively to various non-print media as they develop (including off-line publications such as CD-ROMs and microform and on-line publications such as e-journals).

The Dealing in Cultural Objects (Offences) Act 2003 makes provision for an offence of acquiring, disposing of, importing or exporting cultural objects - ie, objects of historical;, architectural or archaeological interest - which have been excavated or have been removed from a building, monument or structure of historical, architectural or archaeological interest and such excavation or removal constitutes an offence. It is immaterial whether the excavation or removal took place in the United Kingdom or elsewhere or the offence was committed under the law or a part of the United Kingdom or of any other country.

Regard was had to both Article 8 of Council Directive (EEC) 92/12 and ECHR Protocol 1, Article 1in *Customs and Excise Commissioners v Newbury* [2003] EWHC 702 (Admin), [2003] 2 All ER 964 when it was held that it would be disproportionate to condemn as liable to forfeiture - under the Customs and Excise Management Act 1979 - a car in which a passenger had - without the driver's knowledge and contrary to a warning given by him - imported goods without payment of duty.

In dismissing an appeal against the refusal of a magistrates' court to make a representation order in condemnation proceedings under the Customs and Excise Management Act 1979, Sch 3 - whereby a quantity of tobacco and alcohol and a care seized by customs officers from persons returning from a trip to France were held liable to forfeiture for having been imported without payment of duty or having been used for that purpose - it was held in *R (on the application of Mudie) v Kent Magistrates' Court* [2003] EWCA Civ 237, [2003] 2 All ER 631 that the proceedings were civil rather than criminal as there was no element of blameworthiness in them and no penalty was imposed, with the issue simply being whether the goods were liable to forfeiture. Furthermore there was a power to restore the condemned gods if found not to be so liable, the possibility of a review if not restored and an appeal from such a review.

Part 1 of the Land Reform (Scotland) Act 2003 establishes a right to be on all land for recreational, educational and certain other purposes, as well as to cross it, other than: buildings and structures and places used to give a person privacy or shelter; land surrounding non-domestic buildings and structures; land contiguous to and used for school purposes; such land adjacent as is adjacent to domestic buildings and similar places as is sufficient to give the persons living there reasonable measures of privacy and enjoyment; private gardens to which there is a right of common access; land to which public access is subject to other regulation; land in respect of which a charge for access had been and continues to be made; land on which building, engineering and other works are underway; and land on which crops have been sown or are growing. Access rights must be exercised responsibly, ie, there must be no unreasonable interference with the rights of others but the owner must also act responsibly. There is a presumption that the owner is acting responsibly if there is no unreasonable interference with the exercise of access rights but it will be irresponsible to act for the purpose of deterring the exercise of access rights, failing to comply with a local authority notice in respect of such action, failing to give timeous notice to the authority of the ploughing of a path and failing to reinstate the path. It is possible for local authorities to exempt land from access rights for a specified period and purposes. Such authorities may also enter land for any purpose connected with the performance of their functions under this Part of the Act. It will be possible to apply to a court for a determination of whether access rights are exercisable over particular land.

The Crime (International Co-operation) Act 2003 provides for the seizure and transmission of evidence pursuant to a request for assistance from an overseas authority in relation to an investigation or prosecution, A warrant for this purpose can be issued only in the same circumstances as would be possible in relation to a domestic case. It also implements the 2003 Framework Decision on the execution in the European Union of orders freezing property or evidence adopted by the Council of the European Union on 22 July 2003. Part 1 deals with the making of freezing orders where there is evidence in a participating country, as well as the execution of orders for use in any proceedings or investigation in such a country, and Schedule 4 deals with the giving effect to overseas freezing orders in respect of terrorist assets and the transmitting of such orders abroad.

Part 1 of the Anti-Social Behaviour Act 2003 grants the police the power to close down premises being used for the supply, use or production of Class A drugs where there is associated serious nuisance or disorder. A notice for this purpose - which will not affect the

owner or those who habitually reside there - can only be authorised by a police superintendent (or officer of a higher rank) where satisfied that the local authority has been consulted and that reasonable steps have been taken to identify those living on the property or with an interest in it. Such a notice must be considered by a magistrates' court within 48 hours of the posting of the notice on the property and that court can make a closure order closing the premises (or part thereof) altogether for a period of up to 3 months, with the possibility of an extension to a maximum of 6 months. In making such an order the court must be satisfied not only about the existence of the reasons for the notice but also that it is necessary to prevent future disorder or serious nuisance. There is also provision for the proceedings to be adjourned for up to 14 days to allow the occupier or someone with an interest in the property to show why an order should not be made. There is provision for the payment of compensation to any person suffering financial loss as a result of a notice or order where he or she had no connection with the use of the premises on which the notice or order was based, he or she had (if the owner or occupier) taken reasonable steps to prevent that use and it is appropriate in all the circumstances to compensate him or her for that loss. Part 8 of the Act 2003 gives local authorities powers to deal with complaints about high hedges - ie, so much of a barrier to light or access as is formed wholly or predominantly by a line of two or more evergreen or semi-evergreen trees or shrubs and rises to a height of more than two metres above ground level - which are having an adverse effect on a neighbour's enjoyment of his property, so that if efforts to resolve the matter amicably fail, the hedge-owner could be ordered to remedy the problem and to prevent it recurring. Failure to comply with an order could result in a fine and the local authority could go in and do the work itself, recovering the costs from the hedge-owner.

The Marine Safety Act 2003 confers powers on the Secretary of State - with the object of reducing or preventing risks to safety and risks of pollution - to give a direction to a person in charge of land next to, or accessible from, United Kingdom waters or to a person in charge of facilities used by ships (such as berths, wharves and jetties) which requires him or her to allow persons to land and/or to make facilities under his or her control available. Provision is made for the payment of compensation by the Secretary of State to any person who has suffered unreasonable loss or damage as a result of any remedial action taken in accordance with a direction. The Act also allows fire authorities to make a charge for fire-fighting services at sea outside the area of every fire authority.

Under the Railways and Transport Safety Act 2003 marine officials have been empowered to detain a vessel - pending the arrival of the police - when they reasonably suspect a person on board (other than a passenger) on board is impaired through drugs or alcohol. The Act also provides for the introduction of a compulsory railway safety levy on the railway industry. See also the discussion under Article 2 of this Act.

The provision in the r 43(3) of the Prison Rules 1999 for a prisoner's cash to be paid into an account under the control of the governor and for the prisoner concerned to be credited with the amounts in the books of the prison - pursuant to the vesting by the Prison Act 1952, s 35 for all real and personal property of prisoners to be vested in the governor - was held in *Duggan v Governor of Full Sutton Prison* [2003] EWHC 361 (Ch), [2003] 2 All ER 678 not to have imposed a trust on the governor to invest the cash on the prisoner's behalf in an interest-bearing account and the only relationship created in private law was that of debtor and creditor. The rule entitled the prisoner to be credited with an equivalent sum in the books of the prison and there was no rule which positively prevented him from requesting it to be transferred to an interest-bearing account outside the prison or evidence that he had ever been prevented from taking that course. There was thus nothing disproportionate in the arrangements provided by the rule as a response to the public interest requirement that the prisoner should not have cash in prison.

Under the Criminal Justice Act 2003, s 8 the recording by a custody officer of what a detained

person has with him on entering custody is now only at the officer's discretion.

See also the discussion under Article 2 of the Fireworks Act 2003, the discussion under Article 7 of *R (on the application of Hoverspeed Ltd) v Customs and Excise Commissioners* [2002] EWCA Civ 1804, [2003] 2 All ER 553 and of *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, the discussion under Article 12 of Part 7 of the Anti-Social Behaviour Act 2003, the discussion under Article 16 of the Licensing Act 2003, the discussion under Article 23 of *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 and the discussion under Article 34 of the Homelessness etc (Scotland) Act 2003 and of *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.

Practice of national authorities

See the discussion under Article 6 of the review by the Privy Counsellor Committee.

Article 18. Right to asylum

International case law and concluding observation of international organs

See the discussion under Articles 19 and 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003).

National legislation, regulation and case law

In dismissing a challenge to the operation of a pre-entry clearance immigration control operated intermittently at Prague airport, under which Roma were questioned more intensively and with a greater degree of scepticism than non-Roma, it was held in *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666 that the Convention relating to the Status of Refugees did not give a right of access to any country to claim asylum and was concerned with the non-return of those who had left their state so that the Secretary of State was under no obligation to facilitate the arrival of asylum-seekers and was indeed entitled to take steps to prevent their arrival. Furthermore, given the requirement that each application had to be examined individually, there could be no objection to the more rigorous questioning of some than others and the policy at the airport was manifestly not to refuse Roma as Roma but to refuse prospective asylum-seekers or those who could not satisfy the immigration office to the requisite standard that they would not claim asylum on arrival which was requirement or condition that applied equally to others.

In dismissing the appeals of asylum-seekers whose claims for support had been refused pursuant to the Nationality, Immigration and Asylum Act 2002, s 55 on the basis that the Secretary of State was not satisfied that they had made their claim for asylum as soon as reasonably practicable after their arrival in the United Kingdom, it was held in *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 2 All ER 905 that (a) the test to be applied in deciding whether claim was made as soon as reasonably practicable was whether, having regard both to the practical opportunity and the asylum-seeker's personal circumstances, he or she could reasonably have been expected to have claimed asylum earlier than he or she had and in applying this test regard should be had to the effect of anything the asylum-seeker might have been told by his or her facilitator; (b) the imposition by the legislature of a regime which prohibited asylum-seekers from working and further prohibited the grant to them, when they were destitute, of support amounted to positive action directed against asylum-seekers and not to mere inaction but the degree of degradation that had to be demonstrated to engage ECHR Article 3 fell significantly

below the definition of destitution in the Immigration and Asylum Act 1999, s 95(3) - namely, a person not having adequate accommodation or any means of obtaining it (whether or not other essential living needs are met) or has adequate accommodation or the means of obtaining it but cannot meet other essential living needs - and Article 3 would not be engaged by the fact that there was a real risk that an individual; asylum-seeker might be brought so low that he or she would be driven to crime or to prostitution in order to survive; (c) that it was not unlawful for the Secretary of State to decline to provide support unless and until it was clear that charitable support had not been provided and that the individual was incapable of fending for him or herself but the Secretary of State had to be prepared to entertain further applications from those to whom he had refused support who had not been able to find any charitable support or other lawful means of fending for themselves and, if the denial of support impacted sufficiently on an asylum-seeker's private and family life, the Secretary of State would be in breach of the negative obligation imposed by ECHR Article 8 unless he could justify his conduct under Article 8(2) and (d) that, although the claimants had not initially been treated fairly, the requirements of ECHR Article 6 would be satisfied by the combination of the Secretary of State's decision-making process - if appropriate steps were taken to remedy the deficiencies in procedure - and judicial review of the decision reached by that process.

In remitting a case for reconsideration where an appeal against refusal of claim for asylum because the ill-treatment of a claimant from Sri Lanka had been inflicted not because of political opinions but of suspicion, however unjustly, of involvement in violent terrorism, it was held in *R (on the application of Sivakumar) v Secretary of State for the Home Department* [2003] UKHL 14, [[2003] 2 All ER 1097 that such suspicion was not a sufficient reason for concluding that he was not ill-treated for a reason within Article 1A of the Convention Relating to the Status of Refugees, 1951 and the case had to be considered in the round, giving due weight particularly to the evidence of extreme torture. Furthermore the evaluation of the material facts was not to be compartmentalised and the cumulative effect of the relevant factors - the claimant came from an area plagued by terrorist activities, there was evidence of widespread torture of persons suspected of being insurgents or collaborators and the authorities had subjected him to sustained, exceptionally sadistic and humiliating torture - had to be considered. Thus, on a realistic view of the facts, there was a reasonable likelihood of persecution on the ground of race and membership of a particular social group.

The use of a fast-track procedure to deal with asylum claims from states listed in the Nationality, Immigration and Asylum Act 2002, s 115(7) - in respect of whom the Secretary of State was required, unless satisfied that the claims were not clearly unfounded, to issue a certificate which precluded any appeal that removal would be contrary to Convention relating to the Status of Refugees or the ECHR while the asylum-seekers concerned were still in the United Kingdom - was held in *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 All ER 1062 not to be inherently unfair as the procedures in place afforded the asylum-seekers an opportunity to give evidence of their individual experiences and those assisting them an opportunity to make representations on the import of such evidence and did not preclude presentation of expert evidence about the conditions in the countries listed in s 115(7).

In dismissing appeals against the refusal of claims to asylum based on their conscientious objection to compulsory military service arising from their political opposition to the policies of the then Turkish government in relation to the Kurdish people and a wish not to be required to participate in actions, possibly involving atrocities and abuses of human rights, against their own people, it was held in *Sepet v Secretary of State for the Home Department* [2003] UKHL 15, [2003] 3 All ER 304 that there was currently no legal rule binding in international law which recognised a right to conscientious objection - absolute or partial - to military service such as would give rise to a good case for refugee status if it were not respected.

A claimant for asylum stopped receiving the income support payable to asylum-seekers pursuant to the Income Support (General) Regulations 1987, reg 70(3A)(b)(i) - whereby a person ceased to be an asylum-seeker for this purpose in the case of a claim for asylum which was recorded by the Secretary of State as having been determined (other than on appeal) on the date on which it was so recorded - but, although the content of the internal file note refusing her asylum had been sent to the Benefits Agency, the letter with the reasons for refusal was not sent to her and it was Home Office departmental policy not to communicate to an asylum-seeker that a claim had been refused until an immigration officer had considered whether his or her request for leave to enter should be granted on some ground other than that of refugee status, which in the instant case occurred some five months later. In allowing her appeal against the refusal of judicial review of the decision to treat her asylum claim as refused and to withdraw her income support, it was held (4-1) in *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 All ER 827 that the right of access to justice meant that notice of a decision was required before it could have the character of a determination with legal effect because the individual concerned had to be in a position to challenge that decision in the courts if he or she wished to do so and it was an unjust proposition that an excommunicated administrative decision could bind an individual.

In allowing a review under the Housing Act 1996, s 202(1)(c) of a refusal by a local authority in London of accommodation to asylum-seekers because they had been allocated accommodation in Glasgow by the National Asylum Support Service pursuant to a dispersal scheme - requiring preferences of asylum-seekers to be ignored - that was authorised by the Immigration and Asylum Act 1999, it was held (2-1) in *Al-Ameri v Kensington and Chelsea Royal London Borough Council* [2003] EWCA Civ 235, [2003] 2 All ER 1 that residence in a district in accommodation provided to a destitute asylum-seeker under the 1999 Act was not capable of being regarded as residence of his or her own choice within the meaning of s 199(1)(a) of the 1996 Act; the minimum requirement to be satisfied before normal residence in a district could be said to be of the occupant's own choice was that the occupant was not there at someone else's dictation. The Homelessness etc (Scotland) Act 2003, s 7 excludes from the definition of 'normally resident' for the purposes of housing legislation circumstances where the applicant was resident in accommodation provided in pursuance of the 1999 Act.

See also the discussion under Article 6 of the Extradition Act 2003 and the discussion under Article 19 of *R (on the application of Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 3 All ER 1174.

Practice of national authorities

European Roma Rights Center has expressed concern about the application of 'explicitly racially discriminatory border policies' in the form of a number of groups, including Roma, being subjected to special procedures and being prevented from attempting to board aeroplanes bound for the United Kingdom (see also 'National legislation'). It also pointed out that it is widely and credibly alleged that migrants - including in particular Romani ones - as a deterrent to further immigration and stated that this was also the object of the expulsion of some Czech Roma in the presence of members of the television media. In addition it reported that its research had shown that between late January and April 2002 87% of Roma from Prague airport were refused entry to the United Kingdom while only 0.2% of non-Roma were so refused (*Summary Overview of the Human Rights Situation of Roma in the European Union*, October 2003).

The Northern Ireland Human Rights Commission has expressed concern that the small number of asylum-seekers held in custody in Northern Ireland are being kept in a maximum security prison 'cheek by jowl with persons convicted of serious offences' and stated that the

option for the detainees to be moved to a less restrictive environment in a centre in Scotland was not, in all cases, a reasonable alternative; *Annual Report 2002-03*.

See also the discussion under Articles 6 and 24 of reports of the Joint Committee on Human Rights.

Reasons for concern

The numerous measures designed to prevent anyone from being in a position to claim asylum and the use of economic pressure against those whose claims, whatever their merits, are seen as belated.

Article 19. Protection in the event of removal, expulsion or extradition

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination, in its Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic reports (CERD/C/63/CO/11, 10 December 2003) expressed concern about the application of the Race Relations Amendment Act 2000, s 19D, which makes it lawful for immigration officers to 'discriminate' on the basis of nationality or ethnic origin provided that it is authorised by a minister. This was seen as incompatible with the very principle of non-discrimination and the Committee recommended the United Kingdom to consider re-formulating or repealing s 19D in order to ensure full compliance with the Convention.

National legislation, regulation and case law

In allowing appeals against the reinstatement of decisions to issue and serve removal directions on a woman and her two dependent children in circumstances where she had stayed in the United Kingdom after the expiry of her visa and the relationship of the two children - who had been born there - with their British father (who maintained them and on whom they were emotionally dependent) would then be ended, it was held in *Edore v Secretary of State for the Home Department* [2003] EWCA Civ 716, [2003] 3 All ER 1265 that the tribunal had not been entitled to regard the Secretary of State's decision as having struck a fair balance between the competing interests in play.

In dismissing appeals against the refusal of asylum to persons who were prevented from freely practising, and in particular from preaching or teaching, their religion in their countries, it was held in *R (on the application of Ullah) v Special Adjudicator* [2002] EWCA Civ 1856, [2003] 3 All ER 1174 that the underlying rationale for the application of the ECHR to the act of expulsion was that it was an affront to fundamental humanitarian principles to remove an individual to a country where there was a real risk of serious ill-treatment, even though such ill-treatment might not satisfy the criteria of persecution under the Refugee Convention, but the test was Article 3 and the European Court of Human Rights had not yet taken the step of extending the scope of the ECHR to other articles where the apprehended treatment of a deportee would fall short of that covered by Article 3. Moreover the Human Rights Act 1998, ss 3 and 6 did not require United Kingdom courts to take that step. Furthermore the inhibition that might be placed on the right of one claimant to practice her religion by the possibility that she might have to move from her home to a different part of the country fell far short of persecution under the Refugee Convention or ill-treatment that violated ECHR Article 3 and ECHR Article 9 was not engaged by her proposed removal.

A person in respect of whom removal directions are given may be placed, under the authority of an immigration officer, on board any ship or aircraft or through train or shuttle train in

which he or she is to be removed in accordance with the directions. The latter may include provision for the person concerned to be accompanied by an escort of one or more persons from a private company and it is an offence for the captain of a ship or aircraft or a train manager to fail without reasonable excuse to comply with any directions for a person's removal or knowingly to permit such a person to disembark or leave the train when required to prevent it. However, concern about safety, disruptive behaviour by the person being removed and availability of seats does give some discretion to refuse to accept someone for the purpose of removal. Actual removal may be enforced to arresting the persons concerned and the Home Affairs Select Committee – in its report *Asylum Removals* (HC 654, 2002-03) - reported complaints about inadequate time being allowed for them to collect belongings and settle their affairs and that sometimes the removal is initiated after an unannounced arrival at their home or when they have gone to a reporting centre oblivious to this possibility. Although the use of reasonable force to effect removal is permitted, the Committee noted some allegations of assault and the use of pepper sprays which were disputed by the immigration officers involved. Methods of restraint for the purpose of removal may be lawful but these should not be such as to cause unnecessary harm or to endanger life.

Practice of national authorities

The House of Commons Home Affairs Select Committee report on *Asylum Removals* (HC 654, 2002-03) has recommended that a rationale should be appended to any measure extending the list of countries in the Nationality, Immigration and Asylum Act 2002, s 94 which are believed to be safe, the voluntary assisted returns programme be opened up to detainees in removal centres, during any delay in the removal of failed asylum-seekers the individuals concerned should be provided with either adequate support or a temporary status allowing them to work to support themselves, the negotiation of Readmission Agreements with countries currently reluctant to accept the return of their nationals should be a diplomatic priority, a welfare officer ought to be attached to each removal centre with a remit that includes ensuring that those detained have an opportunity to alert friends, family and legal representatives to their impending removal, there might be a case for giving anyone detained for longer than three months an automatic bail hearing at that point, children should only be detained prior to removal when the planned detention is very short or where there are reasonable grounds to suppose that the family is likely to abscond, there should be an automatic bail hearing after 12 months' detention with a presumption in favour of release and reviews held at 6 monthly intervals thereafter, strip-searches of detainees should only be carried out where justified by reasonable suspicion and not as a matter of routine, the full set of operating standards for removal centres should be published as soon as possible as the delay in doing so has led to undesirable disparities in standards and conditions between different centres, the inadequate arrangements for access to legal advice should be resolved through the appointment of a welfare officer who can facilitate access or the provision of access to a duty solicitor, notice of removal and information as to the whereabouts of those to be removed should be given in good time to legal representatives for them to make representations, payment of a modest allowance should be made to those being returned who are likely to be destitute or impoverished on arrival in their country of origin and enforced removals should be carried out more rapidly, effectively and humanely.

Reasons for concern

The risk of human rights violations other than ill-treatment following from expulsion and the manner in which removal is effected, particularly in terms of the impact on family relations and personal affairs.

CHAPTER III : EQUALITY

Article 20. Equality before the law

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination expressed concern in its Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic reports (CERD/C/63/CO/11, 10 December 2003) that the latter's courts would not give legal effect to the provisions on the Convention on the Elimination of All Forms of Racial Discrimination 'unless the Convention is expressly incorporated into its domestic law or the State party adopts necessary provisions in its legislation' (para 11). The United Kingdom was thus recommended to review its legislation in order to give full effect to the provisions of the Convention in its domestic legal order. The Committee was also concerned about the fact that, unlike the Race Relations Act 1976, the amending regulation for the implementation into domestic law of the European Race Directive (see the discussion under Article 21 of 'National legislation') did not cover discrimination on grounds of colour or nationality, with the possibility of the emerging situation leading to inconsistencies in discrimination laws and differential levels of protection according to the categorisation of discrimination and of difficulties being created for both the general public and law enforcement agencies (para 15). It thus recommended that the amending regulations be extended to cover discrimination on the grounds of colour and nationality and that the United Kingdom consider introducing a single comprehensive law, consolidating primary and secondary legislation, to provide for the same protection from all forms of racial discrimination, enshrined in article 1 of the Convention. It also recommended, recalling its General Recommendation XXIX, that a prohibition against descent-based discrimination be included in domestic legislation (para 25).

National legislation, regulation and case law

For the purposes of a complaint of sex discrimination in the context of employment, it was held in *A v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1584, [2003] 1 All ER 255 that a post-operative male to female transsexual was to be regarded as female, except perhaps in circumstances where there were significant factors of public interest - such as a wish for the transsexualism to remain undisclosed - to weigh against the interests of the individual applicant in obtaining legal recognition of her gender reassignment. Thus conformity of legal and apparent gender could no longer be invoked as a genuine occupational qualification - pursuant to the requirement that a constable carrying out a search of a person be of the same sex as the person searched - justifying a refusal of employment.

The Communications Act 2003, s 337 requires OFCOM to include in its licences conditions to promote equality of opportunity in relation to employment with the licence holder; these conditions must promote equality between men and women and between different races. Licensees must also be required to promote the equalisation of opportunities for disabled persons.

Practice of national authorities

See the discussion under Articles 21 to 26.

Reasons for concern

See those expressed in respect of Articles 21 to 26.

Article 21. Non-discrimination

International case law and concluding observation of international organs

The Committee on the Elimination of Racial Discrimination expressed concern in its Concluding Observations on the United Kingdom's sixteenth and seventeenth periodic reports (CERD/C/63/CO/11, 10 December 2003) that the United Kingdom continued to uphold its restrictive interpretation of the provisions of Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination and it was recalled that this conflicted with its obligations under Article 4(b) (para 12). In the light both of the United Kingdom's recognition that the right to freedom of expression and opinion are not absolute rights and of statements by some public officials and media reports that might adversely influence racial harmony, the Committee recommended that the United Kingdom reconsider its interpretation of article. 4. The Committee was also concerned about 'the increasing racial prejudice against ethnic minorities, asylum-seekers and immigrants reflected in the media and the reported lack of effectiveness of the Press Complaints Commission in dealing with this issue', as well as about both reports of attacks on asylum-seekers and antagonism towards asylum-seekers helping to sustain support for extremist political opinions' (paras 13 and 14). It recommended that consideration be given as to how the Press Complaints Commission could be made more effective and could be further empowered to receive complaints from the Commission for Racial Equality and other organisations working in the field of race relations. In addition the Committee recommended that the United Kingdom adopt further measures and intensify its efforts to counter racial tensions generated through asylum issues 'inter alia, by developing public education programmes and promoting positive images of ethnic minorities, asylum-seekers and immigrants, as well as measures making the asylum procedures more equitable, efficient and unbiased'. It also encouraged the United Kingdom to adopt measures conducive to integrating the different ethnic and racial representation within the police force. Furthermore the Committee expressed concern about the discrimination faced by Roma/Gypsies/Travellers that is reflected 'inter alia, in their higher child mortality rate, exclusion from schools, shorter life expectancy, poor housing conditions, lack of available camping sites, high unemployment rate and limited access to health services' (para 23). It thus recommended that the United Kingdom adopt further appropriate modalities of communication and dialogue between Roma/Gypsy/Traveller communities and central authorities and that it also adopt national strategies and programmes with a view to improving the situation of the former against discrimination by State bodies, persons or organisations. The Committee also reiterated its concern that, besides these populations, certain other minority groups or individuals belonging to them experienced discrimination in the areas of employment, education, housing and heath and it urged the continued taking of affirmative measures to ensure equal opportunities for full enjoyment of their economic, social and cultural rights (para 24). See also the discussion of the Concluding Observations under Articles 2, 7, 10, 11, 18 and 19.

See also the discussion under Article 14 of the conclusions of the European Committee of Social Rights.

National legislation, regulation and case law

The Race Relations Act 1976 (Amendment) Regulations 2003 give effect to Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin insofar as this was not achieved by existing legislation. They came into force on 19 July 2003. The first steps to implement Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation have been taken with the adoption of the Employment Equality (Sexual Orientation) Regulations 2003 and the Employment Equality (Religion or Belief) Regulations 2003 which came into force in December 2003. Further

steps, involving amendments to the Disability Discrimination Act 1995 and the adoption of new legislation outlawing discrimination on grounds of age, will be taken in October 2004 and by the end of 2006 respectively.

It was held in *Relaxion Group plc v Rhys-Harper (FC)* [2003] UKHL 33, 19 June 2003 that the Disability Discrimination Act 1995, the Race Relations Act 1976 and the Sex Discrimination Act 1975 protected an employee against discrimination by an employer after a contract of employment had been terminated so that a claim could be brought against the latter in respect of a negative reference that was unfair and inaccurate.

The Police (Northern Ireland) Act 2003, s 23 provides for a limited exception to the 50:50 rule regarding recruitment from the two communities so that constables with specialist policing skills can be recruited. The Northern Ireland Policing Board must, however, be satisfied that there is a need for more persons with a particular skill at constable rank which cannot be met through appointing persons who have complied with the normal training requirements. This authorisation to recruit such persons is for two years, with the possibility of extension to four years by the Secretary of State if this is authorised by the Board.

The Child Support Commissioners have ruled that it is unlawful to treat a parent who is living with a partner of the same sex differently from one in a heterosexual relationship when calculating their joint housing costs; Liberty press release, 9 October 2003.

See also the discussion under Article 6 of *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 1 All ER 816, the discussion under Article 8 of *R (on the application of S) v Chief Constable of South Yorkshire* [2002] EWCA Civ 1275, [2003] 1 All ER 148, the discussion under Article 12 of the Local Government Act 2003, the discussion under Article 18 of *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666, the discussion under Article 23 of *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 and the discussion under Article 34 of *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577.

Practice of national authorities

The European Monitoring Centre on Racism and Xenophobia has reported an increase of 2% to 54,351 in the number of racist incidents reported to and recorded by the police for 2000-01, with recorded racially aggravated offences increasing by 20% to 30,113. Of the latter 50% involved harassment, 17% common assault, 11% other wounding and, 21% criminal damage (*Racism and xenophobia in the EU Member States trends, developments and good practice in 2002*).

A report published by the Commission for Racial Equality on Strategic Health Authorities has demonstrated limited knowledge and understanding of the applicable legislation, a lack of clarity about how to link race equality work with the mainstream agendas of the authorities (such as monitoring and achieving performance targets and delivering the NHS plan) and being unprepared to performance manage for race equality (*Promoting Race Equality in the English NHS*). A further report published by the Commission has shown that, while a third of public bodies have adopted focused action in respect of the duty imposed by the Race Relations (Amendment) Act 2000 to make improvement on race equality across their activities, just under a third have given weak 'off-the peg' responses and a significant number had not done anything to comply with it (*Survey - Towards Race Equality*). Furthermore five government departments have no senior ethnic minority staff but, withy the exception of the Ministry of Defence, all departments have ethnic minorities in their total workforces that represent the population. The Commission has also adopted a legal strategy whereby it is likely only to take on a case which will clarify important points of law, affect large numbers

of people, have a significant impact on one or more work or social sectors, necessitate legislative change, test the public duty to promote race equality, have a strong likelihood of success or merit special consideration by reason of geographical considerations (*Legal Strategy 2003*).

The report of a formal investigation into the Prison Service made 17 findings of unlawful racial discrimination - the majority involving individual cases - which related to the general atmosphere, the treatment of prison staff and prisoners, access to goods, facilities and services, control of the use of discretion, prison transfers and allocation, discipline, incentives and earned privileges, access to work, race complaints by prisoners by prisoners and their investigation, correcting bad practice, protection from victimisation and management systems and procedures. Its examination of the death of Zahid Mubarek at the hands of his cellmate found in particular a failure of management systems in either identifying the violent and racist nature of the cellmate or protecting Mubarek from him (*A formal investigation into HM Prison Service of England and Wales Parts 1 and 2*). The decision as to whether a non-discrimination notice has been suspended after the Commission reached an agreement with the Prison Service whereby it committed itself to implementing a detailed action plan in order to deliver race equality throughout the service.

Reasons for concern

The incidence of racist offences, the adequacy of controls over racist expression, the disadvantage experienced by members of certain minority groups with regard to the take-up of public services and the failure to control discriminatory treatment by some public servants.

Article 22. Cultural, religious and linguistic diversity

International case law and concluding observation of international organs

See the discussion under Article 10 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination.

National legislation, regulation and case law

See the discussion under Article 21 of the implementation of an EC Directive.

Practice of national authorities

See the discussion under Article 10 of the report by the House of Lords Select Committee on Religious Offences.

Reasons for concern

See those expressed under Articles 10 and 21.

Article 23. Equality between man and women

International case law and concluding observation of international organs

A complaint by a widower about being refused social security benefits equivalent to those which a widow whose husband had died in similar circumstances to those of his wife was the subject of a friendly settlement in Eur.Ct.H.R., *Atkinson v United Kingdom*, 8 April 2003, involving the payment to him of GBP 10,488.12 to cover any pecuniary and non-pecuniary

damage as well as costs. Equal treatment to widows and widowers in respect of social security benefits has in the meantime been introduced by the Welfare Reform and Pensions Act 1999 with effect from 9 April 2001 and, having regard to this reform and the payment of compensation and costs awarded, the Committee of Ministers has declared that it has exercised its functions under ECHR Article 46(2) in respect of the similar cases of Eur.Ct.H.R., *Willis v United Kingdom*, 11 June 2002 (Resolution ResDH(2003)130, 22 July 2003) and Eur.Ct.H.R., *Rice v United Kingdom*, 1 October 2002 (friendly settlement) (Resolution ResDH(2003)148, 22 July 2003).

In Eur.Ct.H.R., *Michael Matthews v United Kingdom*, 15 July 2002 a complaint about the fact that the applicant was not entitled to free travel on most public transport before the age of 65 whereas women were entitled to it from the age of 60 was the subject of a friendly settlement, involving the payment of GB 242 in respect of pecuniary damage. The Committee of Ministers - having regard to measures taken to prevent new violations of the same kind, involving a legislative change granting travel concessions to all who have attained the age of 60 irrespective of their sex, and the payment of the compensation agreed - has now declared that it has exercised its functions under ECHR Article 46(2) Resolution ResDH(2003)51, 24 April 2003).

National legislation, regulation and case law

It was held in *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 that the policy under which only pre-1998 victims of the failure to pay widowers social security benefits equivalent to those which widows whose husbands had died in similar circumstances - including a pension and a lump sum of GBP 1,000 - who had brought a claim before the European Court of Human Rights and had had that claim ruled admissible would receive a friendly settlement (as in *Atkinson* above) did not constitute discrimination such as to constitute an independent violation of ECHR Article 14 read with Article 8 or Protocol 1, Article 1 between those widowers and those in the instant case who had not made such claims as the failure to make them was the reason the latter had not been able to benefit from the policy. Moreover, although the payment of extra-statutory payments to put widowers into the same position as widows receiving them on a transitional basis before the equalisation of the position of widows and widowers with the entry into force of the Welfare Reform and Pensions Act 1999 with effect from 9 April 2001 - involving abolition of the widow's pension and the payment of a bereavement allowance for one year to both widows and widowers - would have prevented breaches of Article 14 coupled with Article 8 following the entry into force of the Human Rights Act 1998, it was not irrational for the Secretary of State to decline to adopt this course since it might make more sense to leave those who do not receive a benefit conferred with no rational justification on one class to seek such a remedy as the law allows. Furthermore the principle of just satisfaction did not entitle widowers to those payments as this would only increase the size of those to whom anomalous payments were being made but they should be awarded damages in respect of the lump sum payments to which in justice they were entitled.

A revised *Code of Practice on Equal Pay* - taking account of new law and recent equal pay case decisions - has been issued by the Equal Opportunities Commission, coming into force on 1 December 2003. The Code, although not binding, is admissible in evidence in any proceedings under the Sex Discrimination Act 1975 and the Equal Pay Act 1970 so that tribunals can take into account an employer's failure to act on its provisions.

Practice of national authorities

According to the *New Earnings Survey* (16 October 2003) the gender gap in average hourly pay of full-time employees, excluding overtime, narrowed between 2002 and 2003 to its lowest value since records began, with women's pay being 82% that of men's. Moreover the

median hourly pay (excluding overtime) of women grew by 3.5% whereas that for men grew by 1.1%. The average weekly earnings of full-time employees for women (GBP 396) were 75.4% of those for men (GBP 525), reflecting in part the fact that women worked 3.5 fewer hours than men. The survey emphasised that the average pay did not necessarily indicate differences in pay for comparable jobs and that averages were affected by the different work patterns of men and women, such as the proportions in different occupations and their length of time in jobs. However, the Equal Opportunities Commission has reported that the average hourly pay rate for women working part-time is 41% less than that for men, 60% of employers have no plans to check whether they are paying fairly through an Equal Pay Review, around 40% of women have a weekly income of less than GBP 100 and women's income in retirement is just 54% that of men's; *Annual Report 2002-03*. Other disparities noted included: 27% of women aged 45-64 are carers compared to 19% of men; 97% of modern apprentices in engineering and construction are men; 80% of those using public transport are women, with 40% of women (as compared to 20% of men) having no driving licence; and women comprise only 6% of the directors of FTSE 100 companies and 14% of the judiciary. *Promoting gender equality in health*, a report published by the Commission, has found that Government objectives in areas such as heart disease, mental health and suicide, smoking or sexual health will not be met unless different health strategies and targets for men and women are adopted. It highlights that, although some specialist services have been developed specifically for women or for men, there is little recognition of the fact that gender issues also need to be incorporated into other aspects of health planning. Amongst the findings from a number of exploratory projects published by the Commission in *Gender and poverty in Britain*, it was shown that women are more likely than men to be living in poverty (after housing costs, 25% of females and 22% of males are living in households with equivalent incomes below 60% of the median), there is often an implicit assumption - underpinning their poverty - that women have access to a male partner's income and that their main role is as a carer, women's poverty can be hidden by unequal income distribution within the household. The Commission has called for a legal requirement for public bodies to promote sex equality (such a duty already exists in respect of race equality; see the discussion under Article 21); 29 September 2003. It has also noted that, while the introduction of Pension Credit - providing assistance notwithstanding the existence of some savings - would now lift many of today's female pensioners out of poverty, there was an urgent need for the Government to help women pensioners of the future to build up their entitlement to a full state pension now. The Commission has proposed a number of changes to the current state pensions system - such as adding together earnings from more than one job for national insurance purposes and reviewing the lower earnings limit threshold - so as to widen entitlement to the full amount; 6 October 2003. An investigation by the Commission into allegations of widespread sexual harassment of women postal workers in Royal Mail was suspended following an agreement based on a wide-ranging plan to stamp out such harassment (7 August 2003).

The results of the 2001 Census revealed that the working lives of men and women were still profoundly influenced by their sex, with 84% of employees in personal services, 78% of people doing administrative and secretarial work and 71% of sales and customer services staff comprised of women and men making up 91% of those working in skilled trades, 83% of process, plant and machine operatives and 66% of managers, senior officials and professionals (National Statistics, *Census 2001*, 2003).

Reasons for concern

The continued, albeit declining, difference in pay and employment opportunities between men and women.

Article 24. The rights of the child

International case law and concluding observation of international organs

See the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003).

National legislation, regulation and case law

The Commissioner for Children and Young People (Scotland) Act 2003 establishes this post with the general function of promoting and safeguarding the rights of children and young people (ie, up to 18, or 21 if they have been looked after by a local authority anywhere in the United Kingdom but are in Scotland).The promotional role is intended by s 4 to involve the provision of children and young persons with information and the fostering of awareness of their rights amongst adults, as well as to promote best practice amongst service providers. A specific duty is placed on the Commissioner by s 5 to have regard to the relevant provisions of the UN Convention on the Rights of the Child, but in particular to regard and to encourage others to regard the best interests of children and young people as a primary consideration, and to promote equal opportunities. There is also a general duty in s 6 for the Commissioner to encourage the involvement of children and young people in all of his or her work, as well as particular duties to achieve this. The Commissioner is given the power by ss 7-9 to carry out investigations into how the rights, interests and views of children and young people are taken into account by service providers in decisions or actions affecting them and a written report on these to the Scottish Parliament is required by s 11. There is also a duty in s 10 to make an annual report to Parliament on the functions exercised by the Commissioner and a power in s 12 to lay before it other reports relating to his or her functions as considered necessary or appropriate. Insofar as reasonable and practicable there is a duty in s 13 to ensure that children and young people referred to in a report have their anonymity preserved.

The Protection of Children (Scotland) Act 2003 requires Scottish Ministers to keep a list of individuals whom they consider to be unsuitable to work with children. For this purpose organisations are required to refer the case of an individual who is or has been working in a child care position if he or she has been dismissed, transferred to a position which is not a child care one or not re-employed for having harmed a child or placed the child at risk or would have been so dismissed but for having resigned, retired or been made redundant, as well as the cases of individuals about whom information has became available after they left their employment leading them to form the opinion that they would have dismissed them on this ground. Comparable obligations to these are also established for employment agencies and certain professional bodies. Information submitted with a reference is privileged unless shown to have been submitted with malice. Insofar as any such reference is not vexatious or frivolous, Scottish Ministers shall invite observations from the individual concerned and, if satisfied that the organisation making the reference reasonably considered the individual to have harmed a child or placed a child at risk and that the individual is unsuitable to work with children, the individual shall be included in the list. Individuals named in reports of a relevant inquiry can also be included in the list on the same basis after an opportunity to submit observations has been given. It is also possible to include persons in the list on a provisional basis and give notice of this to the organisation with which they are working and a court can refer the case of an individual convicted of an offence against a child to Ministers for inclusion in the list. All individuals included in the list, as well as those who are similarly regarded in other jurisdictions, are prohibited from applying for, offering to do, accepting or doing any work in a child care position and it is an offence for an organisation to offer such work or procure it for someone on the list, or to fail to remove an individual on it from such work. A person the list may not be included in the register of teachers. Anyone on it may apply to a sheriff for a determination as to whether or not he or she should continue to be included in it.

It was held in *P v BW* [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074 that the Children Act 1989, s 97(2) - which provides that no person shall publish any material which is intended to, or likely to, identify any child as being involved in legal proceedings in which any power under the 1989 Act may be exercised by the court with respect to that or any other child unless the court is satisfied that the welfare of the child requires it - and rule 4.16(7) of the Family Proceedings Rules 1991 - which provides that, unless the court directs otherwise, a hearing of proceedings under the 1989 Act or a directions appointment in proceedings under that Act, shall be in chambers - were compatible with ECHR Article 6(1).

Part 5 of the Anti-Social Behaviour Act 2003 includes generally applicable provisions restricting the carrying of firearms (including air weapons and imitation firearms) in a public place but also raises the age at which a young person may own an air weapon from fourteen to seventeen. As it will also be an offence for anybody to give an air weapon to a person under seventeen, no one under this age will be able to have such a weapon in their possession unless supervised by someone who is aged at least 21 or as part of an approved target shooting club or shooting gallery. 14 to 16 year olds can still have air weapons unsupervised when on private land where this is with the consent of the occupier but it will be an offence for them to shoot beyond the boundaries of that land. See

Provision is made in Part 6 of the Criminal Justice Act 2003 for defendants aged under 18 to give, for certain offences, an indication of plea - along the lines of the procedure applicable in adult cases - so as to try and avoid cases involving young defendants being sent to the Crown Court unnecessarily.

The Criminal Justice (Scotland) Act 2003, s 23 enables young persons (over 14 but under 21 years of age) who are remanded or committed for trial or sentence to be held in young offenders institutions in certain circumstances. Section 52 extends the prohibition of publication of proceedings at children's hearings [prosecutions] from when a hearing is convened to when the case is referred and this applies to all children connected with the hearing and not just the one referred.

See also the discussion under Article 3 of the Sexual Offences Act 2003 and the Criminal Justice (Scotland) Act 2003, the discussion under Article 6 of the Mental Health (Care and Treatment)(Scotland) Act 2003, the discussion under Article 7 of the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 and of Parts 3 and 4 of the Anti-Social Behaviour Act 2003, the discussion under Article 11 of the Licensing Act 2003, s 20, the discussion under Article 12 of Part 4 of the Anti-Social Behaviour Act 2003, the discussion under Article 14 of *A v Head Teacher and Governors of Lord Grey School* [2003] EWHC 1533 (QB), [2003] 4 All ER 1317, the discussion under Article 33 of measures relating to adoption, maternity and paternity leave, the discussion under Article 34 of the Homelessness etc (Scotland) Act 2003 and the discussion under Article 35 of *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2002] EWHC 2785 (Admin), [2003] 2 All ER 105.

Practice of national authorities

Parliament's Joint Committee on Human Rights in its report, *The UN Convention on the Rights of the Child* (Tenth report, 2002-03), considered aspects of the convention's implementation and the concluding observations made on the second periodic report submitted to the Committee on the Rights of the Child. It remained unconvinced that criminalizing young children, by a very low age of criminal responsibility (10 years), was the best way to ensure that they turn away from a life of crime and recommended an increase in this age to 12. The Committee shared the UN Committee's concerns about the increasing levels of imprisonment of children and young persons and their treatment in custody and

called for more resources to be devoted to devising alternatives to custody and to rehabilitative opportunities for children in custody to ensure that they are more able to rebuild their lives constructively upon release. It welcomed a court decision in 2002 that the Children Act 1989 applies to children in custody and called for the necessary legislative steps to be taken to ensure that this duty applies to prison authorities as well as to local authorities. The Committee considered that the Government should legislate to ensure a statutory right to education and access to special needs provision equal to that enjoyed by all other children. It also considered that it was arguable that it would be in the best interests of all young people under 18 serving custodial sentences for them to be removed from the responsibility of the Prison Service and given over to a separate organisation which was more fully imbued with a culture of respect for children's rights. In addition the Committee examined the Government's responses, both in word and deed, to concerns of the UN Committee relating to child poverty, children in armed conflict, child health and parental identity, It recommended the withdrawal of the reservation relating to nationality and immigration and concluded that the retention of the defence of 'reasonable chastisement' was incompatible with the provisions of Article 19 of the Convention (*cf* the discussion under Article 3 of the Criminal Justice (Scotland) Act 2003).

Taking note of the existence or moves to establish commissioners for children for Northern Ireland, Scotland and Wales (see above), the Joint Committee for Human Rights has recommended the establishment of children's commissioner for England; *The Case for a Children's Commissioner for England*, Ninth Report, 2002-03).

The Northern Ireland Human Rights Commission has expressed concern that the rights of children while travelling to and from school are not wholly protected and that there is still no law effectively preventing physical assaults on children in the home; *Annual Report 2002-03*.

See also the discussion under Article 2 of the review of inquest arrangements and the discussion under Article 6 about mental health treatment.

Reasons for concern

The low age of criminal responsibility, the use of prison for children and the adequacy of the educational provision for those held in them and the effectiveness of the mechanisms to protect children against violations of their rights.

Article 25. The rights of the elderly

International case law and concluding observation of international organs

Nothing applicable.

National legislation, regulation and case law

See the discussion under Article 21 of the implementation of an EC Directive and the discussion under Article 34 of the Homelessness etc (Scotland) Act 2003.

Practice of national authorities

Age Concern, while welcoming the reduction in size of the form for claiming Attendance Allowance, has emphasised that the complexity of forms is stopping older people from claiming benefits; press release, 31 October.

See also the discussion under Article 23 about state pensions.

Reasons for concern

The delay in implementing protection against age-related discrimination and the adequacy of the account being taken of the capacities of the elderly to take up all the benefits to which they are entitled.

Article 26. Integration of persons with disabilities

International case law and concluding observation of international organs

The European Committee of Social Rights in *Conclusions XVI-2* has found that the situation regarding vocational training arrangements and placement arrangements for disabled persons is in conformity with requirements in Article 15(1) and (2) of the European Social Charter (pp 36-40).

See also the discussion under Article 15 of the European Committee of Social Rights's *Conclusions XVI-2* on vocational guidance, education and vocational training.

National legislation, regulation and case law

See also the discussion under Articles 11 and 20 of the Communications Act 2003, under Article 21 of the implementation of an EC Directive, the discussion under Article 34 of the Homelessness etc (Scotland) Act 2003, the discussion under Article 36 of the Communications Act and the discussion under Article 37 of the Dog Fouling (Scotland) Act 2003.

Practice of national authorities

Of 1,781 cases of disability discrimination investigated by the Disability Rights Commission in 2002, 55% related to workplace discrimination and 334 complaints were concerned with the issue of making a reasonable adjustment; press release, 25 April 2003.

MIND has claimed that persons with mental health problems applying for the benefits available are poorly served by claims forms and benefits staff and has offered to re-write the forms in a more user-friendly way; press release, 17 July.

Reasons for concern

The delay in implementing further protection against disability-related discrimination and the adequacy of the account being taken of the capacities of the disabled to take up all the benefits to which they are entitled.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

No significant developments to be reported.

Article 28. Right of collective bargaining and action

International case law and concluding observation of international organs

An Individual Observation concerning ILO Convention No 87, Freedom of Association and Protection of the Right to Organise, the Committee of Experts on the Application of Conventions and Recommendations published in 2003 dealt with two sets of provisions in the Trade Union and Labour Relations (Consolidation) Act 1992. The first concerned sections 64-67, which prevented trade unions from disciplining their members who refused to participate in lawful strikes and other industrial action or who sought to persuade fellow members to refuse to participate in such action. The Committee took note of information received from the government that, despite an increase in the number of days of strike, there were only 49 complaints in respect of the prohibition, but recalled that unions should have the right to draw up their rules without interference from public authorities and so to determine whether or not it should be possible to discipline members who refuse to comply with democratic decisions to take lawful industrial action. The second set of provisions (ss 223 and 224) have resulted in an absence of immunities in respect of civil liability when undertaking sympathy strikes, in respect of which the Committee recalled its previous observation that workers should be able to take industrial action in relation to matters which affect them even though, in certain cases, the direct employer may not be party to the dispute and that they should be able to participate in sympathy strikes provided the initial strike they are supporting is itself lawful. The importance of this freedom had previously been underlined on account of employers commonly avoiding the adverse effects of disputes by transferring work to associated employers, restructuring their businesses in order to make primary action secondary. In both cases the Committee requested that it be kept informed of developments. In another Individual Observation also published in 2003 concerning ILO Convention No 144, Tripartite Consultation (International Labour Standards), 1976, the Committee made a number of comments. Firstly, as also pointed out in its 2000 General Survey, it referred to the considerable latitude with regard to consultation procedures that is left to Members by Article 2 of the Convention. Secondly, recalling both its 1993 observation and its 2000 General Survey, the Committee emphasised that in order to be 'effective' consultations must take place before final decisions are taken, irrespective of the nature or form of the procedures adopted; '[t]he effectiveness of consultations thus presupposes in practice that employers' and workers' representatives have all the necessary information far enough in advance to formulate their own opinions'. Thirdly it trusted that the Government and the social partners would examine the manner in which the Convention is applied and that the next report would contain indications on any measures taken in order to continue developing effective tripartite consultation in the sense of the Convention'.

National legislation, regulation and case law

The Fire Services Act 2003, s 1 gives the Secretary of State the power - for up to two years from its commencement - to make orders fixing or modifying the conditions of service of fire brigade workers but he or she must, if there appears to him or her to be a negotiating body, first submit his proposals for an order to that body, allow that body at least 21 days to report to him or her about the opinions of the members of that body on the proposals and consider any report made to him by that body within the period he or she has allowed. Under the power

to make such orders it is possible to make provision with retrospective effect fixing or modifying the pay or allowances of fire brigade members (including provision having effect from a time before the passing of the Act) but this does not include the power retrospectively to reduce the pay and allowances payable to a person. In s 2 it is made clear that nothing in the Act affects the possibility of the parties agreeing on a reference to mediation, conciliation or arbitration on the interpretation of the June 2003 agreement between the Fire Brigades Union and the local authority fire service employers.

The undertaking of industrial action (whether the refusal to do particular tasks or to work at all), as well as its organisation, will potentially lead to the commission of various civil and criminal wrongs but a 'right to strike' is effected through the conferment of an immunity in respect of those wrongs for some such action. This will arise for the organising union where the action is lawful in the sense of having been first authorised by a properly held ballot of the employees concerned and where it is directed only at an employer which is party to the dispute. There will be similar immunity for the employees who take part in the action but, as this can be sufficiently serious to be regarded as a repudiation of employment, their dismissal may be justified and there is certainly no entitlement to be paid. Dismissal will, however, be seen as unfair if it occurs in the first 8 weeks of the action or if the employee concerned ceased to take part in the action before that period ended or if the employer had failed to take appropriate procedural steps to resolve the dispute. Continuity of employment is not affected by participation in lawful industrial action but the period spent on it will not count towards a person's total period of continuous employment. There is no objection to an employer dismissing employees who take part in unlawful industrial action unless not all of them are dismissed or some are re-engaged within three months of the dismissal. The shaping of the balance between the interests of employees and employers, with its heavy emphasis on ensuring that procedural conditions are observed before any protection is obtained for a strike, has not been materially influenced by EC law.

Reasons for concern

The restriction on the power of unions to discipline members who do not participate in lawful strikes and the way in which the loss of immunity for sympathy action undermines action against employers organising their businesses in structurally, if not economically, discrete forms.

Article 29. Right of access to placement services

International case law and concluding observation of international organs

The European Committee of Social Rights in *Conclusions XVI-2* has found that the situation regarding vocational training and retraining of adult workers is, pending receipt of information on the existence of preventive measures against the deskilling of still active workers at risk of becoming unemployed as a consequence of technological and/or economic progress, the expenditure for training measures as a share of total expenditure on labour market policy and the sharing of the burden of the cost of vocational training among public bodies, enterprises and households as regards continuing training, in conformity with Article 10(3) of the European Social Charter. It also asked for confirmation of the correctness of its interpretation of the low activation rate with respect to training measures being the consequence of the labour market policy (where training intervenes only at a later stage, ie, after the Jobseeker's Allowance device has been exhausted) and, if this is the case, for increased effort in providing continuing training for unemployed people from the beginning of unemployment (pp 28-32).

See also the discussion under Article 26 of the Committee's conclusions.

Reasons for concern

The adequacy of vocational training and retraining arrangements.

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

See the discussion under Article 21 on the implementation of Directives 2000/43/EC and 2000/78/EC.

Article 31. Fair and just working conditions

International case law and concluding observation of international organs

The European Committee of Social Rights in *Conclusions XVI-2* concluded that the situation with respect to the provision for the enforcement of safety and health regulations by measures of supervision is not in conformity with Article 3(2) because of the manifestly insufficient number of inspections carried out in Northern Ireland, where a decrease in visits from 7,107 in 1995-96 to 2,872 in 1999-2000 had been attributed to a significant number of retirements and the redeployment of inspectors to help support the establishment of the new Health and Safety Executive for Northern Ireland (pp 11-12). It also concluded that the situation regarding adequate remuneration is not in conformity with Article 4(1) as the statutory minimum wage cannot be considered 'fair', with the full rate and *a fortiori* the development rate falling manifestly short of the 60% threshold (net minimum wage as a share of the net average wage); for this purpose it relied on figures showing the former as 46% of median full-time earnings and 36.4% of the net average (pp 14-15). The Committee requested information on the value of the minimum wage as well as of the national average wage after deduction of any taxes and social security contributions, as well as detailed information on the effects of tax alleviation measures for single workers on the minimum wage and on any other measures (eg income and housing supplements) which improve the situation for this category. It also concluded that the situation relating to increased rate of remuneration for overtime is not in conformity with Article 4(2) as there had been no change in the position, with the determination of rates of payment for overtime work being left to the negotiation between employers and their staff and insufficient evidence being afforded by surveys provided by the Government alleging that in practice workers do receive an increased rate of remuneration for overtime work (p 15). It concluded that the situation with respect to reasonable notice of termination of employment was still not in conformity with Article 4(4) as there had been no changes in relevant legal provisions and the notice in the case of workers with less than three years' service continued to be too short (p 16). It also concluded that the situation with respect to the limitation of deduction from wages was not in conformity with Article 4(5) as such deductions were allowed on the basis of rules set in the employment contract between the employer and the employee and, even if the case law principle of proportionality is a sufficient legal limitation with regard to the amount of the deduction, there is no mention of any such limitation with regard to the cases in which deductions may be applied (p 16). Pending the receipt of information concerning which sectors and under what conditions work is allowed on public holidays and whether the employees concerned are entitled to take another day off, as well as of information demonstrating that in the absence of any statutory right to paid absence on public holidays the great majority of workers enjoy the protection of Article 2(2) of the European Social Charter by collective agreement or by other means, the European Committee of Social Rights in *Conclusions XVI-2* has found that the situation regarding public holidays with pay to be in conformity with Article 2(2) (p 6). Also pending the receipt of information concerning the exceptions - 'eg, security work, where the job

involves round the clock staffing; during peak busy periods or when an emergency occurs' - in which the right to weekly rest periods under the Work Time Regulations implementing Council Directive 93/104/EC does not apply and also of updated information on the extent of Sunday work, the Committee concluded that the situation with regard to the weekly rest period is in conformity with Article 2(5) (p 8). Pending the receipt of information on the percentage of companies that have appointed trade union safety representatives, the Committee concluded that the situation with regard to consultation with employers' and workers' organisations on questions of safety and health is in conformity with Article 3(3) (p 13). The Committee deferred its conclusion on the conformity with Article 2(3) of the position regarding annual pay with holidays pending receipt of information on the situation of seasonal workers, temporary workers and workers on fixed-term contracts, as well as of evidence that the great majority of workers are entitled to take holidays 'lost' due to illness or accident at another time so as to ensure that they benefit from at least two weeks' annual holiday (pp 6-7).It also deferred its conclusion on the conformity with Article 3(1) of the situation regarding safety and healthy working regulations, pending receipt of information on the introduction of dose limits for ionising radiation into domestic law, on the application of the regulations to non-permanent workers and on the protection afforded to domestic employees via contractual arrangements rather than these regulations (pp 9-10).

National legislation, regulation and case law

Under the National Minimum Wage Act 1998, s 1, all qualifying workers are entitled to be paid at least the rate of the national minimum wage, as set by the Secretary of State from time to time and s 17 provides that a worker who has been paid less than this wage is entitled, under his or her contract of employment to be paid the difference between the amount he or she was in fact paid and the amount that would have been paid if the minimum wage had been received. However, a limitation in the enforcement arrangements for the payment of the national minimum wage was revealed in a ruling of the Employment Appeal Tribunal in *Inland Revenue v Bebb Travel plc* (16 August 2002), namely, that an enforcement officer - who can serve enforcement notices on employers - had no power to issue a notice in respect of past periods of employment only so that there was no power to issue a notice at all in relation to workers whose employment with the employer had already ended. This meant that the officers could not then bring a complaint in respect of non-payment for such periods to an employment tribunal and, although the worker could still bring proceedings on his or her own account, it was doubted that all such workers would be capable or be prepared to do so. The National Minimum Wage (Enforcement Notices) Act 2003 amends the 1998 Act so that enforcement officers do have the power to issue notices which relate to past pay periods that ended before the passing of the Act but a limit is introduced for the first time on the arrears that may be the subject of an enforcement notice, namely pay periods ending no more than 6 years before the date of its service.

See also the discussion under Article 21 on the implementation of Directives 2000/43/EC and 2000/78/EC.

Practice of national authorities

According to the Health and Safety Executive's *Statistics of Fatal Injuries 2002/03* the number of workers fatally injured in 2002-03 and the rate of fatal injury to workers both fell by 10% to 251 and 0.8 per 100,000 respectively. While the rate of major injuries rose in the same period by 1.5% to 28,426, the number of reported over-3-day injuries to employees fell by 2.8% to 126,004 and this discrepancy is seen as pointing to the need for further analysis to see whether the former increase reflects a genuine change in the pattern (National Statistics, *Statistics Highlights 2002/03*). There was also a 1% increase in the number of enforcement notices to 17,042 for 2001-02, the latest year for which data was available. The Health and Safety Commission has produced its *2nd Report to the European Commission on the Practical*

Implementation of the Temporary Workers Directive (91/383/EEC) (HSC/03/97) which concluded that the general approach to management of health and safety and the need for provision of information, instruction and training is generally understood and accepted by the business community. Moreover it found that employers and employees are, in general, implementing the requirements of the Management of Health and Safety at Work Regulations 1992 (as amended in 1999) and that overall these have proved a success in terms of improving work practices and changing attitudes to risk control, with no problem being identified in respect of temporary workers.

Reasons for concern

The effectiveness of health and safety protection in the workplace, the adequacy and equality of remuneration levels and the undue reliance on negotiated arrangements to obtain fair working conditions.

Article 32. Prohibition of child labor and protection of young people at work

No significant developments to report.

Article 33. Family and professional life

National legislation, regulation and case law

The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 and the Flexible Working (Procedural Requirements) Regulations 2002 entered into force on 6 April 2003, enabling workers with children under 6 years old to ask their employers for the right to vary their working conditions in some way (such as working from home or working fixed shifts) and the latter must give a response within 14 days. A refusal is only possible because of the additional costs involved, the detrimental effect on meeting customer demand, performance or the quality of the firm‘s output, an inability to recruit additional staff, an insufficiency of work in the time for which work is proposed or planned structural changes. In addition from the same date ordinary maternity leave has been increased by the Maternity and Parental Leave Regulations to 26 weeks and these also enable employees with 26 weeks’ continuous service to take additional maternity leave for a further 26 weeks. At the same time the Paternity and Adoption Leave Regulations introduce an adoption leave equivalent to maternity leave, allow employees to take up to two weeks’ paid leave to care for their new baby and support the mother and allow both mothers and fathers can take up to 13 weeks’ unpaid leave to care for their child up to five years from the date of birth or adoption.

Article 34. Social security and social assistance

International case law and concluding observation of international organs

In an Individual Observation published in 2003 concerning ILO Convention No 102, Social Security (Minimum Standards), 1952 the Committee of Experts on the Application of Conventions and Recommendations noted with satisfaction that paragraph 34108 of the Decisions Makers Guide no longer contained a general guidance that ‘even when claimants have not deliberately done anything wrong, this can still amount to misconduct’, with the illustration of sanctioning a claimant who was accidentally late for work. In its previous comments had requested a modification of the guide so as to bring it in line with the adjudication officers’ case law sanctioning in practice only wilful misconduct in accordance with Article 69(f) of the Convention.

National legislation, regulation and case law

Powers have been conferred by the Education (School Meals)(Scotland) Act 2003 on Scottish Ministers to prescribe circumstances in which education authorities are obliged to ensure that provision is made for pupils to receive milk, meals or other refreshments free of charge.

The Homelessness etc (Scotland) Act 2003, s 1 widens the definition of persons having a priority need for accommodation in existing legislation to include those vulnerable as a result of: old age; mental illness; personality disorder; learning or physical disability; chronic ill health; having suffered a miscarriage or undergone an abortion; having been discharged from hospital, a prison or the armed forces; or other special reason. Also added to the definition are 16 and 17 year olds, certain young people between 18 and 20, a person who runs the risk of violence or is likely to be the victim of harassment because of their religion, sexual orientation, race, colour or ethnic or national origins and a person who runs the risk of domestic abuse, as well as in most circumstances those residing with someone who is defined as having a priority need for accommodation. However, there is also provision in ss 2 and 3 for the abolition of the test as soon as Scottish Ministers are satisfied that local authorities will be able to carry out their duties in relation to homeless people without distinguishing between applicants on the basis of priority need. Section 4 transforms the duty to make inquiries as to whether someone became homeless intentionally into a discretion and section 5 makes some provision for the housing of persons who did become homeless intentionally but have a priority need. In addition the provision of interim housing for homeless persons until the general duty to secure accommodation is discharged is required by s 9. Furthermore landlords are required by s 10 to notify the local authority, unless it is the authority, when raising proceedings for possession of a dwelling and the sheriff is given a discretion by s 12 not to make an order for possession in circumstances where the rent arrears are a consequence of a delay or failure in the payment of housing benefit, other than that resulting from the tenant‘s act or omission. The latter provision also directs the sheriff to have regard to such delay or failure when considering whether it is reasonable to make an order for possession. See also the discussion under Article 18 of this Act.

Pursuant to Part 2 of the Anti-Social Behaviour Act 2003 social landlords are now required to prepare and publish policies and procedures on anti-social behaviour and to make them available to the public. Guidance for this purpose may be issued in the case of local housing authorities or housing action trusts by the Secretary of State (in England) or by the National Assembly for Wales (in Wales) and in the case of registered social landlords by the Housing Corporation (in England) or the National Assembly (in Wales). It also enable certain social landlords to apply for injunctions to prohibit anti-social behaviour, ie, conduct which is capable of causing nuisance or annoyance, even if no complaint has been received and no specific individual has been affected, which directly or indirectly relates to or affects their management of their housing stock without necessarily occurring in the vicinity of the latter. Such an injunction may be made against anyone who has a right to live in property owned or managed by the landlord, anyone who has a right to live in any other property in the neighbourhood, anyone else lawfully in such property or in the neighbourhood and staff employed in connection with the management of the landlord’s stock. It is also possible to apply for an injunction where someone has used or threatened to use their housing for an illegal purpose. A court granting an injunction can attach a power of arrest or exclude a person from specified premises or a specified area where there is the use or threat of violence or a significant risk of harm - including emotional or psychological harm - to any person within the class of persons against whom an injunction may be made. It is envisaged that the fact that there is no longer a requirement of a use or threat of violence in all cases means that the power could be applied in cases of racial or sexual harassment. If the behaviour on which an injunction is based is prohibited by the terms of a tenancy agreement and is capable of causing nuisance or annoyance to any person the court may exclude a person from specified premises or a specified area and attach a power of arrest to any provision of the injunction.

Such an injunction may exclude someone from his or her own place of residence and may be made without giving notice to the respondent, although he or she must subsequently be given the power to make representations. Furthermore local authorities, housing action trusts and registered social landlords can now seek to bring to an end a secure tenancy through a demotion order. Such an order will be granted if the tenant, another resident of or visitor to the tenant's home has behaved in a way which is capable of causing nuisance or annoyance or if such a person has used the premises for illegal purposes and it is reasonable for one to be granted. If a tenant against whom a demotion order has been granted remains in occupation a new 'demoted tenancy' begins on the same day. A demotion order can also be made on the same basis in respect of an assured tenancy which would then be replaced by a demoted assured short hold tenancy but such a tenancy will automatically turn into an assured one after one year unless the landlord has issued a notice of proceedings for possession during that period. The tenancy will continue as a demoted assured shorthold one if such a notice has been issued until the notice is withdrawn or six months have passed and either no proceedings have been issued or these have been determined in the tenant's favour. A demoted assured short hold tenancy can be ended at any time during the demotion period. Changes have also been made to the court's exercise of discretion in possession proceedings so that, when considering whether it is reasonable to grant a possession order against a secure or assured tenant under one of the nuisance grounds of possession, the court must give particular consideration to the actual or likely effect which the anti-social behaviour has had or could have on others.

In two conjoined appeals - the first concerning the failure to provide a pensioner living abroad with the annual increase of the state retirement pension based on price inflation which was received by pensioners living in the United Kingdom and the second concerning the payment of a lesser jobseeker's allowance to someone in the 18 to 24 years age than to someone aged 25 years or over, where both the pension and the allowance were contributions-based - it was held in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2003] EWCA Civ 797, [2003] 3 All ER 577 that, while states were in general free to grant, amend or discontinue social security benefits and to change the conditions for entitlement to them as they pleased, where contributions were exacted as a price of entitlement a reduction or qualification could engage ECHR Protocol 1, Article 1, without necessarily amounting to a violation of it simpliciter because there was no entitlement under it to receive a particular amount, but any reduction or qualification was also subject to the constraints of ECHR Article 14. In the case of the pension the circumstances of the claimant and the chosen comparators were not so similar as to call for a positive justification for the withholding of the pension increase but the circumstances of a person over 25 and a person under 25 were so similar as to call for a positive justification for the less favourable treatment in the case of the allowance but the Secretary of State had demonstrated a perfectly reasonable justification for the differential payments based on the earnings and the living arrangements of persons under 25.

See also the discussion under Article 7 of *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, the discussion under Article 18 of *Al-Ameri v Kensington and Chelsea Royal London Borough Council* [2003] EWCA Civ 235, [2003] 2 All ER 1 and of *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 2 All ER 905, the discussion under Article 23 of *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2003] EWCA Civ 813, [2003] 3 All ER 673 and the discussion under Article 37 of the Sustainable Energy Act 2003 .

Practice of national authorities

In England the number of households in accommodation arranged by local authorities under homelessness legislation at the end of September 2003 was 93,930, 3% higher than at the end of the previous quarter and 10% higher than at the end of September 2002 (National Statistics, *Statutory Homelessness: England Q3 2003*.

See also the discussion under Article 2 about the Information Commissioner, under Article 19 of a report by the Home Affairs Select Committee, under Article 23 about poverty and state pensions and the discussion under Articles 25 and 26 on the complexity of forms.

Reasons for concern

The increasing level of homelessness and practical obstacles to the take-up of benefits by the disabled and the elderly.

Article 35. Health care

International case law and concluding observation of international organs

See the discussion under Article 4 of Eur.Ct.H.R., *McGlinchey and Others v United Kingdom*, 29 April 2003 and also the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003).

National legislation, regulation and case law

Part 1 of the Health and Social Care (Community Health and Standards) Act 2003 establishes the concept of a NHS foundation trusts as a public benefit corporation authorised to provide goods and services for the purposes of the health service. Trusts will not be subject to direction by the Secretary of State but will be monitored by an Independent Regulator. Although they will be part of the National Health Service they will have greater financial and management freedom, including freedom to retain surpluses and to invest in the delivery of new services, to manage and reward their staff flexibly and to access a wider range of options for capital funding. Each trust will have a board of governors responsible for representing the interests of the local community, staff and local partner organisations. Both existing NHS trusts and other persons can apply to become NHS foundation trusts but only with the support of the Secretary of State and the authorisation to become one will be given by the Independent Regulator, whose decision will be take into account the applicant‘s ability to provide the goods and services that it will be required to provide. The Independent Regulator has powers to intervene where foundation trusts breach its obligations and they can be dissolved by the Secretary of State where its goods and services remain at risk. Two new inspectorates - the Commission for Healthcare Audit and Inspection and the Commission for Social Care Inspection - have been established by Part 2 of to carry out general reviews of health and social care in England of Wales (although, in the case of the latter the functions of the second inspectorate have been conferred on the National Assembly for Wales) by reference to standards set out in that part. The Secretary of State and the Assembly are also given powers to make regulations about the handling and consideration of complaints and the Health Service Commissioner has been enabled to consider complaints from individuals dissatisfied with the way in which a complaint has been handled under these regulations. The existing arrangements for the NHS to recover costs - from the compensator and not the patient - where people receive compensation for injuries are modified in Part 3 of the Act through the addition of the provision of ambulance services to what is recoverable, the making of provision for contributory negligence findings to be taken into account when calculating the amount recoverable and the allowing of applications by compensators to defer payment until after the determination of an appeal against charges imposed. A new duty is established by Part 4 for Primary Trusts and Local Health Boards to provide or secure the provision of primary dental and medical services and provision is made for contracts for such services to be made between these bodies and general dental practitioners, dental corporations and general medical practices. Finally Part 5 provides for the replacement of the Welfare Food Scheme - under which tokens for milk (in both liquid and dried form) and vitamins are

provided to expectant mothers and children up to the age of 5, as well as under which non-means-tested milk is provided to children up to 5 in nurseries and day care and to a very few disabled children - by schemes with aims of ensuring that children in low income families have access to a healthy diet - covering a broader range of foods in addition to milk and infant formula - and of giving increased support for breastfeeding. Powers are thus provided for regulations to establish schemes to help certain pregnant women, mothers and children to have access to, and incorporate in their diets, food of a prescribed description.

Pursuant to a policy objective of reducing the number of people who are ready and safe to leave hospital but are unable to do so because their care needs have not been assessed or their package of onward care - whether in the person's own home or elsewhere - has not been put together, the Community Care (Delayed Discharges Etc.) Act 2003 - which applies only to England and Wales - provides for an obligation for a duly notified local authority to make a payment to the healthcare provider for each day of delay when a National Health Service patient's discharge is delayed and the local authority is responsible for that delay. In addition provision is made for the possibility of removing, in circumstances to be set out in regulations, the power of local authorities to charge for certain community care and carers' services. The object of such provision is to facilitate the pooling of monies and the integration of services with regard to community equipment services (including aids to daily living and minor adaptations to help people stay independent in their homes) and intermediate care (structured programmes of time-limited rehabilitation to assist the recovery of as much independence as possible). Although there is already power to undertake such pooling, its use is seen as being restricted where the local authority has a power to charge for a service and the National Health Service does not; see 'Practice of national authorities' below.

Tissue typing which enabled an embryologist to ascertain whether an embryo would produce a child whose tissue would match that of another person, enabling that child to act as a donor for an older sibling with a serious genetic disorder, was held in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2003] EWCA Civ 667, [2003] 3 All ER 257, still to constitute treatment 'for the purpose of enabling women to carry children' within the Human Fertilisation and Embryology Act 1990, s 2(1) and so could be authorised under the licensing powers of the Human Fertilisation and Embryology Authority.

The parents of two teenage children who were suffering from a rare and fatal neurodegenerative disorder involving the deposit of abnormal prion proteins in the brain - which had led to them becoming helpless and mentally-incapacitated invalids with a severely limited enjoyment of life and for which there was no cure and no recognised effective drug capable of prolonging life or arresting the deterioration - succeeded in *Simms v Simms* [2002] EWHC 2734 (Fam), [2003] 2 All ER 669 in obtaining declarations that it would be lawful for their children to receive a treatment untested on humans but which medical research abroad had identified as inhibiting the formation of abnormal prion protein in mice infected with a different disease in the same group. In the court's view it was reasonable, where there was no alternative treatment available and the disease was progressive and fatal, to consider experimental treatment with unknown benefits and risks but without significant risks of increased suffering to the patient where there was some chance of benefit to the patient; a patient who was not capable to consent to pioneering treatment ought not to be deprived of the chance in circumstances where he would have been likely to consent if he had been competent. Furthermore it could not be said that, in the instant case, the treatment was clearly futile or that it would not be proper to give it in suitable cases to those suffering from prion diseases so its use would comply with the requirement for a doctor to act at all times in accordance with a responsible and competent body of relevant professional opinion and would be in the patients' best interests.

It was held in *R (on the application of B) v Ashworth Hospital Authority* [2003] EWCA 547, [2003] 4 All ER 319 that, notwithstanding the problems for those charged with the task of

caring for and treating patients who suffered from more than one mental disorder, the liability to detention under the Mental Health Act 1983 was linked to the mental disorder from which the patient was classified as suffering and which was considered to be treatable and it was not lawful under s 63 to treat compulsorily someone detained as a patient by a hospital order under the Act for a mental disorder that was not the subject of the hospital order.

See also the discussion under Article 6 of *R (on the application of Morley) v Nottinghamshire Health Care NHS Trust* [2002] EWCA Civ 1728, [2003] 2 All ER 784, the discussion under Article 18 of *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 All ER 827 and the discussion under Article 34 of the Homelessness etc (Scotland) Act 2003.

Practice of national authorities

By the end of 2002 the estimated number of people living with HIV was 49,500, an increase of 20% on the figure for 2001, with the 5,711 new cases diagnosed being almost double that for 1998. On the other hand the numbers of AIDS diagnoses and deaths in HIV-infected individuals remain constant, with 777 reports of deaths so far for 2002 (Health Protection Agency, *HIV and AIDS*). There has been a 14% rise between 2001 and 2002 in the incidence of chlamydia (81,700 cases) and 9% increase in diagnoses of gonorrhoea (24,953 infections) (Health Protection Agency, *Sexual Health*).

The House of Commons Committee of Public Accounts has reported on the problem of delayed discharge of older patients from NHS acute hospitals, with some 3,500 such persons remaining there after medical staff have declared them fit ands safe to be discharged because arrangements are not complete for them to move on. It called for the Government, health authorities, hospital trusts and independent providers to work together better to plan care provision; *Thirty-Third Report: ensuring the Effective Discharge of Older Patients from NHS Acute Hospitals*, HC 459, 17 September.

See also the discussion under Article 6 on mental health and the discussion under Article 20 of Strategic Health Authorities.

Reasons for concern

The adequacy of medical care in prisons and the increase in the incidence of sexually transmitted diseases.

Article 36. Access to services of general economic interest

National legislation, regulation and case law

The Communications Act 2003, s 10 requires OFCOM (see further the discussion under Article 11) to take steps to encourage others to secure that domestic electronic communication apparatus is developed which is capable of being used with ease, and without modification, by the widest possible range of individuals (including those with disabilities) and that such apparatus is as widely available as possible for acquisition by those wishing to use it. Under s 11 OFCOM is also under a duty to promote media literacy. In addition under s 45 it has the power to impose universal service conditions to persons providing an electronic communications network or service and under s 68 it is under a duty to keep under review and monitor changes in tariffs for universal service tariffs. Moreover s 218 requires it to secure a public teletext service and ss 272 and 273 require the imposition of certain must-offer obligations in relation to television networks and satellite services. Furthermore by s 16 it is required to establish and maintain effective arrangements for consultation about the carrying

out of its functions with regard to electronic communication networks and services, including a Consumer Panel.

Article 37. Environmental protection

International case law and concluding observation of international organs

See the discussion under Article 47 of Eur.Ct.H.R., *Hatton and Others v United Kingdom*, 8 July 2003.

National legislation, regulation and case law

Under Part 6 of the Anti-Social Behaviour Act 2003 the chief executive of a local authority can issue a closure order for up to 24 hours in relation to licensed premises or premises operating under a temporary event notice which are causing a public nuisance. Disobedience to an order is an offence for which the penalty is imprisonment for up to 3 months or a fine of up to GBP 20,000. In addition the 2003 Act removes the requirement that the use of powers to deal with noise at night (through warning notices and fixed penalties) under the Noise Act 1996 be dependent upon them first being specifically adopted by a local authority. It also replaces the duty to take reasonable steps to investigate a complaint by a discretionary power and gives authorised local authority officials the ability to issue fixed penalty notices to persons who have perpetrated acts of graffiti or fly-posting. The 2003 Act also enables a local authority to serve a 'graffiti removal notice' on the owners of street furniture, statutory undertakers and educational institutions whose property is defaced with graffiti that is either detrimental to the amenity of the area or offensive. The property-owners concerned can be required to act within a minimum of 28 days and, if they fail to do so, the local authority can intervene and clean up the graffiti, with the ability to recover from them the reasonable costs of so doing. In order to provide a more punitive deterrent for those responsible for displaying an advertisement in contravention of regulations made under the Town and Country Planning Act 1990, s 220, the penalty for this offence has been increased from GBP 1,000 to GBP 2,500. The latter penalty also applies to the new offence created by the 2003 Act of selling aerosol spray paints to persons under 16 years old. Furthermore the Act empowers waste collection authorities to stop, search and (after the issue of a warrant) seize a vehicle suspected of being used for the unlawful deposit of waste and local authorities to enter Crown land or land occupied by a statutory undertaker (other than land occupied for the purposes of the armed forces), clear it of litter and recover their costs through the courts.

The Sustainable Energy Act 2003 makes provision concerning the development and promotion of a sustainable energy policy. This includes: the requirement for the publication of an annual report on the progress made in cutting carbon emissions, maintaining the reliability of energy supplies, promoting competitive energy markets and reducing the number of people living in fuel poverty (ie, the members of a household living on a lower income in a home which cannot be kept warm at a reasonable cost); the designation of at least one energy efficiency aim relating to residential accommodation within a week of the Act's entry into force and then take reasonable steps to achieve it and any others subsequently designated; the making of a direction requiring each energy conservation authority to take such energy conservation measures as it considers likely to result in achieving by a given date a specified level of improvement in the energy efficiency of residential accommodation in its area; the making of a statement before the end of 2003 specifying one or more CHP targets (ie the percentage of the amount of electricity to be used by government that is generated by a generating station which is operated for the purposes of producing heat, or a cooling effect, in association with electricity) to begin on 1 January 2010; and the imposition of duties on the Gas and Electricity Markets Authority to carry out an impact assessment when carrying out its functions and to use certain sums for promoting the use of energy from renewable sources.

The Water Act 2003 imposes a duty on the government to take steps to encourage the conservation of water and to report on the action taken every three years

Under the Household Waste Recycling Act 2003 waste collection authorities will be required from 31 December 2010 to ensure that its arrangements for the collection of household waste from any premises involve the collection of at least two types of recyclable waste together or individually separated from the rest of the household waste unless satisfied that the cost of so doing would be unreasonably high or comparable alternative arrangements are available.

Under the Waste and Emissions Trading Act 2003 provision is made for: the adoption of regulations specifying the maximum amount by weight of biodegradable municipal waste which - consistent with Council Directive 1999/31/EC, Article 5(2) - is allowed to be sent to landfills; the transfer by waste disposal authorities, by trade or otherwise, of landfill allowances allocated to them; the monitoring of compliance and the maintaining of records; the adoption of strategies for reducing the amount of biodegradable waste that goes to landfills, including recycling, composting, biogas production, materials recovery or energy recovery; further provision to secure the separation of waste; and penalties for non-compliance with schemes for the trading of emissions quotas.

The Dog Fouling (Scotland) Act 2003 makes provision in relation to the offence of dog fouling (ie, defecation in public open places with limited exceptions for guide and working dogs, dogs used by the armed forces, customs and the police and in emergency rescue to assist the disabled), including the use of fixed penalty notices for such an offence.

Article 38. Consumer protection

National legislation, regulation and case law

See the discussion under Article 36 of the Communications Act 2003.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

National legislation, regulation and case law

The European Parliament (Representation) Act 2003 has established a mechanism by which the number of Members of the European Parliament representing the United Kingdom can be reduced consequent upon the accession of new member states to the European Union, as agreed by the Treaty of Nice. For this purpose the Lord Chancellor is empowered by s 3 to require the Electoral Commission within a specified period about the distribution of MEPs according to total number specified by him (this will not initially be the lowest figure set by the Treaty of Nice as not all the 12 new Member States envisaged by the Treaty of Nice will accede before the 2004 elections). In making its recommendations the Commission must give each region a minimum of 3 MEPs and ensure that as nearly as possible the ratio of electors to MEPs is the same in each region. Section 5 gives the Lord Chancellor the power to make an order giving effect to a change in Community law in the number of MEPs to be elected for the United Kingdom and a recommendation made by the Electoral Commission as to their distribution in the regions by altering the total number and distribution of UK MEPs. Provision is also made by s 7 for periodic reviews of the distribution of MEPs - on the foregoing basis - to be carried out by the Electoral Commission rather than the Secretary of State. The Act also provides for the enfranchisement of the Gibraltar electorate for the purposes of European Parliamentary elections as of 2004, following the ruling in Eur.Ct.H.R., *Matthews v United Kingdom*, 18 February 2003 that the inability of the people of Gibraltar to take part in elections for the European Parliament - which formed part of Gibraltar's legislature through the application of the EC Treaty to European territories for whose external relations a Member State is responsible - was a violation of ECHR Protocol 1, Article 3.This action is being taken unilaterally after a failure to secure the unanimous agreement of the Council to an amendment to the EC Act on Direct Elections of 1976 to provide for its application to Gibraltar which, although forming part of Her Majesty the Queen's Dominions, is not a part of the United Kingdom, to which the 1976 Act is applicable. Thus Part 2 of the 2003 Act provides for the entirety of United Kingdom electoral law, as it applies to European Parliamentary elections, to be applied to Gibraltar for this purpose, modified as necessary to ensure practical application. In particular it is provided that Gibraltar should be combined with an existing electoral region in England or Wales for the purpose of elections taking place after 1 April 2004 and a recommendation as to which should be chosen is to be made by the Electoral Commission, after consultation, and the Lord Chancellor is empowered to give effect to this by order.

Practice of national authorities

See the discussion under Article 40 regarding the Local Government Act 2003.

Article 40. Right to vote and to stand as a candidate at municipal elections

National legislation, regulation and case law

The Local Government Act 2003, s 103 permits the Secretary of State to move, by order, the dates of English local elections (for principal councils and parish councils) and Greater London Authority elections in 2004 so that they are held on the same day as the European Parliamentary general election due in June 2004. In the event that local elections are moved, the Secretary of State may by order provide that by-elections that are otherwise required to be

held should not take place during the period from 6 May 2004 until the June election date. A similar power is given by s 104 to the National Assembly for Wales in respect of elections in Wales. Under s 114 of the Act it is established that, where any salary is paid to an employee by an employer in respect of time taken off in order to undertake duties as a local councillor, the value of the salary is not to be classified as a political donation under the Political Parties, Elections and Referendums Act 2000.

Article 41. Right to good administration

Not applicable.

Article 42. Right of access to documents

Not applicable.

Article 43. Ombudsman

Not applicable.

Article 44. Right to petition

Not applicable.

Article 45. Freedom of movement and of residence

International case law and concluding observation of international organs

See the discussion under Article 21 of the Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003.

National legislation, regulation and case law

Pursuant to the European Union (Accessions) Act 2003, s 2, the Secretary may by regulations provide that a specified enactment relating to either the entitlement of a national of an EEA State to enter or reside in the United Kingdom as a worker or any matter ancillary to that entitlement applies in relation to a national of a relevant acceding State - ie, the Czech Republic, the Republic of Estonia, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Poland, the Republic of Slovenia and the Slovak Republic - as it applies in relation to a national of an EEA State. This provision reflects the fact that the Accession Treaty of 16 April 2003 - the implementation of which into UK law is provided for in s 1 of the Act - grants nationals of Cyprus and Malta the same rights to work in another Member State as are currently enjoyed by nationals of the existing Member States but the other new Member States are subject to transitional provisions. Although the Government announced in December 2002 that it would grant the nationals from the latter states the same rights to work in the United Kingdom as are enjoyed by nationals of the existing Member States, the formulation employed in s 2 enables the transitional restrictions to be invoked through the repeal or suspension of any regulations made under it. It is envisaged that this safeguard would be invoked in the event of an unexpected threat to a region or occupational sector within the UK labour market, although the need to use it is doubted.

See also the discussion under Article 3 of the Sexual Offences Act 2003, the discussion under Article 6 of the Extradition Act 2003 and the discussion under Article 18 of *European Roma Rights Centre v Immigration Officer at Prague Airport* [2003] EWCA Civ 666.

Practice of national authorities

Although access to certain areas was restricted on security grounds during the visit of President Bush in November, demonstrations in central areas were not prevented and it seems unlikely that the restrictions would be regarded as incompatible with either the right to freedom of movement or of assembly.

See also the discussion under Article 18 of concerns by the European Roma Rights Center and the discussion under Article 24 of a report by the Joint Committee on Human Rights.

Article 46. Diplomatic and consular protection

No significant development to report.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

In Concluding Observations of the Committee on the Elimination of Racial Discrimination (CERD/C/63/CO/11, 10 December 2003) it was noted that the effectiveness of the Human Rights Act 1998 could be undermined by the absence of a central body to implement it and an early decision was recommended on the United Kingdom's earlier commitment to consider establishing a Human Rights Commission in order to enforce the Act and the possibility of granting such a commission comprehensive competence to review complaints of human rights violations (para 22). The Committee also invited the United Kingdom to give high priority to its review of the possibility of making the optional declaration provided for in Article 14 of the Convention, as well as to giving favourable consideration to making this declaration (para 28).

The fact that the scope of judicial review proceedings in respect of a quota system of night flying restrictions was limited to concepts such as irrationality, unlawfulness and patent unreasonableness and did not - prior to the entry into force of the Human Rights Act 1998 - allow consideration of whether a claimed increase in night flights represented a justifiable limitation on the right to respect for private and family lives or the homes of those who live in the vicinity of London Heathrow airport was found (16-1) in Eur.Ct.H.R., *Hatton and Others v United Kingdom*, 8 July 2003 not to be sufficient to comply with the requirements of ECHR Article 13. However, the Grand Chamber ruling of the Court in this case did not follow the Chamber judgment in Eur.Ct.H.R., *Hatton and Others v United Kingdom*, 7 December 2000 and find that the right to respect for private and family life had also been violated as a result of the Government's failure to assemble the evidence that would have been necessary for the decision to adopt the quota system to be made on the basis of the relevant considerations. Furthermore it found (12-5) that the authorities had not overstepped their margin of appreciation by failing to strike a fair balance between the right of the individuals affected by the regulations on night flights to respect for their private life and home and the conflicting interests of others and of the community as a whole.

After proceedings had been determined by a judge in circumstances where, by oversight, the power to authorise circuit judges to sit as justices of the High Court had not been exercised, it was held in *Coppard v Customs and Excise Commissioners* [2003] EWCA Civ 511, [2003] 3 All ER 351 that, pursuant to the de facto doctrine at common law, a person who was believed - and believed himself - to have the necessary judicial authority would be regarded in law as possessing such authority and such a judge was 'a tribunal established by law' for the purposes of ECHR Article 6 since the doctrine validated the office of the judge rather than his acts and did not ratify the acts of usurpers or operate arbitrarily, being limited to the correction of mistakes of form rather than of substance.

The fixing by the Secretary of State of the tariff for a person convicted of an offence for which a discretionary sentence of life imprisonment was imposed (ie, the minimum period to be served to satisfy the requirements of retribution and deterrence and to benefit from the exercise of discretion to release on licence) over 9 years after his conviction was found in Eur.Ct.H.R., *Easterbrook v United Kingdom*, 12 June 2003 to be a violation of Article 6(1) in that sentencing had not been completed within a unreasonable time and had been carried out by a member of the executive rather than an independent and impartial tribunal.

In Eur.Ct.H.R., *Mills v United Kingdom*, 5 June 2001 a violation of Article 6(1) had been found in respect of the absence of a fair hearing by an independent and impartial tribunal in

proceedings against the applicant before a tribunal. The Committee of Ministers - having regard to measures already taken to avoid new violations of the same kind, notably through the entry into force of the Armed Forces Act 1996 which amended the arrangements for holding courts-martials, and the payment of the costs and expenses awarded - has now declared that it has exercised its functions under ECHR Article 46(2) (Resolution ResDH(2003)10, 24 February 2003).

While the genuineness of the separation of the prosecuting, convening and adjudicating roles, as well as the independence of the decision-making of those bodies from chain of command, rank or other service influence, in an air-force court martial process was found in Eur.Ct.H.R., *Cooper v United Kingdom*, 16 December 2003 to be established, doubts about the independence and impartiality of the naval court-martial process were considered to be objectively justified in Eur.Ct.H.R., *Grieves v United Kingdom*, 16 December 2003 on account of the absence of a full-time permanent president of courts-martial (with no hope of promotion and no effective fear of removal and who was not subject to report on his judicial decision-making), the fact that the judge advocate is a serving naval officer who, when not sitting in a court-martial, carries out regular nature duties and the fact that the briefing notes sent to the members of naval courts-martial were substantially less-detailed and significantly less clear than those sent in the air-force system. There was, therefore, a finding of a violation of ECHR Article 6(1) in the *Grieves* case.

In Eur.Ct.H.R., *Devlin v United Kingdom*, 30 October 2001, a violation of Article 6(1) had been found as a result of the denial of access to court resulting from a certificate having the nature of conclusive evidence preventing judicial scrutiny of facts relevant to a complaint about discrimination in a refusal of employment. The Committee of Ministers - having regard to measures already taken to avoid new violations of the same kind, notably through the entry into force of the Northern Ireland Act (Tribunal (Procedure) Rules 1999 which provide a right of judicial appeal against such certificates, and the payment of the compensation and costs and expenses awarded - has now declared that it has exercised its functions under ECHR Article 46(2) (Resolution ResDH(2003)9, 24 February 2003).

The denial of legal representation in disciplinary proceedings before a prison governor which could (and did) lead to the imposition of additional days' custody - ie, that days which would extend the period before becoming entitled to release on licence but which could not extend the length of the original sentence imposed by the trial court - for the prisoners concerned was found (11-6) in Eur.Ct.H.R., *Ezeh and Connors*, 9 October 2003 to be a violation of ECHR Article 6(3)(c), upholding the Chamber judgment in Eur.Ct.H.R., *Ezeh and Connors*, 15 July 2002. Following the latter judgment the Prison (Amendment) Rules 2002 - providing for the removal of the governor's power to impose additional days and for the referral by him of charges determined to be sufficiently serious to be referred to an adjudicator (district judges who visit prisons on a regular basis) who has the power to impose additional days as a penalty and before whom a prisoner is to be given the opportunity to be legally represented - came into force.

A violation of ECHR Art 6(1) was found in Eur.Ct.H.R., *Edwards and Lewis v United Kingdom*, 22 July 2003, where neither the content nor the nature of evidence which related, or may have related, to an issue of fact decided by the trial judge - whether the defendants had been entrapped into committing the offences concerned by undercover police officers or informers - and which could then have led to certain prosecution evidence being excluded for that reason had been disclosed to the defendants on public interest grounds but had been seen by that judge in determining whether the public interest was against disclosure. The European Court considered that this had prevented the defence representatives from arguing the case on entrapment in full before the judge and that, in these circumstances, the procedure employed to determine the issues of disclosure of evidence and entrapment did not comply with the requirements to provide adversarial proceedings and equality of arms and did not incorporate

adequate safeguards to protect the interests of the accused. Since the convictions in these cases the introduction of a 'special counsel' scheme - where a lawyer is appointed by the Attorney General to represent the interests of the individual in cases involving national security without being responsible to him or her so that the lawyer is both entitled and obliged to keep confidential any information which cannot be disclosed - in cases where the prosecution wished to seek, *ex parte*, non-disclosure on grounds of public interest immunity has been recommended in *The Review of the Criminal Courts in England and Wales* (2001). The withholding of evidence in the public interest was also found to have resulted in violation of Article 6(1) in Eur.Ct.H.R., *Dowsett v United Kingdom*, 24 June 2003, on this occasion in conjunction with Article 6(3)(b). In this case the trial judge had not been notified of the prosecution's decision to withhold the evidence and, although at the commencement of an appeal against conviction the defence had been notified that certain information remained undisclosed, there had been no review of this material by the Court of Appeal in an *ex parte* hearing. The fact that such a review had not been requested by the defence was not considered significant as, recalling the earlier ruling in *Rowe and Davis v United Kingdom*, Eur.Ct.H.R., 16 February 2000, it was held that the appeal court in deciding whether the material in issue should be disclosed would neither have been assisted by defence counsel's arguments as to its relevance nor have been able to draw on any first hand knowledge of the evidence given at the trial. Since the convictions challenged in these cases it has been established in English case law that it was a matter for the judge rather than the prosecution to decide whether evidence should be withheld in the public interest.

A period of three years before an appeal against a conviction for rape was heard and determined was - having regard to the overall length of time, the lapse of over a year in bringing the appeal on for hearing and the lapse of five months in relisting the case after hearing a witness - found in Eur.Ct.H.R., *Mellors v United Kingdom*, 17 July 2003 to be unreasonable and thus a violation of ECHR Article 6. A period of over eight years between the issuing of a writ against the applicants in respect of a property dispute and the setting down of the case for trial was, notwithstanding that they had not put the matter of the length of the pre-trial proceedings to the High Court, found in Eur.Ct.H.R., *Price and Lowe v United Kingdom*, 29 July 2003, to have been unreasonable and thus a violation of Article 6(1).

See also the discussion under Article 4 of Eur.Ct.H.R., *McGlinchey and Others v United Kingdom*, 29 April 2003 and Eur.Ct.H.R., *Z W v United Kingdom*, 29 July 2003, the discussion under Article 6 of Eur.Ct.H.R., *Hutchinson Reid v United Kingdom*, 20 February 2003 and the discussion under Article 7 of Eur.Ct.H.R., *Peck v United Kingdom*, 28 January 2003.

National legislation, regulation and case law

Part 2 of the Criminal Justice (Scotland) Act 2003 establishes for victims of certain crimes (or their nearest relative in cases where they have died or suffer from a physical or mental incapacity) the right to make and submit a written statement to the court - after conviction and before sentencing - about the effect of the crimes upon them and to receive information about the release or escape of an offender sentenced to prison for a period of 4 years or more, life imprisonment or detention for life and to receive information from and make representations to the Parole Board for Scotland about an offender's release on licence. There is provision for the defendant to dispute information contained in a victim's statement but in certain sexual offences cases the accused cannot personally question a victim on the content of the statement. The police are also empowered to pass on information about victims of crime, with their consent, to prescribed bodies who can provide counselling and support.

The Police (Northern Ireland) Act 2003, s 13 extends the powers of the Police Ombudsman so that he or she may investigate a current practice or policy of the police that has come to his or her attention if he or she has reason to believe that such an investigation would be in the

public interest. It will be possible for the report on an investigation undertaken pursuant to this power to disclose information relating to the identity of an individual where this is considered necessary in the public interest.

The arrangements for the management of the courts in England and Wales have been significantly revised by the Courts Act 2003. Part 1 replaces a number of bodies with a single courts organisation that will be an executive agency, forming part of the Department for Constitutional Affairs and having community links - to ensure that the administration of the courts is focussed on the needs of court users and the local community more generally - through courts boards also established by the Act. In addition, pursuant to Part 2, lay magistrates will henceforth be given a national rather than local jurisdiction, although they will continue to be assigned to a particular local area and restrictions on where magistrates can sit and on their powers in particular courthouses have been removed in order to introduce greater flexibility. The current absence of any statutory restriction on the grounds for the removal of magistrates is also replaced in s 11 by four specified grounds; misbehaviour, incapacity, neglect of duty and persistent failure to meet prescribed competences. Furthermore s 27 provides that the justices' clerks - the legal advisers to lay magistrates - will now be employed by the Lord Chancellor rather than the magistrates' courts committees which formerly were responsible for managing these courts but the Act retains the qualifications required for justices' clerks and confirms their independence when exercising any legal function. Provision is also made in s 36 and Schedule 5 for a role of fines officer to take enforcement action so that there will no longer be a need for all enforcement decisions to be taken by a court. In addition a fines collection system has been set up, introducing financial incentives to offenders to pay their fines and a range of disincentives for fine default, including wider powers to make attachment of earnings orders. There is provision in the Act for this system to be piloted and for any necessary modifications to be made before a permanent scheme is introduced. Section 45 and Schedule introduce the possibility of binding rulings being made at pre-trial hearings in criminal cases that are to be heard in the magistrates' courts; such a power - which is intended to assist in the more efficient preparation of cases for trial and brings the position of magistrates' courts into line with those of the Crown Court - will be available following a not guilty plea up to the commencement of the trial and will extend to issues of law and admissibility of evidence. Court security officers are given the power - including the power to use reasonable force - by s 53 to restrain, exclude or remove a person if it is reasonably necessary to do so to maintain order, secure the safety of people in the court building and to enable court business to be conducted without disruption and they may also remove any person from a courtroom at the request of a judge or a justice of the peace (see also the discussion under Article 7 of this Act). Provision is made in Part 5 of the Act for the establishment of Her Majesty's Inspectorate of Court Administration, which will have the power to inspect the system that supports the carrying on of the business of all magistrates courts, county courts and the Crown Court. Under Part 6, as part of the policy of greater flexibility in judicial deployment, High Court judges, Circuit judges and Recorders obtain the same powers as magistrates in criminal and family cases and District Judges (Magistrates' Courts) will become capable of exercising some powers of a Crown Court judge. Part 7 seeks to achieve a closer alignment of the various criminal courts (magistrates' courts and the Crown Court), enabling the Lord Chief Justice, with the concurrence of the Lord Chancellor, to issue directions as to practice and procedure for all these courts and establishing one forum - the Criminal Procedure Rule Committee - for the development of rules and the introduction of consistency in procedures. It also establishes a Family Procedure Rules Committee with a similar role in respect of family proceedings in the High Court, county courts and magistrates' courts. Provision is made in Part 8, with a view to reducing delay, for single judges considering applications for leave to appeal to the Court of Appeal Criminal Division to give procedural directions for the hearing of the application or of the appeal that need not trouble the full court, subject to a right on the part of the applicant or the prosecutor to renew the application to the full court. This Part also makes provision to separate the judicial and administrative functions of the posts of Registrar of Criminal

Appeals and Registrar of the Courts-Martial Appeal Court so that they become more clearly judicial offices, with the administrative duties falling to appropriate Court Service staff. The aim is to enable the Registrar to give procedural directions for the preparation or hearing of the application or of the appeal, subject to the right on the part of the applicant or the prosecution, to submit the matter to a single judge for review. There is also an extension of the time from 14 to 28 days in which an application by either the defence or the prosecution for leave to appeal from a decision of the Court of Appeal Criminal Division can be made, which now runs from the date of that court's reasoned judgment rather than from the date of its decision. Section 93 also introduces a power to order third parties to pay costs incurred by parties to a criminal case as a result of the third party's serious misconduct (such as a newspaper article causing the abandonment of a trial).

The use of a legally qualified clerk of court to advise lay justices on matters of law, practice and procedure was held in *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] UKPC D1, [2003] 1 All ER 1106 not to be incompatible with the right to a fair and public hearing before an independent and impartial tribunal as the advice was detached from the decision made by the court, the clerk was a professional man bound by a professional code and performing duties which were regulated by well-understood conventions and there was a right of appeal so his advice, if wrong, could be corrected. It was further held that there was nothing objectionable in the practice of private communications between the clerk as legal assessor and the justice provided that care was taken not only to confine such communications to the provision of legal advice but also to recognise and raise in open court any matter upon which the defence, or indeed the prosecution, might reasonably wish to make material comment.

Under the Local Government Act 2003, ss 105 and 106 and Schedule 4 the administrative support systems for Valuation Tribunals - which hear appeals against rating, council tax valuations and liability - are transferred to a new non-departmental public body, the Valuation Tribunal Service, from the Office of the Deputy Prime Minister. Although the latter may provide guidance to the Service about the carrying out of its functions and appoints members to form it, the increased independence should strengthen the independence of the tribunals from the executive.

The administration of a reprimand or warning under the Crime and Disorder Act 1998, s 65 - which could only be given under the Home Office guidance then applicable if the young person concerned made a clear and reliable admission of all elements of the offence, having been made aware of the consequences of an admission (which in the case of an offence covered by the Sex Offenders Act 1997 [now replaced by the Sexual Offences Act 2003; see the discussion under Article 3]would require registration under that Act) - was held in *R (on the application of U) v Metropolitan Police Commissioner* [2002] EWHC 2486 (Admin), [2003] 3 All ER 419 to be the determination of a criminal charge within the meaning of ECHR Article 6 but the scheme was not itself unlawful as there was nothing in the Act which required the police to proceed without the consent of the offender. However, the decisions to give the warnings in the instant cases were quashed because the claimants had been required to subject themselves to an administrative procedure which had the effect of publicly pronouncing their guilt of the offence of indecent assault and under the practice adopted pursuant to the guidance there had been no effective waiver procedure requiring consent by the offender and his or her parent, carer or other appropriate adult, reliance on implied consent not being a sufficient safeguard

The arrangements for prison discipline, including access to legal representation, has been reformed by Prison (Amendment) Rules 2002 (see 'International case law').

The empanelling of a second jury, pursuant to the Criminal Procedure (Insanity) Act 1964, s 4A, to determine whether a defendant had done the acts alleged against him after the first had found him unfit to stand trial was found in *R v H* [2003] UKHL 1, [2003] 1 All ER 497 not to

involve the determination of a criminal charge (and thus a violation of ECHR Article 6 because the defendant, being unfit to plead, could not give instructions and participate fully in his defence) since, although the procedure could lead to a final acquittal in the event of a negative ruling, an affirmative one could lead only to absolute discharge or a hospital order - with the possibility of a full trial in the latter case if the defendant recovered - and not to a conviction or punishment.

Part 3 of the Criminal Justice Act 2003 allows for a caution with specific conditions attached to it to be given where there is sufficient evidence to charge a suspect with an offence which he or she admits and the suspect agrees to the caution. It would be for the prosecutor to decide whether a conditional caution was appropriate and in most cases for the police to administer it. If the suspect failed to comply with the conditions, he or she would be liable to be prosecuted for the offence. Provision is also made for a code of conduct on such cautions. Part 5 of the Act introduces a new objective single test for the disclosure of unused prosecution material to the defence, requiring the prosecutor to disclose prosecution material that has not previously been disclosed and which might reasonably be considered capable of undermining the case for the prosecution against the accused, or of assisting the case for the accused. There is also a revised continuing duty on the prosecutor to disclose material that meets the new test, with a specific requirement to review the prosecution material on receipt of the defence statement and to make further disclosure if required under the continuing duty. The accused is also required to provide a more detailed defence statement than currently required, setting out the nature of his defence including any particular defences on which he intends to rely and indicate any points of law he wishes to take, including any as to the admissibility of evidence or abuse of process. A new obligation on the defence to provide details of the witnesses it intends to call will be accompanied by a code of practice governing the conduct of any interviews by the police or non-police investigators with defence witnesses disclosed in accordance with the requirement. There is also a requirement for the judge to warn the defence about disclosure failures and a judicial discretion to disclose the defence statement to the jury. The procedure for enabling the jury to draw adverse influences from defence disclosure failures in respect of the defence statement is simplified. Part 7 of the Act sets out the circumstances in which criminal trials that currently take place on indictment in the Crown Court before a judge and jury will in future be conducted by a judge sitting alone, namely, serious or complex fraud cases (having regard to the burden on the jury) and those cases where there is a real and present danger of jury tampering (or this has already occurred). Provision is made in Part 8 for courts to hear evidence by way of a live television link from outside the court building where believed to be in the interests of the efficient or effective administration of justice, going significantly beyond their current limited use in cases such as young, disabled, vulnerable or intimidated witnesses (similar provision in the case of Scotland is made by the Criminal Justice (Scotland) Act 2003, s 80). Part 9 introduces a right of appeal for the prosecution in respect of rulings that have the effect of terminating the trial and of evidentiary rulings made in certain trials for specified offences. Part 11 removes the general bar on the prosecution from producing evidence in a trial of a defendant's misconduct (including previous convictions) and itemises the circumstances in which it may be admissible (notably where it is important explanatory evidence, is relevant to or has substantial probative value in relation to an important issue between the prosecution and the defence or corrects a false impression given by the defendant about himself), seeks to simplify the rules on the admission of hearsay evidence and provides a discretion to admit out of court statements.

The preclusion by the Crown Proceedings Act 1947, s 10 of claims against the Crown in tort for personal injury incurred while on duty or on the land, premises or vehicle of the armed forces where the Secretary of State had certified that it had been (or would be) treated as attributable to his or her services for the purposes of entitlement to a pension -which had been repealed prospectively in 1987 - was held in *Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 2 All ER 689 to be a substantive and not a procedural limitation on claims - which

allowed for a no-fault system of compensation to be substituted for a claim for damages and which was unaffected by the provision of an official certificate - and was thus not incompatible with the right of access to court under ECHR Article 6(1).

The Railways and Transport Safety Act 2003 replicates, for aviators and mariners, provisions of the Road Traffic Act 1988 with regard to requiring specimens of breath, blood or urine to be provided by a suspect. See also the discussion under Article 2 of this Act.

Pursuant to the Crime (International Co-operation) Act 2003, s 9, evidence obtained from an overseas authority is subject to the same provisions on the admissibility of evidence as evidence obtained under normal domestic arrangements. Chapter 3 of Part 1 of this Act also makes provision for the hearing of witnesses from abroad through television links and the hearing of witnesses in the United Kingdom through both this medium and telephone.

Following a finding that delays in the reviews of the detention of patients under the Mental Health Act 1983 had violated their rights under ECHR Article 5(4), it was held in *R (on the application of KB) v Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2003] 2 All ER 209 damages should be awarded to four of the patients, for whom the finding of a breach did not constitute just satisfaction, on the following basis: the provision in the Human Rights Act 1998, s 8(3) for damages to be awarded 'where necessary' meant that in some circumstances an award would be unnecessary; the prohibition in s 9(3) of that Act of any award of damages other wise than by way of compensation precluded the award of exemplary damages; even in the case of mentally ill claimants, not every feeling of frustration and distress would justify an award of damages and an important touchstone of the intensity required in cases such as the instant would be if hospital staff had considered it to be sufficiently relevant to the mental state of the patient to warrant its mention in the clinical notes; the relevant period for assessment was that between the times when the tribunal should have determined a patient's application and the day when it was actually determined, ie, the period of unlawful delay; and damages should not be awarded for loss of a chance of a favourable decision or loss of opportunity as such so a claimant who sought damages on the basis of an allegation that he would have had a favourable decision at an earlier date if his ECHR right had been respected had to prove his allegation on the balance of probabilities.

See also the discussion under Article 4 of *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796, the discussion under Article 17 of *R (on the application of Mudie) v Kent Magistrates' Court* [2003] EWCA Civ 237, [2003] 2 All ER 631, the discussion under Article 18 of *R (on the application of Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364, [2003] 2 All ER 905 and of *R (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2003] 3 All ER 827 and the discussion under Article 24 of *P v BW* [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074 and of the Commissioner for Children and Young People (Scotland) Act 2003.

Practice of national authorities

The Police Ombudsman for Northern Ireland has published *A study of the treatment of solicitors and barristers in Northern Ireland* which reported that 55 out of 1,458 respondents to a postal questionnaire had said that they had experienced intimidation, harassment or threats from the police, either personally or indirectly via a client. And with the majority doing so on more than three occasions. The most serious incidents involved: defamation of the respondent's character, profession or firm; direct physical threats or threats of arrest; accusations of being members of terrorist organisations; threats to pass on details to terrorist or political organisations; racist or sectarian abuse; unprofessional conduct during the interview of clients; and the raising of voices or making of inappropriate comments. Most saw the establishment of the Ombudsman's Office - which occurred after most of the incidents - as a positive development in the oversight of the police and expected an improvement in the

way complaints against the police would be dealt with in the future.

See also the discussion under Article 6 of a report by the Joint Committee on Human Rights, the discussion under Article 11 of the Press Complaints Commission and the discussion under Article 19 of a report by the Home Affairs Select Committee.

Reasons for concern

The effectiveness of remedies in cases involving children, the detention of persons alleged to be mentally ill and the protection of the environment, as well as the way wide-ranging changes made to the criminal justice system will operate in practice.

Article 48. Presumption of innocence and right of defence

National legislation, regulation and case law

Following the quashing of a conviction - after 10 years in prison - because of an abuse of process in the circumstances of his return to the United Kingdom to face trial, a claimant's application for compensation under the Criminal Justice Act 1988, s 133 - which sought to implement the International Covenant on Civil and Political Rights, Article 14(6) and which required compensation to be paid to a person who had suffered punishment as a result of a conviction that had been reversed on the ground that a new or newly discovered fact had shown beyond reasonable doubt that there had been a miscarriage of justice - was refused because he had not been found by the appeal court to be innocent. However, it was held in *R (on the application of Mullen) v Secretary of State for the Home Department* [2002] EWCA Civ 1882, [2003] 2 All ER 613 that proof of innocence was not a prerequisite to a payment as such a restriction was not the intention of those drafting the Covenant provision and in any event the presumption of innocence required that Acts of Parliament were to be interpreted on the basis that it had not been intended that the state should proceed on the footing that a wrongly convicted man was guilty.

In allowing an appeal against a conviction for being in charge of a motor vehicle after consuming so much alcohol that the proportion of alcohol in the defendant's breath exceeded the prescribed limit, it was held (2-1) in *Sheldrake v Director of Public Prosecutions* [2003] EWHC 273 (Admin), [2003] 2 All ER 497 that the defence in the Road Traffic Act 1988, s 5(2) - which involved proving that at the time of the alleged commission of the offence 'the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit' - interfered prima facie with the presumption of innocence and it should be read down so as to impose only an evidential burden on the defendant, ie, to demonstrate from the evidence an arguable case that there was no likelihood of his driving the vehicle while being in excess of the prescribed limit.

.

It was established in *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA 1567, [2003] 1 All ER 1 that the courts could under their inherent power restrain an advocate from representing a party if it were satisfied that there was a real risk that his or her continued participation would lead to a situation - such as through the possession of confidential information or the influence of a personal factor - where the order made at trial would have to be set aside on appeal but such action was not found to be necessary in the circumstances under review.

After an inquiry agent had, in the course of investigations for insurers who were defending a claim for personal injuries, obtained access to the claimant's house on two occasions by posing as a market researcher and had recorded her – without her knowledge – using a hidden video camera, it was held in *Jones v University of Warwick* [2003] EWCA Civ 151, [2003] 3

All ER 760 that the contravention of the claimant's privacy was a relevant consideration for the court in the exercise of its discretion in making orders as to the management of the proceedings. However, it was considered that the conduct of the insurers was considered not to be so outrageous that the defence based on the video recordings made by the agent should be struck out and that it would be artificial and undesirable for evidence which was relevant and admissible not to be before the judge who had the task of trying the case.

See also the discussion under Article 3 of the Sexual Offences Act 2003 and the discussion under Article 47 of the Criminal Justice Act 2003.

Article 49. Principles of legality and proportionality of criminal offences and penalties

International case law and concluding observation of international organs

Nothing applicable.

National legislation, regulation and case law

Part 1 of the Criminal Justice (Scotland) Act 2003 has introduced a new sentence of an order for lifelong restriction (OLR) for persons convicted of serious violent and sexual offences, provides the process for assessing the risk the offender's being at liberty presents to the public at large and consequent eligibility for this new disposal, provides for arrangements for dealing with an offender who may have a mental disorder and removes the mandatory restriction requirement for persons dealt with on grounds of insanity where the charge is murder. An OLR is a sentence of imprisonment or detention for an indeterminate period and a court may impose any competent disposal except a life sentence or detention without limit of time where an OLR is not made because it is not satisfied that the risk criteria are met. In Part 3 provision is made for the imposition of 'extended sentences' on certain sexual offenders, combining a term of imprisonment and a further period for which they are subject to a licence where it is considered by the court that the period (if any) which the offenders would otherwise have been subject to a licence would not be adequate for the purpose of protecting the public from serious harm from them. Section 26 gives a court sentencing someone already serving a sentence of life imprisonment to provide that a life sentence should commence when his release would otherwise have been required and a determinate sentence should commence on the expiry of the punishment part of the existing life sentence. Part 7 provides for courts to be designated as 'drugs courts' and empowers them to impose interim sanctions such as short periods of custody (up to 28 days) or community service for non-compliance with a probation order or drug treatment and testing order while still allowing the original order to continue.

Part 2 of the Crime (International Co-operation) Act 2003 implements the Framework Decision of 13 June 2002 on combating terrorism insofar as it requires the United Kingdom to take extra-territorial jurisdiction over a range of terrorist offences; existing legislation - which is otherwise considered to meet the requirements of the Decision - does not provide for this as the primary basis of criminal jurisdiction is territorial. Extra-territorial jurisdiction relating to the specific terrorist offences in the Terrorism Act 2000 is only taken in respect of United Kingdom nationals and residents but such jurisdiction is also applied to certain offences when committed abroad against such persons and diplomatic and consular staff of any nationality, as well as against the residential or working premises and vehicles of the latter. The same principles of extension also apply to the commission of the offence under the Anti-terrorism, Crime and Security Act 2001, s 113 of using or threatening to use a biological, chemical, radioactive or other noxious substance to cause various kinds of serious harm in a manner designed to influence the government or intimidate the public. Part 9 of the Criminal Justice (Scotland) Act 2003 makes the bribery or corruption of a foreign officer or a foreign public body an offence and this extends to conduct outside the United Kingdom if it would be an

offence if done in Scotland.

A prisoner sentenced by a Scottish court to life imprisonment for murder and then transferred to an English prison at his request and then transferred to an English prison at his request - where he was treated under the Criminal Justice Act 1961, s 26 for the purpose of detention, release and so on as if the sentence which had been imposed had been an 'equivalent sentence' passed by the court in the place to which he was transferred - had a tariff of 12 years set by the Secretary of State - eight years having been recommended by the trial judge after the transfer but the Lord Chief Justice of England and Wales being of the opinion that the tariff would have been fixed at 10 to 11 years if he had been convicted there - was held in *R (on the application of McFetrich) v Secretary of State for the Home Department* [2003] EWHC 1542 (Admin), [2003] 4 All ER 1093 not to entail a violation of ECHR Article 7 as the penalty life imprisonment was unaffected by the tariff-setting process, which did not spell out the actual period to be served but merely the minimum period, and the only sentence for murder that could be passed by a court was one of life imprisonment so that the phrase 'equivalent sentence' was not to be read as meaning the sentence of life imprisonment and the tariff.

The making of an order, pursuant to the Powers of Criminal Courts (Sentencing) Act 2000, s 86, extending supervision and recall to the whole of a sentence of imprisonment - rather than the two-thirds point to which it would otherwise be applicable - in respect of sexual offences committed before the original establishment of such a power in legislation which the 2000 Act replaced was held in *R v T* [2003] EWCA Crim 1011, [2003] 4 All ER 877 to be a punitive measure and, as the legislation contained no clear terms which required it to be construed as having retrospective operation, s 86 could be read - in accordance with the Human Rights Act 1998, s 3 - in a manner compatible with ECHR Article 7 so that the purported extension of the licence period would be quashed. A conclusion of incompatibility with Article 7 was also reached in *R (on the application of Uttley) v Secretary of State for the Home Department* [2003] EWCA Civ 1130, [2003] 4 All ER 891 about similar powers of extension in the Criminal Justice Act 1991, ss 33(2), 37(4A) and 39, with declarations to that effect being made under the Human Rights Act 1998, s 4(2). Contrariwise, in *R v R* [2003] EWCA Crim 2199, [2003] 4 All ER 882 it was held that an extension under s 86 of the 2000 Act was preventive, relating to the execution of the sentence and being part of the machinery of carrying out the penalty, so that an order for it did not constitute the imposition of a heavier penalty than was available when the offence was committed and there was no violation of Article 7.

The imposition of a disqualification orders under the Criminal Justice and Court Services Act 2000, s 28 - whereby the persons concerned would be prevented from working with children - in respect of offences committed before the implementation of the Act but at sentencing which took place after it had come into force was held not to be objectionable in *R v Field* [2002] EWCA Crim 2913, [2003] 3 All ER 769 since such an order could be made whether or not a person was convicted and without regard to the extent or the seriousness of the offending. The nature and purpose of an order pointed overwhelmingly to it being preventative rather than punitive, with regard being had to whether a repetition of the conduct was likely, and it was thus not a penalty under ECHR Article 7.

The Extradition Act 2003, s 196 includes genocide, crimes against humanity, war crimes and related offences as extradition offences and provides that conduct that would be punishable as one of those offences in the United Kingdom amounts to an extradition offence even if it would not have been an offence at the time when and the place where it occurred.

See also the discussion under Article 3 of the Sexual Offences Act 2003 and the discussion under Article 10 of the Criminal Justice (Scotland) Act 2003.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

National legislation, regulation and case law

Part 10 of the Criminal Justice Act 2003 reforms the law relating to double jeopardy by permitting retrials in respect of certain very serious offences (including murder, manslaughter and rape) where new and compelling evidence - such as DNA or fingerprint tests and new witnesses to the offence coming forward - has come to light. In order to avoid possible harassment of acquitted persons, the personal consent of the Director of Public Prosecutions is required both to the taking of significant steps in the re-opening of investigations (except in urgent cases) and to the making of an application to the Court of Appeal for a ruling that the acquittal be quashed and a re-trial to be ordered. The Court of Appeal must be satisfied that the new evidence is highly probative of the case against the acquitted person.

The Extradition Act 2003, s 12 bars the extradition of a person if he or she would be entitled to be discharged if charged with the offence in question in the part of the United Kingdom where the judge exercises jurisdiction because of rules relating to a previous acquittal or conviction.

Reasons for concern

The actual operation of the exceptions that are now allowed to the prohibition on double jeopardy.

ERRATA TO THE REPORT ON THE UNITED KINGDOM

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

At p. 19 of the report, under the heading National legislation, the sentence "The present offences connected with female genital mutilation - established by the Prohibition of Female Circumcision Act 1985 - have been restated in the Female Genital Mutilation Act 2003 so that it is now clear that they apply not only to acts committed by anyone within the United Kingdom but also to those committed elsewhere by a non-United Kingdom national or permanent resident outside the United Kingdom." should read instead "The present offences connected with female genital mutilation - established by the Prohibition of Female Circumcision Act 1985 - have been restated in the Female Genital Mutilation Act 2003 so that it is now clear that they apply not only to acts committed by anyone within the United Kingdom but also to those committed elsewhere by a United Kingdom national or permanent resident outside the United Kingdom"

Article 6. Right to liberty and security

At p. 22 of the report, under the heading National legislation, the sentence "Part 2 f the Act repeals the provision which purports to make it an exception to the right to bail that an offence appears to have been committed while the defendant was on bail for another offence and replaces it with a resumption that bail will not be granted in these circumstances to a defendant aged 18 or over unless the court is satisfied that there is no significant risk of his reoffending on bail." should read instead "Part 2 of the Act repeals the provision which purports to make it an exception to the right to bail that an offence appears to have been committed while the defendant was on bail for another offence and replaces it with a resumption that bail will not be granted in these circumstances to a defendant aged 18 or over unless the court is satisfied that there is no significant risk of his reoffending on bail."

At p. 25 of the report, under the heading National legislation, the sentence "In the latter cases a person's extradition must not be ordered if he could be, will be or has been sentenced to death unless the Secretary of State has received a written assurance which he or she considers adequate that a sentence of death will not be imposed or (if imposed, will not be carried out (s 94)." should read instead "In the latter cases a person's extradition must not be ordered if he could be, will be or has been sentenced to death unless the Secretary of State has received a written assurance which he or she considers adequate that a sentence of death will not be imposed or (if imposed, will not be carried out (s 94))".