E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE UNITED KINGDOM IN 2004

submitted to the Network by **Jeremy McBRIDE**

on 22 April 2005

Reference: CFR-CDF/UK/2004

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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), François Moyse (Luxembourg), 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), 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

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PRELIMINARY REMARKS

The survey that follows is subject to the same caveats as those attached to the report for 2003, namely, that it 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 possible to see a good number of potentially positive legislative and case law developments in the course of 2004, some of which might be regarded as exemples of good practice for wider emulation. These include:

- the new arrangements for an independent investigation of deaths occurring in prisons and in police custody;
- the judicial compulsion to hold an investigation into a death occurring in a military prison in Iraq and the adaptation of the procedure governing inquests to ensure that the requirements of ECHR Article 2 are fulfilled;
- the reduction in the use of live fire by the police in Northern Ireland;
- the respect for the informed exercise of choice regarding assisted suicide abroad as seen in *Re Z (an adult: capacity)* [2004] EWHC 2817 (Fam);
- the extension of protection against domestic violence effected by the Domestic Violence, Crime and Victims Act 2004;
- the refusal in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2004] EWCA Civ 1394 to allow the claim of a blanket subject-matter immunity in respect of acts of torture alleged to have been committed by state officials;
- the removal of the defence of reasonable chastisement in proceedings for assault on a child;
- the introduction of the new trafficking offences by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 and the restoration of provision of a safe house for trafficked girls and boys;
- the ruling of the appellate committee of the House of Lords that detention powers under the Anti-terrorism, Crime and Security Act 2001 were both discriminatory and disproportionate;
- the increased regulation of the storage and use of human organs and tissues afforded by the Human Tissue Act 2004, with consent being the fundamental principle applicable;
- the introduction of a licensing requirement for activities involving the supply or use of workers – regardless of the contractual arrangement between the workers and either the person supplying or using them – in a number of fields where exploitation has occurred;
- the enactment of the Gender Recognition Act 2004;
- the recognition in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 All ER 995 of some limits on the disclosure of information about public figures;
- the replacement of a care order by a parenting order as the sanction for breach of a child safety order;
- the dialogue between Government and faith communities;

- the potential widening of the scope of subsidiary protection by the ruling in *R (on the application of Ullah) v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 3 All ER 785;
- the rulings in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411 and *A v Chief Constable of West Yorkshire* [2004] UKHL 21, [2004] 3 All ER 145 which respectively allow same-sex partners to succeed to tenancies and requiring persons whose gender has been reassigned to be treated as having the new gender for the purpose of service in the police;
- the efforts being made by the Commission for Racial Equality to tackle discrimination against Gypsies and Travellers;
- the efforts to mainstream the Welsh language in Government departments;
- the introduction of the office of Children's Commissioner;
- the response by the Employment Relations Act 2004 to the ruling in Eur.Ct.H.R. (4th sect.), *Wilson and Others v United Kingdom* (Appl. nos 30668/96, 30671/96 and 30678/96) judgment of 2 July 2002 (final), that it was contrary to ECHR Article 11 for the law not to prevent employers from offering inducements to employees in order to surrender their collective representation;
- the increased powers of minimum wage enforcement officers to obtain information; and
- the establishment of the Health Protection Agency.

It should also be noted that there is a valuable safeguard for rights and freedoms in a matter not not refered to under any of provisions below, namely, that the power in the Civil Contingencies Act 2004 to make regulations to deal with emergencies – defined as including war, attack by a foreign power, terrorism posing a serious threat of danger to the security of the United Kingdom and events which threaten serious damage to either human welfare in a place in the United Kingdom or the environment of a place in the United Kingdom – not only requires the maker to state that any made are consistent with Convention rights and to be satisfied that they are in due proportion to the aspect or effect of the emergency which the provision is intended to prevent, control or mitigate but also expressly provides that they may not amend the Human Rights Act 1998.

However, all these welcome developments are counterbalanced by a number of pressing concerns about the impact of various developments on rights and freedoms recognised in the Charter. These include:

- the change in the guidelines so as to allow plastic bullets to be fired at children;
- the incidence of deaths in custody, together with the inappropriateness of detaining many of those involved and the circumstances in which they are held;
- the inadequacy of arrangements to investigate deaths occurring in hospitals in Northern Ireland;
- the failure to deal with inadequate investigations occurring before the entry into force of the Human Rights Act 1998;
- the continued problem of overcrowding and the failure adequately to address the needs of prisoners who were women, old or foreign nationals;
- the lack of security felt by young people held in prisons and the conditions to which they are subject;
- the conditions and lack of security felt by persons held in immigration removal centres;
- the acceptance by the majority in *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123 that use could be made of evidence obtained by torture by agents of foreign states;
- the continued use of detention without trial for foreign terrorist suspects and its impact on those concerned;
- the continued use of violence by paramilitary organisations in Northern Ireland;

- the use of pre-trial detention in so many cases involving women that ultimately lead to an acquittal or a non-custodial sentence;
- the existence of various instances where procedural safeguards against the detention of those of unsound mind or its continuation are not fully applicable;
- the use and duration of detention without trial of foreign terrorist suspects in circumstances where the necessity for such measures has been extensively questioned;
- the rise in the number of interceptions of telephones and the disproportionate exercise of stop and search powers on certain sections of the community;
- the ability to override a parent's objections to the proposed treatment of a child without the authorisation of a court;
- the scope of the restriction of publications by prisoners about their crimes or past offences;
- the interference in the autonomy of trade unions effected by sections 15, 65 and 174 of the Trade Union and Labour Relations (Consolidation) Act 1992;
- the shortcomings in education and training provided to girls under 18 serving Detention and Training Orders;
- the potential for the changes made by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 to the handling of claims for asylum to lead to persons being returned to countries where they will face persecution;
- the breadth of the definition given to particularly serious crimes in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002;
- the continued difficulties facing asylum-seekers in obtaining basic support for living;
- the use of deeming provisions to prevent a challenge to the supposed safety of a country to which someone is to be removed;
- the readiness to accept diplomatic assurances despite significant evidence of the practice of using prohibited treatment in the country concerned;
- the amount of force used in removing failed asylum-seekers and the withdrawal of social security as a device to secure their departure;
- the failure to implement measures to tackle discrimination within the criminal justice system in Northern Ireland;
- the lack of sufficient funding to support complainants bringing discrimination cases in Northern Ireland;
- insufficient consideration of cultural differences in the provision of maternity care;
- the absence of sufficient sites where Gypsies and Travellers can lawfully camp and the protection afforded to them against eviction;
- the overall adequacy of support for minority languages;
- the failure of women to be represented appropriately in senior positions and the continued gap between the pay levels of men and women;
- the comparatively low level of political participation by women;
- the inaccessibility of websites for disabled users;
- the obstacles to some parents obtaining flexible work arrangements;
- the continuing absence of equality between spouses in Northern Ireland with regard to matrimonial property;
- the obstacles to family reunion for migrant workers;
- the growth in homelessness and the use of the Habitual Residence Test as a condition for eligibility for housing benefit;
- the extent of the restriction on the right of convicted prisoners to vote;
- the scope for abuse in postal voting;
- the unmet need for legal services and the increasing constraints on the operation of the legal aid system;
- instances of unduly long criminal proceedings;

- the appropriateness of the arrangements for trying children.

Although these concerns are not all matters for which a resolution that is both speedy and satisfactory can be realistically expected, they ought to be a major focus of attention in the course of 2005.

CHAPTER I : DIGNITY

Article 1. Human Dignity

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

None additional to those under Article 4

Legislative initiatives, national case law and practices of national authorities

None additional to those under Articles 2-4

Reasons for concern

None additional to those under Article 4

Article 2. Right to life

Euthanasia (active and passive, assisted suicide)

Legislative initiatives, national case law and practices of national authorities

It was held in *Re Z (an adult: capacity)* [2004] EWHC 2817 (Fam) that a chronically ill person in the care of a local authority who wished to travel abroad to undergo an assisted suicide and who could not travel unaided could be taken there by her husband. In the court's view the evidence clearly established that she had legal capacity and that her decision was her own, freely arrived at with full knowledge of its consequences so that it was not entitled to test that decision against what it thinks is right.

Positive aspects

The respect for the informed exercise of choice as seen in *Re Z (an adult: capacity)*.

Rules regarding the engagement of security forces (use of firearms)

Legislative initiatives, national case law and practices of national authorities

The Police Ombudsman for Northern Ireland has reported a significant reduction in the use of live fire by police officers; this occurred on 21 occasions in 2001-02, 11 in 2003 and 5 in 2004 (*Annual Report April 2003-March 2004*). There has also been a corresponding reduction in complaints about other uses of firearm (e.g., assaults), with 40 cases in 2002, 25 in 2003 and 12 in 2004. However, concern about the change in the guidelines on the use of plastic bullets, allowing them to be fired at children if they are posing a risk to life or of serious injury, was expressed in British Irish Rights Watch's *Annual Report*. This report also expressed dismay at the apparent focus of the working party carrying out research on less lethal alternatives to plastic bullets – which have not been fired in Northern Ireland since September 2002 - on commissioning a different kind of plastic bullet which will cause less head injuries and an individually-targeted CS gas canister (see *Less Lethal Steering Group Phase 4 Report*). It also pointed out that CS gas has a worse effect on people who suffer from asthma, to which children tend to be more prone than adults.

Positive aspects

The reduction in the use of live fire by the police in Northern Ireland.

Reasons for concern

The change in the guidelines so as to allow plastic bullets to be fired at children.

The fight against the trafficking in human beings (including the use of technical means to prohibit the illegal crossing of borders)

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Gangmasters (Licensing) Act 2004 and the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 under Article 5.

Positive aspects

None additional to those under Article 5

Good practices

None additional to those under Article 5

Domestic violence (especially as exercised against women)

Legislative initiatives, national case law and practices of national authorities

The Domestic Violence, Crime and Victims Act 2004 has widened the definition of cohabitants to include same-sex cohabitants to apply for occupation orders under sections 36 and 38 of the Family Law Act 1996. It also extends the availability of non-molestation orders to those in domestic relationships who have never cohabited or have never been married but who have or have had an intimate personal relationship with each other, which is or was of significant duration.

Positive aspects

The extension of protection against domestic violence effected by the Domestic Violence, Crime and Victims Act 2004.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about "the investigations carried out … into a number of deaths by lethal force arising between the entry into force of the [UN] Convention in 1988 and the Human Rights Act in 2000 which have failed to fully meet its international obligations" (CAT/C/CR/33/3, 25 November 2004, para 4(f). It recommended that all practicable steps be taken "to review investigations of deaths by lethal force in Northern Ireland that have remained unsolved, in a manner, as expressed by representatives of the State party, "commanding the confidence of the wider community"" (para 5(k).

Legislative initiatives, national case law and practices of national authorities

Her Majesty's Prison Inspectorate has reported that prisons in England and Wales were still recording two self-inflicted deaths a week, with some prisons not having put in place essential protective measures and few having a genuinely multi-disciplinary approach to self-harm and suicide. Prison overcrowding was considered to be a factor in the extent of suicides occurring (*Annual Report 2003-2004*). The parliamentary Joint Committee on Human Rights has also reviewed the scale of the problem of deaths in custody – there is a suicide or death of someone in jail or sectioned under the Mental Health Act 1983 every second day - and has reached a similar conclusion, namely, that measures to reduce deaths in custody are being implemented within a system where there are many acutely vulnerable people detained, especially in prison, who should simply not be there and that overcrowding in the prison system further hampers efforts to reduce such deaths. It considered that in the long-term increased resources and a reduction in the use of imprisonment were needed to address the problem but called for risk assessment of detainees, especially on admission to custody, and stressed the importance of maintaining a standard of healthcare equivalent to that available in the community. The provision of adequate treatment for drug and alcohol addiction was also seen as essential in order to protect the rights to life and to freedom from inhuman and degrading treatment. The Committee expressed concerns about the detention of mentally ill people in inappropriate forms of detention, whether in prison, police cells or immigration removal centres. It was also concerned about deaths in custody from the use of control and restraint, even though they were relatively rare. The report makes recommendations on the training of police custody officers and on the training on control and restraint in all forms of detention. In addition it emphasises the need to ensure that families are informed, supported and involved immediately following a death and at all stages of an investigation. The Committee considered that the difficulties in obtaining evidence to support prosecutions following deaths in custody needed to be addressed by strong evidence-gathering powers and close co-operation between the prosecution service and the police and other investigating authorities. It also recommended the establishment of a cross-departmental task-force on deaths in custody, supported by human rights expertise, with the functions of sharing information on good practice and developing guidelines in relation to the prevention of deaths in custody, reviewing the systems for conducting investigations into such deaths, developing good practice standards on training, reviewing recommendations from coroners, public inquiries and research and monitoring progress on their implementation, collecting and publishing information on deaths in custody and commissioning research and making recommendations to Government (*Deaths in Custody*, HL 15-I/HC 137-I).

The satisfactory nature of investigations into deaths has, moreover, been of concern in respect of those occurring in contexts other than where the persons concerned were in custody. Thus the granting of a declaration that an inquest into the death of a prisoner – who had hanged himself in his cell - had been inadequate to meet the procedural obligation in ECHR Article 2 was upheld in *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 All ER 465 as, pursuant to the regime for conducting inquests established by the Coroners Act 1988 and the Coroners Rules 1984 as hitherto understood and followed, the inquest verdict did not express the jury's factual conclusion on the events leading up to the death, namely, as to whether the prisoner should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. However, the appellate committee of the House of Lords considered that compliance with the requirements of the ECHR could be achieved by interpreting the word 'how' in s 11(5)(b)(ii) of the 1988 Act and r 36(1)(b) of the 1984 rules ('how … the deceased came by his death') as meaning not simply 'by what means' but 'by what means and the jury's conclusion might be obtained by the coroner inviting an expanded form of verdict, inviting a narrative form of verdict in which the its conclusions were briefly summarised or inviting answers to factual questions put by him. Their Lordships further considered that compliance with the ECHR did not require that the power reserved to the coroner under r 43 of the 1984 rules to make an

appropriate report should be exercisable by the jury but they indicated that the procedural obligation under Article 2 would be most effectively discharged if the coroner announced publicly not only his intention to report any matter but also neutrally expressed the substance of that report. Applying the foregoing approach their Lordships dismissed an appeal against an order for a new inquest in *R (on the application of Sacker) v West Yorkshire Coroner* [2004] UKHL 11, [2002] 2 All ER 487 where the coroner had not had an opportunity of inviting the jury to consider the disputed factual issues surrounding the death of the claimant's daughter whilst she was being held on remand in prison and in particular as to whether this death had been contributed to by neglect. A new inquest was considered to be the most convenient and appropriate way of identifying the cause or causes of the deceased's suicide, the steps (if any) that could have been taken and had not been taken to prevent it and the precautions (if any) that should be taken to avoid or reduce the risk to other prisoners. These rulings may help address the concern of the Northern Ireland Human Rights Commission that reform of the inquest system in that part of the United Kingdom was long overdue (*Annual Report 2004*). However, they will not be sufficient to all of the problems revealed by a study for the same Commission with regard to the arrangements for investigating deaths in hospital. This concluded that the existing arrangements do not meet the requirements of ECHR Article 2 in that: there is no automatic requirement for an investigation; both clinical audit mechanisms and internal reviews and referrals to the chief executive of trusts are insufficiently independent to provide an appropriate level of scrutiny; the system of death certification can conceal the presence of individual or systemic errors which have contributed to the death; where the death has occurred during or after a surgical procedure there is no mandatory requirement to report that death to a coroner; the decision as to whether a surgical death should be reported to the coroner can be made by junior members of the medical team; where a death is reported, the corner retains a wide discretion as to whether there should be a post mortem; a coroner's report can take place and a report be provided by the State pathologist without scrutiny of the clinical notes and records by an independent expert in the field; the coroner has a wide discretion with regard to whether an inquest is held in a particular case; the coroner can decide not to hold an inquest on the basis of the completion of a post mortem report alone; the coroner is currently required to combine an investigative role with regard to the preparation of an inquest and a judicial role in the holding of an inquest; the restrictive nature of the verdicts available at an inquest can preclude a full investigation of the circumstances surrounding how the deceased died; the coroner does not have a power to make a recommendation to prevent the recurrence of the circumstances which caused the death; where a report is made to a professional healthcare body there is no requirement for that body to address the matter and report back to the coroner; and the clinical negligence system will not necessarily afford a mechanism for an open and objective evaluation of the circumstances surrounding the death and indeed, in cases where there has been clear systemic or individual error, it is more likely to conceal rather than reveal such errors (*Investigating Deaths in Hospital in Northern Ireland*). The lack of independent scrutiny just noted can be contrasted with that provided in the new system for handling complaints against the police in England and Wales which came into effect in April. Thereafter all serious incidents involving death and serious injury, as well as allegations of racially discriminatory behaviour and corruption, must be referred to he Independent Police Complaints Commission, which decides how the complaint should be investigated and which has its own team of investigators. This Commission also has powers to decide an appeal against a police service's refusal to record a complaint and the outcome of complaints investigated by the police service themselves. In addition it is responsible for setting standards that the police service must meet when investigating complaints from members of the public. Also since April all deaths in prison, probation hostels and immigration detention centres are being investigated by the Prison and Probation Ombudsman. Additionally the Ombudsman has the discretion to investigate, to the extent appropriate, cases that raise issues about the care provided by a prison. Furthermore permission to challenge the refusal of the Ministry of Defence not to hold an inquiry into the alleged torture and death of Baha Mousa in Iraq was granted in *R (Al-Skeini) v Secretary of State for Defence*, *The Times*, 14 December, on the basis that the Human Rights Act 1998 was

applicable in to a British military prison, operating in Iraq with the consent of the Iraqi authorities. However, it was also held that there was no obligation to investigate deaths of civilians occurring as a result of military operations in the field.

Although the some of the changes just noted may improve the way future deaths are investigated, there are many that have already occurred where the requirements of ECHR Article 2 have still not been fulfilled. Thus the Northern Ireland Human Rights Commission has noted that there are over 2000 unsolved murders dating from before the Belfast (Good Friday) Agreement of 1998 and that there was evidence that a number of them had not been effectively investigated (*Annual Report 2004*). Nor does there appear to be any legal basis for compelling them to be investigated given developments since the ruling in Eur.Ct.H.R.(3rd sect.), *McKerr v United* Kingdom, (Appl. nº 28883/95) judgment of 4 May 2001 (final) that there had been a violation of ECHR Article 2 in respect of investigatory shortcomings with regard to the death of the claimant's son after he was shot by the police, the government had paid the compensation awarded but stated that it did not propose to take any steps to hold a further investigation into the death. In upholding the dismissal of an application for judicial review of this decision, it was held in *Re McKerr* [2004] UKHL 12, [2004] 2 All ER 409 that there was no obligation to hold an investigation into a killing which occurred before the Human Rights Act 1998 came into force since that obligation was triggered by the occurrence of a violent death and did not exist in the absence of such a death. The appellate committee of the House of Lords emphasised that there was a distinction between the rights arising under the ECHR and the rights created by the 1998 Act by reference to the ECHR; the former existed before the enactment of that Act and they continued to exist but they were not part of United Kingdom law because the ECHR did not form part of that law. It was further held that there was no separate overriding common law right corresponding to the procedural right implicit in Article 2 and to hold otherwise would be to create an obligation on the state corresponding to that provision in an area of the law for which Parliament had long legislated, a consideration militating against action to develop the common law. Concern about many deaths prior to the entry into force of the 1998 Act not having had an investigation that meets the requirements of ECHR Article 2 is also highlighted in British Irish Rights Watch's *Annual Report* and its report *The Death of Stephen McConomy*. However, following the publication in April of the reports of Justice Peter Cory, who had been appointed by the British and Irish Governments to investigate allegations of collusion between security forces and terrorists in six high profile cases and who upheld some of them, the Northern Ireland Office has announced that public inquiries would be established into three of the cases and has undertaken to set out the way forward after the conclusion of a prosecution connected with the fourth. It was announced in July that the conduct of the inquiries would be governed by the principles of independence, transparency, fairness and respect for individuals, power to seek to establish the facts and access to necessary resources but avoidance of unnecessary expenditure.

Positive aspects

The judicial compulsion to hold an investigation into a death occurring in a military prison in Iraq and the adaptation of the procedure governing inquests to ensure that the requirements of ECHR Article 2 are fulfilled.

Good practices

The new arrangements for an independent investigation of deaths occurring in prisons and in police custody.

Reasons for concern

The incidence of deaths in custody, together with the inappropriateness of detaining many of those involved and the circumstances in which they are held, the inadequacy of arrangements to investigate deaths occurring in hospitals in Northern Ireland and the failure to deal with inadequate investigations occurring before the entry into force of the Human Rights Act 1998.

Article 3. Right to the integrity of the person

Breaches of the right to the integrity of the person (general)

Legislative initiatives, national case law and practices of national authorities

The Human Tissue Act 2004 has been enacted in order to provide a consistent legislative framework for issues relating to whole body donation and the taking, storage and use of human organs and tissue. It makes consent the fundamental principle underpinning the lawful storage and use of human bodies, body parts, organs and tissue and the removal of material from the bodies of deceased persons, providing for a 'nominated representative' to make decisions about regulated activities after a person's death. Living children who are competent may give their own consent. Use for purposes other than that for which consent has been given is unlawful. The Act also sets up an over-arching authority which is intended to rationalise existing regulation of activities like transplantation and anatomical examination and which will introduce regulation of other activities like *post-mortem* examinations and the storage of human material for education, training and research. The Act is intended to achieve a balance between the rights and expectations of individuals and families and broader considerations such as the importance of research, education, training, pathology and public health surveillance to the population as a whole.

Good practices

The increased regulation of the storage and use of human organs and tissues afforded by the Human Tissue Act 2004, with consent being the fundamental principle applicable.

Protection of persons in medical research

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Human Tissue Act 2004 above.

Good practices

The increased regulation of the use of human organs and tissues afforded by the Human Tissue Act 2004, with consent being the fundamental principle applicable.

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

Conditions of detention and external supervision of the places of detention

Penal institutions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about "reports of unsatisfactory conditions in … detention facilities including substantial numbers of deaths in custody, inter-prisoner violence, overcrowding and continued use of "slopping out" sanitation facilities, as well as reports of unacceptable conditions for female detainees in the Hydebank Wood prison, including a lack of gender-sensitive facilities, policies, guarding and medical aid, with male guards alleged to constitute 80% of guarding staff and incidents affecting female detainees" (*ibid*, para 4(g)). It has recommended the development of "an urgent action plan, including appropriate resort to criminal sanctions" to address these concerns and the taking of "appropriate gender-sensitive measures" (para 5(l)). In addition it has recommended that consideration be given to "developing a means of central collection of statistical data on issues arising under the Convention in the State party's prisons and other custodial facilities" (para 5(o)).

Legislative initiatives, national case law and practices of national authorities

A review by Her Majesty's Inspectorate of Prisons has found that, while some prisons were taking seriously the needs of older prisoners, there was no overall strategy and that prisons were primarily designed for, and inhabited by, young and able-bodied people. It found little evidence of the needs of older prisoners for health and care being individually assessed; a particularly serious problem involved the disengagement of some prisoners from staff and other prisoners as a result of physical or intellectual degeneration or mental health problems. It was also found that few prisons were fulfilling the requirements of the Disability Discrimination Act, which became applicable to prisons in October 2004. There also appeared to be inadequate preparation for the release of older prisoners. In addition the review noted the particular problem of isolation as a result of age and being in a foreign country that was being experienced by older and middle-aged woman prisoners from other countries who were serving long sentences for drug importation. It called for the development and implementation of a strategy to deal with the care and treatment of older prisoners (*'No problems – old and quiet: Older prisoners in England and Wales*). A survey by the Inspectorate on escort between prisons and between prisons and courts found that the longest journey was two hours and 10 minutes, with juveniles, women and young adult prisoners experiencing the longest journeys, and that inter-prison transfers could take considerably longer; 74% of the prisoners rated the comfort of the vehicles as bad or very bad; women under escort reported feeling less safe than men with whom they shared transport and by whom they could be verbally abused and intimidated; special needs were not always anticipated in advance and special arrangements made; comfort breaks were only provided in 20% of journeys over two and a half hours in length; prisoners were given insufficient notice of planned moves; and prisoners were given insufficient information about what happens under escort, how to communicate with staff or how to make a complaint (*Prisoners Under Escort*). The Inspectorate has reported that prisons are 24% overcrowded but noted a considerable improvement in healthcare, although the response to problems of mental health was seen as only skimming the surface. The provision of education and training was still considered to be inadequate despite investment, with the situation of short-term prisoners being particularly serious. It noted a lack of confidence by prisoners about the handling of racial incident complaints and the failure of prison catering and shops to reflect the diversity of the community being served, as

well as considering that the development of a strategy to deal with the needs of prisoners who are foreign nationals was considered essential (*Annual Report 2003-2004*).

The problems faced by foreign nationals in prison have also been highlighted by the Prison Reform Trust, noting in particular that: there has been a failure to provide adequate translation and interpretation facilities so that they miss out on basic provisions, such as showers and associations, because they have not understood staff instructions or basic questions; unnecessary difficulties in maintaining family contact with mental health problems ensuing from their separation and isolation; they face a struggle to get legal and immigration advice so that they remain in jail after the completion of their sentence; racism and a lack of respect and understanding from prison staff is not uncommon; and there is a lack of proper procedures in place to prepare them for their release and there are insufficient resettlement programmes specifically for them (*Forgotten Prisoners – The Plight of Foreign National Prisoners in England and Wales*). These problems were reiterated in a subsequent report published by the Trust, which also noted that there were now two prisons where over half the population comprised foreign nationals and sixteen others were they made up a quarter or more of the population (*Going the Distance – Developing Effective Policy and Practice with Foreign National Prisoners*). A report produced by the Trust, analysing the Prison Service's performance against its main targets, has found that: rising numbers sentenced to custody meant that the overcrowding target had not been met, with an average rate of 21.7% for doubling up in single cells and some instances of it being 75%; there was a failure to meet the target of 24 hours per week of purposeful activity and indeed this had only been met once in the last nine years; the total rate of serious assaults was 1.54% against a target of 1.20%; and the number of positive drug tests increased to 12.3% against a target of 10% (*A Measure of Success*).

A report prepared by the Northern Ireland Human Rights Commission has concluded that the implementation of a decision to relocate female prisoners (including immigration detainees) from a female unit in a high security male establishment to a female unit in a lower security male young offenders centre follows a failure to address adequately the problems associated in holding women in male establishments. In contradiction to the Prison Inspectorate's recommendations for the treatment of women: there will not be full physical separation; there will not be autonomous management for the women's unit; there will be no separate health care facility for women; there will be mixed gender visits and kitchen duty; the cells are smaller; there is no in-cell sanitation (which was previously enjoyed); staff have not been effectively trained in dealing with the needs of women; and there has been no full needs assessment of the women concerned (*Report on the Transfer of Women from the Mourne House Unit , Maghaberry Prison to Hydebank Wood Young Offenders Unit*); see also the concern expressed by the Committee against Torture above.

Reasons for concern

The continued problem of overcrowding and the failure adequately to address the needs of prisoners who were women, old or foreign nationals.

Centres for the detention of juvenile offenders

Legislative initiatives, national case law and practices of national authorities

A survey undertaken by Her Majesty's Inspectorate of Prisons of the views of young people under the age of 18 on their experience in custody found a quarter had received insulting remarks from staff, a third had felt unsafe at some time, boys were more than three times as likely to experience control and restraint techniques, significantly more boys said that they had been insulted and assaulted by other young people, nearly half the girls but under a quarter of the boys reported being under medication, under half the boys had access to

showers whereas for girls it varied according to institution from 99% to 20% and a quarter of all young people said that they had not had a visit (which was consistent with the Inspectorate's concern about the distance young people are held from their family and home) (*Juveniles in Custody: A unique insight into the perceptions of young people held in Prison Service*).

A report by the Prison Reform Trust and Community Care magazine on young people's experiences in prison has found that many young prisoners spend up to 20 hours locked in shared cells designed for only one person, forcing them to use the toilet in front of their cellmate and eat their meals in the same cramped, unhygienic conditions. Furthermore overcrowding is leading to the frequent movement of young people from one jail to another, sometimes over great distances, which causes distress, disrupts educational and training courses vital for rehabilitation and breaks family ties. It also found that: only six establishments provide an average of 30 hours purposeful activity per week so that most young prisoners are spending long hours locked in their cells with nothing to do; the majority of young people are sentenced to less than six months in custody, with these short sentences resulting in loss of accommodation, employment and family ties; and despite pockets of good practice, young people are not being adequately supported to find housing, and either employment, education or training on release (*A Lost Generation*).

Reasons for concern

The lack of security felt by young people held in prisons and the conditions to which they are subject.

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

Her Majesty's Prison Inspectorate has reported that most immigration removal centres recorded a high-level of detainee insecurity, in spite of relatively positive relationships between staff and detainees. It found that systems for detecting and preventing suicide and self-harm were well-established in most centres but that in all of them there was an inappropriate use of strip conditions and special segregated cells for those at risk of self-harm. It contrasted one centre with staff aware of the particular sensitivities of detainees and another- which was also a prison - with living accommodation that was filthy and in disrepair, staff lacking knowledge and understanding of detainees and using routine transfers to segregation units. It noted that the detention of children continues, with numbers rising, that an inability to work left detainees with not enough to do, that cleaning and catering services were often below standard and that there was no independent welfare advice (*Annual Report 2003-2004*).

An investigation by the Prison and Probation Ombudsman into a disturbance and fire at a removal centre for failed asylum-seekers and illegal immigrants, which led to the centre's destruction, found that: there were shortcomings in the design and construction materials for the centre, which was not fit for its intended purpose; the incident arose out of the mishandling of the treatment of a particular detainee; there was a lack of clarity as to who was in charge and the command structure; the operation that ended the disturbance worked well but the safeguards protecting those in detention from abuse broke down; there was a lack of centrally-held information about the detainees; and the tension there arose from genuine issues relating to food, communications, feedback from the Immigration Service, problems with heating; inconsistent application of rules and high shop prices (*Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre*). An investigation by the ombudsman into allegations about treatment of detainees at the same removal centre found that a culture of racism and improper use of force was not indicated but that some remarks

made by staff were 'unfortunate' and that there was a heightened reliance on control and restraint which should be carefully scrutinised. In additions recommendations were made with regard to: training of staff; introducing a system of investigating complaints; banning the wearing by staff of badges with inappropriate insignia or designs; addressing detainees' complaints about food; identifying more effective ways of informing detainees about menu choices; introducing multilingual signs; and reviewing the need for a support scheme for ethnic minority staff (*Investigation into Allegations of Racism, Abuse and Violence at Yarl's Wood Removal Centre*).

See also the concerns expressed above about the Hydebank Wood Young Offenders Unit and the discussion in 'Other relevant developments' in Article 18.

The Northern Ireland Human Rights Commission has recommended that there be an explicit set of rules concerning detainees held under the Anti-terrorism, Crime and Security Act 2001, dealing with time spent in cells, legal aid and assistance and contacts with family members and the media (*Countering Terrorism and Protecting Human Rights*).

Reasons for concern

The conditions and lack of security felt by persons held in immigration removal centres.

Fight against the impunity of persons guilty of acts of torture (Convention against torture (1984), Article 5)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about inconsistencies between the requirements of the Convention and provisions of domestic law, notably, the interpretation of the latter as excluding "the use of evidence extracted by torture only where the State party's officials were complicit" (/C/CR/33/3, 25 November 2004, para 4(a)(i). It has recommended that there should be a review of the law "to ensure full consistency with the obligations imposed by the Convention … [and] for greater clarity and ease of access, the State party should group together and publish the relevant legal provisions" (para 5(b)). In addition it recommended that the United Kingdom "should appropriately reflect in formal fashion, such as legislative incorporation or by undertaking to Parliament, the Government's intention as expressed by the delegation not to rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture; the State party should also provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture" (para 5(d)). Furthermore it has recommended that "the State party should ensure that the conduct of its officials, including those attending interrogations at any overseas facility, is strictly in conformity with the requirements of the Convention and that any breaches of the Convention that it becomes aware of should be investigated promptly and impartially, and if necessary the State party should file criminal proceedings in an appropriate jurisdiction" (para 5(j)). The Committee has also expressed concern about sub-sections 4 and 5 of the Criminal Justice Act s 134 in that the former "provides for a defence of "lawful authority, justification and excuse" to a charge of official intentional infliction of severe pain or suffering, a defence which is not restricted by the Human Rights Act for conduct outside the State Party, where the Human Rights Act does not apply" [but see the decision in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* below] and the latter "provides for a defence for conduct that is permitted under foreign law, even if unlawful under the State party's law" (para 4(a)(ii)). It has recommended that appropriate measures be taken "to ensure, if necessary explicitly, that the defences that might be available to a charge brought under Section 134(1) of the Criminal

Justice Act be consistent with the requirements of the Convention" (para 5(a)). It has also recommended a reassessment of the extradition mechanism "in so far as it provides for the Home Secretary to make determinations on issues such as medical fitness for trial which would more appropriately be dealt with by the courts" (para 5(c)). See also the entry below regarding the behaviour of security forces.

Legislative initiatives, national case law and practices of national authorities

In dismissing appeals against detention under the Anti-terrorism, Crime and Security Act 2001, the Court of Appeal has held by a majority in *A v Secretary of State for the Home Department* [2004] EWCA Civ 1123 that evidence obtained by torture would not be deemed admissible when directly procured by United Kingdom agents or in whose procurement such agents have connived but evidence obtained by the agents of foreign states would be admissible.

It was held in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2004] EWCA Civ 1394 that a foreign state, while enjoying personal immunity from suit in the courts of the United Kingdom, could not claim a blanket subject-matter immunity in respect of acts of torture alleged to have been committed by state officials and that, when determining whether any individual claim ought to proceed against a state official, the court should consider and balance at one and the same time all relevant factors. As a consequence appeals against refusals to permit service out of the jurisdiction against certain officials were allowed.

Positive aspects

The refusal in *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* to allow the claim of a blanket subject-matter immunity in respect of acts of torture alleged to have been committed by state officials.

Reasons for concern

The acceptance by the majority in *A v Secretary of State for the Home Department* that use could be made of evidence obtained by torture by agents of foreign states.

<u>Protection of the child against ill-treatments</u>

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee of Ministers of the Council of Europe considered that it was not in a position to conclude whether the United Kingdom law complied with the judgment in Eur.Ct.H.R., *A v United Kingdom*, judgment of 23 September 1998 (in which the defence of reasonable chastisement to a charge of assault occasioning actual bodily harm had resulted in inadequate protection against treatment in breach of Article 3 of the European Convention on Human Rights) because, notwithstanding the entry into force of the Human Rights Act 1998, the ruling of the Court of Appeal in *R v H*, 25 April 2001 that domestic courts were now obliged to take account of the criteria applied by the European Court of Human Rights in determining whether certain treatment falls within the scope of treatment prohibited by Article 3 and the fact that this judgment had been reported in a number of law reports, a debate had arisen as to whether the application of the criteria enunciated by the Court of Appeal by the domestic courts in the case of *R v H* itself and in subsequent case law clearly demonstrated that the corporal punishment of children in breach of the standards required by Article 3 is now unlawful under domestic law in the United Kingdom, or whether this fact had been effectively brought to the knowledge of the public so as to achieve the necessary deterrence. The

Committee thus decided to resume its consideration of this case at a forthcoming meeting not later than 12 months hence, in the light of the measures taken to date and any further developments (*Interim Resolution ResDH(2004)39 concerning the judgment of the European Court of Human Rights of 23 September in the case of A. against the United Kingdom*, 2 June 2004). However, see the following entry.

Legislative initiatives, national case law and practices of national authorities

The Children Act 2004 has removed the defence of reasonable chastisement in any proceedings for an offence of assault occasioning actual bodily harm, unlawfully inflicting grievous bodily harm, causing grievous bodily harm with intent, or cruelty to a child. It also prevents the defence being relied upon in any civil proceedings where the harm caused amounted to actual bodily harm but the defence remains available in proceedings before the Magistrates' Court for common assault on a child.

Positive aspects

The removal of the defence of reasonable chastisement in proceedings for assault on a child.

Behaviour of security forces (including during demonstrations)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about the United Kingdom's "limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that "those parts of the Convention which are applicable only in respect of the territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq"" and observed that "the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party's authorities" (CAT/C/CR/33/3, 25 November 2004, para 4(b)). It has recommended that the United Kingdom "make public the result of all investigations into alleged conduct by its forces in Iraq and Afghanistan, particularly those that reveal possible actions in breach of the Convention, and provide for independent review of the conclusions where appropriate" (para 5(f)). However, see also the discussion of the fight against the impunity of persons guilty of acts of torture.

Positive aspects

None additional to those under the fight against the impunity of persons guilty of acts of torture above.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about "the incomplete factual and legal grounds advanced … [to it] justifying the derogation's from … international human rights obligations and requiring the emergency powers set out in Part IV of the Anti-terrorism, Crime and Security Act 2001" and the "resort to potentially indefinite detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals suspected of involvement in

international terrorism and the strict regime in Belmarsh prison", as well as, with respect to Northern Ireland, about "the absence of precise information on the necessity for the continued emergency provisions for that jurisdiction contained in the Terrorism Act 2000" (CAT/C/CR/33/3, 25 November 2004, para 4(c) and (e)). It has recommended a re-examination of "review processes, with a view to strengthening independent periodic assessment of the ongoing justification for emergency provisions of both … [Acts], in view of the length of time the relevant emergency provisions have been operating, the factual realities on the ground and the relevant criteria necessary to declare a state of emergency" and that there should be a review "as a matter of urgency" of the alternatives available to indefinite detention under the 2001 Act (para 5(g) and (h)).

The Committee against Torture has also expressed concern about "reports of incidents of bullying followed by self-harm and suicide in the armed forces, and the need for full public inquiry into these incidents and adequate preventive measures" (CAT/C/CR/33/3, 25 November 2004, para 4(h)).

Legislative initiatives, national case law and practices of national authorities

A report by 11 psychiatrists and a psychologist on the mental health of the Belmarsh prisoners detained under the Anti-terrorism, Crime and Security Act 2001 has concluded that there was "serious damage to the health of all the detainees they have examined has occurred and is inevitable under a regime which consists of indefinite detention. These conclusions are based on a series of reports originally commissioned for legal purposes from the doctors over the past two and a half years by the prisoners' solicitors. Progressive deterioration in the mental health of all these detainees and their families was observed" (*Damage to the mental health of Belmarsh prisoners detained under the 2001 Anti-Terrorism legislation (Britain's so-called "Guantanamo Bay")*).

In *R (on the application of Green) v Police Complaints Authority* [2004] UKHL 6, [2004] 2 All ER 209 the appellate committee of the House of Lords dismissed an appeal against a ruling that the authority, when reviewing its finding not to order the bringing of disciplinary proceedings against a police officer alleged to have deliberately knocked the claimant down while driving an unmarked police car, did not have to disclose to the claimant all the witness statements and documents that it would be taking into account. Their Lordships recognised that ECHR Article 3 required that the degree of involvement of a claimant in the investigation be sufficient to safeguard his legitimate interests but they considered that in the instant case his particular status and legitimate interests as a complainant had been recognised and safeguarded by his involvement at many stages of the investigation. As a consequence they concluded that the authority had been entitled to take the view that disclosure of the witness statements and other material sought by the claimant was not necessary for the proper discharge of its functions and thus fell within the exception in the Police Act 1996, s 80(1)(a) to the general prohibition on the disclosure of information received by it.

The Northern Ireland Human Rights Commission noted that the most serious and systematic violations of human rights in Northern Ireland were perpetrated by unlawful paramilitary organisations – 11 murders, 156 non-fatal shootings and 149 serious assaults in 2003 – and that these 'punishment attacks seemed increasingly to be accepted as a fact of life (*Annual Report 2004*).

A policy of denial of support under section 55(1) of the Nationality, Immigration and Asylum Act 2002 asylum seekers who have not claimed asylum as soon as reasonably practicable after the person's arrival in the United Kingdom was held in *Secretary of State for the Home Department v Limbuela, Tesema and Adam* [2004] EWCA Civ 540, 21 May, - a case brought by asylum seekers who had been evicted from National Asylum Support Service accommodation pursuant to section 55 and had been sleeping rough or on the street - to be

unlawful, at least until there is evidence that such a policy would not place a substantial number of people over the ECHR Article 3 threshold. A case by case approach to decision-making could not discharge the obligation under Article 3 because the numbers likely to need help were greater than the ability of charities to cope.

Reasons for concern

The continued use of detention without trial for foreign terrorist suspects and its impact on those concerned and the continued use of violence by paramilitary organisations.

Article 5. Prohibition of slavery and forced labour

Fight against the prostitution of others (general)

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Asylum and Immigration (Treatment of Claimants Etc) Act below.

Trafficking in human beings (in particular for sexual exploitation purposes)

Legislative initiatives, national case law and practices of national authorities

Anti-Slavery International has drawn attention to the need to protect migrant workers from exploitation after at least 19 Chinese cockle pickers were drowned in Morecambe Bay (press release, 9 February 2004). Subsequently the Gangmasters (Licensing) Act 2004 was enacted, providing for the licensing of activities involving the supply or use of workers – regardless of the contractual arrangement between the workers and either the person supplying or using them - in connection with agricultural work, the gathering of wild creatures and wild plants, the harvesting of fish from fish farms and certain processing and packaging. It is an offence for anyone to supply such workers without a licence or to enter into an agreement for them to be supplied without a licence.

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has introduced new criminal offences of trafficking persons into, within or out of the United Kingdom for the purpose of exploitation, for which the maximum penalty is 14 years' imprisonment. For the purposes of this offence a person is exploited if he or she is: the victim of behaviour contravening ECHR, Article 4; encouraged, required or expected to do something which would mean an offence is committed concerning organ removal; subjected to force, threats or deception designed to induce him or her to provide services or benefits or enable another person to acquire benefits; or requested or induced to do something, having been chosen on the grounds that he or she is ill, disabled, young or related to a person, in circumstances where a person without the illness, disability, youth or family relationship would be likely to refuse or resist.

Positive aspects

The introduction of the new trafficking offences by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004.

Good practices

The introduction of a licensing requirement for activities involving the supply or use of workers – regardless of the contractual arrangement between the workers and either the person supplying or using them – in a number of fields where exploitation has occurred.

Protection of the child (fight against child labour – especially with purposes of sexual exploitation or child pornography - and fight against the sexual tourism involving children)

Legislative initiatives, national case law and practices of national authorities

A safe house for trafficked girls and boys aged 16-18 was opened in April, with housing in a safe environment and specialist support, including medical care, legal advice and education. Children younger than 16 will be placed with families. This house can receive children trafficked to any part of the country and was opened six months after the country's then only safe house – for trafficked girls just in the West Sussex area – was shut down (Anti-Slavery International press release, 14 April 2004).

Positive aspects

The restoration of provision of a safe house for trafficked girls and boys.

Exploitation of undocumented workers

Legislative initiatives, national case law and practices of national authorities

See the discussion of Gangmasters (Licensing) Act 2004 above.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations noted with interest the new requirements regarding domestic workers in private households who came from abroad, whereby such workers are permitted to change employers regardless of their reasons for leaving their original employer and that any such change in employer must be reported to the Immigration and Nationality Directorate, had been formally incorporated into the Immigration Rules on 18 September 2002. It also stated that it trusts that, with regard to contracted-out prisons and prison industries, the necessary measures will at last be taken to ensure that any work by prisoners for private companies be performed under the conditions of a freely consented upon employment relationship and that the government will soon be in a position to indicate steps taken to this end (*Individual Observation concerning Convention No. 29, 1930, Forced Labour, United Kingdom*, 2004). The European Committee of Social Rights was also concerned about the latter issue, requesting a more detailed description of the working conditions of those prisons where prisoners worked outside the prison administration in order to assess whether these conditions approximate those of workers (*Conclusions XVII-1*).

The European Committee of Social Rights has concluded that the possibility of seamen on strike, pursuant to the Merchant Shipping Act 1995, s 59, facing unjustified criminal sanctions remained not in conformity with Article 1(1) of the European Social Charter (*Conclusions XVII-1*). However, the International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations, which has also been concerned about this provision, noted that there have been no prosecutions under it in recent times and reiterated its hope that proposed amending legislation would be adopted to bring the merchant shipping legislation into conformity with the Abolition of Forced Labour Convention (*Individual*

Observation concerning Convention No. 105, 1957, Abolition of Forced Labour, United Kingdom, 2004).

The European Committee of Social Rights has found the suspension of unemployment benefit of job-seekers who refuse job offers not matching their qualifications to be in conformity with Article 1(2) in the light of the further information that such suspension only occurred after a refusal for a period of 13 weeks (*Conclusions XVII-1*).

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 in Article 19 ('Other relevant developments').

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention

Legislative initiatives, national case law and practices of national authorities

The Justice (Northern Ireland) Act 2004 gives the prosecution a right of appeal against the grant of bail in the magistrates' courts and the Criminal Procedure (Amendment) (Scotland) Act 2004 requires a court, where a person has been refused bail, to consider whether the imposition of a movement restriction condition with a remote monitoring requirement would enable it to release that person on bail and, if so, to grant bail on this basis.

The Northern Ireland Human Rights Commission has recommended that the extension by section 2003 of the Criminal Justice Act 2003 of the maximum detention period under the arrest powers under Part V of the Terrorism Act 2000 from 7 to 14 days should be retained only while the derogation notice under the ECHR is in force and that once the normal Police and Criminal Evidence Act 1984 period of 4 days has passed a new regime with greater attention to the detail of rest, amenities and contacts should be triggered. Furthermore it recommended that the documentation used for authorising an extension to initial detention should expressly refer to the criteria in paragraphs 23 and 24 of Schedule 8 to the 2000 Act and should require not only grounds based on the less opaque criteria used before this Act but also reasons for those grounds. In addition it recommended that: the exclusion from a hearing of a representative be made, if at all, on specified grounds; the police be placed under a continuing statutory duty to review detentions until release; the requirement in the 2003 Act of consultation with a lawyer being within the sight and hearing of a qualified officer be repealed. In addition the Commission recommended the activation of the powers in sections 72 and 73 of the 2000 Act to impose maximum periods for either specific processes or for the overall period of remand in custody but, insofar as this is not feasible, the provisions should be reformulated to allow for the issuance of guidelines that would not have the sanctions currently provided for. It also recommended that: further consideration be given to empowering Resident Magistrates to grant bail, a power taken away by section 67(2) of the Terrorism Act 2000, which separated the remand and bail functions; a maximum period be stipulated for the detention under the power of police and soldiers to stop and question under section 89 of the Terrorism Act 2000 and that any statements made during the questioning be inadmissible in evidence (*Countering Terrorism and Protecting Human Rights*).

A report by the Prison Reform Trust has shown that six out of ten women imprisoned while awaiting trial are subsequently acquitted or given a non-custodial sentence. Furthermore it found that: there was a 196% increase in the number of women remanded in custody between 1992 and 2002 compared to a 52% increase for men; 8,000 of the 12,000 women sent to prison in 2002 were on remand; more women are remanded in custody for theft and handling stolen goods than any other crime; four out of ten remanded women had received help or treatment for mental health in the year before being sent to prison and a quarter said that they had injected drugs in the month before custody. It recommended that custodial remand be reserved for those charged with serious or violent offences, the establishment of women-only supervision centres to work with women who come into contact with the criminal justice system, an increase in the provision and an improvement in the quality of court-based diversion schemes for women with serious mental health problems and an improvement in the provision of information to courts (*Lacking Conviction: The rise of the women's remand population*).

A review by the Northern Ireland Human Rights Commission has recommended: the creation of a statutory right to compensation for arrested persons who have been unlawfully denied access to a solicitor or who have been denied the right to have someone informed that they have been arrested; the creation of a statutory right to compensation for arrested persons who have suffered torture or inhuman or degrading treatment as currently compensation is only possible where the mistreatment amounts to an assault; and the review by the police of their compliance with the requirement in section 33 of the Police and Criminal Evidence (NI) Order 1989 that a person who is at a police station in consequence of an arrest should also be arrested for any other offence for which he or she would be liable to be arrested if released from the first arrest, with – if necessary – a General Order being issued requiring checks on suspects to be conducted more quickly than at present so that arrested suspects can be questioned about earlier incidents which they are also suspected of having committed (*The Rights of People Who Have Been Arrested*).

Reasons for concern

The use of pre-trial detention in so many cases involving women that ultimately lead to an acquittal or a non-custodial sentence.

Detention following a criminal conviction (including the alternatives to the deprivation of liberty and the conditions for the access to release on parole)

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The absence of a body providing the guarantees and procedures required by the ECHR when examining whether a person sentenced to mandatory life imprisonment should be released after he had served the minimum period of imprisonment required to satisfy the requirements of retribution and deterrence – the Parole Board being only able to recommend release and not affording an oral hearing, with the opportunity to examine or cross-examine witnesses relevant to any allegations that the applicant remained a risk to the public – was held in Eur.Ct.H.R.(4th sect.), *Hill v United Kingdom (Appl* n° 19365/02) judgment of 27 April 2004 (final) to be a violation of ECHR, Article 5(4), notwithstanding that the Board had never actually recommended the applicant's release. It was also held that there was a violation of ECHR, Article 5(5) in that there was at the time no possibility in domestic law of obtaining compensation for the violation of Article 5(4).

Legislative initiatives, national case law and practices of national authorities

The retention – as a result of the combined effect of the Criminal Justice Act 1991, ss 35 and 50 and the Parole Board (Transfer of Functions) Order 1998 - of the Secretary of State's discretion to release on licence prisoners serving determinate sentences of over 15 years if recommended to do so by the Parole Board was considered in *R (on the application of Clift) v Secretary of State for the Home Department* [2004] EWCA Civ 514, [2004] 3 All ER 338 not be in contravention of ECHR Article 5, read with Article 14, even though the decision of the Board was final in the case of those serving determinate sentences of less than 15 years. The difference in treatment was justified by reference to the wish that the Secretary of State should remain democratically accountable in respect of the release of those who would generally have committed the most serious crimes or have the worst record (or both), notwithstanding that any cut-off point could, in the case of individual prisoners, create results which were difficult to justify so far as the relevant circumstances of each case was concerned.

Deprivation of liberty for juvenile offenders

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

No significant developments

Legislative initiatives, national case law and practices of national authorities

See the discussion under Article 4

Reasons for concern

None additional to those under Article 4

Deprivation of liberty for persons with a mental disability

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

It was held in Eur.Ct.H.R. (4th sect.), *H L v United Kingdom* (Appl n° 45508/99) judgment of 5 October 2004 (final), that the continuous supervision and control of the applicant, who was autistic and who had been treated as an informal patient in a psychiatric institution from which he was not free to leave, amounted to detention for the purposes of ECHR Article 5(1). It was further held that, considering the lack of any fixed procedural rules by which the admission and detention of compliant incapacitated patients was conducted, particularly as regards who could propose admission, for what reasons and on the basis of what kind of medical and other assessments and conclusions, as well as the absence of any requirement to fix the specific purpose of such admission or to make a continuing clinical assessment of the persistence of a disorder warranting detention, this detention was in violation of Article 5(1) on account of the absence of any procedural safeguards against arbitrary deprivations of liberty on grounds of necessity. In addition it was held that there was a violation of Article 5(4) as it had not been demonstrated that the applicant had available to him a procedure to have the lawfulness of his detention reviewed by a court.

Legislative initiatives, national case law and practices of national authorities

Although it was found *R (on the application of H) v Secretary of State for the Home Department* [2003] UKHL 59, [2004] 1 All ER 412 that there was no violation of ECHR Article 5(1)(e) where a mental health tribunal considered that the claimant, who had been a patient since 1985 under the Mental Health Act 1983 subject to a hospital order and a restriction order without limit of time, could be satisfactorily treated in the community if its conditions were met since the alternative, if those conditions proved impossible to meet, was not discharge but continued detention, there was held to have been a breach of Article 5(4) when it proved impossible to secure compliance with the conditions (involving supervision by a named psychiatrist) of the tribunal's order within a matter of a few months of the order being made as the tribunal, having made its order, was precluded by authority from reconsidering it. However, the tribunal, while lacking the power to secure compliance with its conditions, did not lack an essential attribute of a court for the purposes of Article 5 as it could determine whether the detention of a person of unsound mind in hospital was lawful and, if not, order his release. It was further held that mental health tribunals should no longer proceed on the basis that they cannot reconsider a decision to direct a conditional discharge on specified conditions where, after deferral and before directing discharge, there is a material change of circumstances but should treat their original decision as a provisional one and

should monitor progress toward implementing it so as to ensure that the patient is not left in limbo for an unreasonable length of time. Furthermore in *R (MH) v Secretary of State for Health* [2004] EWCA Civ 1690 it was held ECHR Article 5(4) imposed an obligation on the state to refer to the Mental Health Review Tribunal the case of someone detained under the Mental Health Act 1983 who was 'incapable' and so could not make her own application. In addition it was held that a further right of challenge arose where a patient's detention for 28 days under section 2 of the 1983 Act had been extended by section 29(4) until the disposition of an application to replace her mother with a different 'nearest relative' for the purpose of the Act; the application in the present case still not having been disposed of after 20 months had elapsed.

Reasons for concern

The existence of various instances where procedural safeguards against detention or its continuation are not fully applicable.

Deprivation of liberty for foreigners (in order to prevent their unauthorised entry on the territory with a view to their removal, including their extradition)

Legislative initiatives, national case law and practices of national authorities

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has removed the possibility of a person liable to deportation relying on any previous grant of bail by a court to resist his or her detention pending deportation, although it remains possible for such a person to seek the grant of bail from the immigration service or an immigration appellate body.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In upholding the quashing of a person's certification as a suspected international terrorist under section 21 of the Anti-terrorism, Crime and Security Act 2001, it was held in *M v Secretary of State for the Home Department* [2004] EWCA Civ 324 that the fact that suspicious circumstances existed did not mean that, when all the circumstances were examined, they amounted to a reasonable suspicion sufficient to justify the issue of such a certificate.

The efficacy and necessity of indefinite detention of foreign terrorist suspects was questioned by Human Rights Watch in its report *Neither Just nor Effective*, which also drew attention to its discriminatory character and adverse effect on the detainees themselves. Furthermore the Northern Ireland Human Rights Commission has recommended that detention under the Anti-terrorism, Crime and Security Act 2001 should be replaced by the prosecution of suspected terrorists for recognised offences, with reliance on evidence electronically obtained, or at least the use of less intrusive alternatives to detention (such as confinement to a given area and the use of tagging). In the event of detention being retained, it recommended that: reasonable efforts be made to find third countries willing to receive those concerned, with suitable guarantees as to treatment; a review be undertaken of the inadmissibility of electronically obtained evidence; and a review of the continued need for a derogation under ECHR Article 15; a clear linkage of the detention power to just Al Qa'ida terrorist suspects. In addition it recommended that the uncertainty concerning the meaning of 'links with an international terrorist group' in the definition of terrorist in section 21 be addressed to prevent persons being detained or convicted 'by association'. It also recommended that the office of Independent Commissioner for Detained Terrorist Suspects be provided for by statute for both Northern Ireland and for Great Britain and that his or her jurisdiction should cover not just detainees held under the Terrorism Act 2000 but also those held under the 2001 Act

(*Countering Terrorism and Protecting Human Rights*). The parliamentary Joint Committee on Human Rights has also reviewed the Anti-terrorism, Crime and Security Act 2001 and has: concluded that there are serious weaknesses in the protection of human rights under the detention provisions under Part 4; doubted whether they are required by the exigencies of the situation and thus whether a derogation under ECHR Article 15 is justified; considered that in an indefinite derogation was highly undesirable; considered that there was a serious risk of the powers under Part 4 violating ECHR Article 14 because of their impact on part of the resident community by virtue of their nationality; considered that renewal of the powers under Part 4 to be inappropriate but should in any event be renewed only for 6 months to seek new legislation based on the principles of the Report of the Committee of Privy Councillors in 2003 ('the Newton Committee'); called for publication of anonymised information about each individual Part 4 certification, the number of detentions and their outcomes; and drawn attention to the need for the conditions of detention to reflect the status of those concerned (*Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, HL 38/HC 381). These views were reaffirmed in a subsequent report which also called for consideration of using the alternatives of more intense surveillance and civil restriction orders, as well as allowing for the use of intercept evidence so as to enable prosecutions to be brought (*Review of Counter-terrorism Powers*, HL158/HC713). The view that there was an emergency was not impugned by the appellate committee of the House of Lords in *A v Secretary of State for the Home Department* [2004] UKHL 56, 16 December but the majority of their Lordships did conclude that the detention powers were both disproportionate and discriminatory given that any threat posed by United Kingdom nationals could be addressed without infringing their personal liberty. This resulted in an order quashing the orders detaining the appellants and a declaration that section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with ECHR, Articles 5 and 14, resulting in a need to adopt alternative measures to deal with the threat from suspected terrorists.

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has extended the powers of arrest (and ancillary powers of entry, search and seizure) of immigration officers to a number of offences, including bigamy, fraud, perjury and theft where evidence of them is discovered in the course of their duties investigating immigration matters.

It was held in *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858, [2004] 3 All ER 503 that, when determining whether a person has been informed of the grounds for his or her arrest for the purposes of the Police and Criminal Evidence Act 1984, s 28(3), the question should be whether, having regard to all the circumstances of the particular case, he or she was told in simple, non-technical language that he or she could understand, the essential legal and factual grounds for his or her arrest and that the adequacy of the information given was to be assessed objectively having regard to the information which was reasonably available to the officer concerned. This ruling adopts the approach of the European Court of Human Rights with respect to ECHR, Article 5(2).

A challenge to a direction by the Parole Board, when reviewing the case of a claimant serving mandatory sentences of life imprisonment, that certain material about his removal from an open to a closed prison in the light of investigations into his alleged involvement in drug dealing and bringing in contraband should not be disclosed to him or his legal representatives but only to a specially appointed advocate acting on his behalf because of a real risk to the safety of the sources of the material was rejected in *Roberts v Parole Board* [2004] EWCA Civ 1031, [2004] 4 All ER 1136 since the Criminal Justice Act 1991, s 32 impliedly authorised the Board to adopt the special advocate procedure, enabling it to protect a source who might be at risk if his identity were known while mitigating the unfairness to the prisoner caused by the withholding of evidence. The court considered that, in the context of ECHR Article 5(4), fairness had to be judged on a case-by-case basis and it could not be right to say as a matter of principle it would never be fair for the board to appoint a special advocate; while such a solution should only be adopted in exceptional circumstances, there was no

principled distinction between the need to protect the interest of the state and the need to protect an individual if that were necessary.

The decision in Eur.Ct.H.R. (Grand Chamber) *Stafford v United Kingdom* (Appl n° 46295/99) judgment of 28 May 2002, which held that new issues concerning the lawfulness of a mandatory life prisoner's detention had to be determined after his tariff had expired, was considered in *R (on the application of Richards) v Secretary of State for the Home Department* [2004] EWHC 93 (Admin) to apply retrospectively as well as prospectively so that such a prisoner had an enforceable right to compensation for wrongful detention under ECHR Article 5(5) as a result of the Human Rights Act 1998.

Positive aspects

The ruling of the appellate committee of the House of Lords that detention powers under the Anti-terrorism, Crime and Security Act 2001 were both discriminatory and disproportionate.

Reasons for concern

The use and duration of detention without trial of foreign terrorist suspects in circumstances where the necessity for such measures has been extensively questioned.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

There was a friendly settlement, involving the payment of GBP 4,000 in damages (as well as legal costs), in Eur.Ct.H.R.(3rd sect.), *Martin v United Kingdom* (Appl n° 63608/00) judgment of 19 February 2004 in respect of a complaint that a local authority had placed the applicant's home under surveillance, using a hidden video camera, following complaints from her neighbours about her behaviour and that of her children. The authority had previously confirmed that no further surveillance on the applicant's property would be undertaken and that the tapes of the surveillance already undertaken had been destroyed and disposed of. In addition the carrying out by the police of a covert operation, under which persons suspected of burglary were arrested and detained in a police cell which had been fitted with audio equipment that recorded their conversations, was held in Eur.Ct.H.R. (4th sect.), *Wood v United Kingdom* (Appl n° 23414/02) judgment of 16 November 2004 (final) to be a violation of ECHR Article 8 as there was no legal basis for the recordings. The European Court of Human Rights also found a violation of ECHR Article 13 as there had been no effective remedy under domestic law in respect of the Article 8 violation.

Legislative initiatives, national case law and practices of national authorities

The total figures for telephone tapping in England, Scotland and Wales show a rise of 19% from 1,605 in 2002 to 1,983 in 2003 but these do not include warrants issued by the Foreign Secretary to GCHQ and MI6 or by the Northern Ireland Secretary of State. Furthermore if the 2,844 modifications (change of telephone number or adding of an address) are added in the increase becomes 22% (*Report of the Interception of Communications Commissioner*, HC 883, 22 July).

A Home Office report has indicated that black people are much more frequently subjected to the exercise of stop and search powers by the police. Thus under general powers the per capita rate had risen from 14 per 1,000 in 2001-02 to 16 per 1,000 in 2002-03 in the case of white people, while the increases for Asians in the same periods were from 20 to 27 and for blacks from 67 to 92. In the case of powers under the Terrorism Act 2000, there was an overall increase in usage of 151% but in the case of blacks and Asians the increases were 229% and 285% respectively, with an increase of 344% in the case of persons whose ethnicity was not recorded. Moreover less than 2% of those stopped were arrested (*Statistics on Race and Criminal Justice – 2003*).

The Northern Ireland Human Rights Commission has recommended that the confirmation of the orders under section 44 of the Terrorism Act 2000, which allow for random searches, be required from a judicial officer (*Countering Terrorism and Protecting Human Rights*).

Reasons for concern

The rise in the number of interceptions of telephones and the disproportionate exercise of stop and search powers on certain sections of the community.

Right to the protection of family life and right of the public to have access to information

Legislative initiatives, national case law and practices of national authorities

In upholding injunctions restraining a local authority from publishing an extended executive summary of the report of an inquiry into the management of a home where the second respondent had acted as a foster mother to children with particular difficulties, most of whom remaining with her after they became (vulnerable) adults, and the children and adults would be easily identifiable from this summary, it was held in *Local Authority v Health Authority* [2003] EWHC 2746 (Fam), [2004] 1 All ER 480 that there was a real and substantial risk of press intrusion which would be disruptive to the care of the children and adverse to the welfare of both the children and the vulnerable adults so that the necessary balancing exercise, between the rights and welfare of the children under ECHR Article 8 and the right of the local authority to publish under Article 10, came down in favour of the children and the vulnerable adults and a restraint on publication.

Personal identity (including the right to gain access to the knowledge of one's origins)

Legislative initiatives, national case law and practices of national authorities

The Gender Recognition Act 2004 seeks to provide transsexual people with legal recognition in their acquired gender. Such recognition will follow from the issue of a gender recognition certificate by a Gender Recognition Panel which must be satisfied that the applicant has, or has had, gender dysphoria, has lived in the acquired gender throughout the preceding two years and intends to continue to live in the acquired gender until death. Where applicants have been recognised under the law of another country or territory as having changed gender, the Panel need only be satisfied that the country or territory concerned has been approved by the Secretary of State. This limitation is, however, subject to any enforceable community right so that a national of another country within the European Union or the European Economic Area who has been granted legal recognition of their gender change under the law of that country and has an enforceable right under EC law to recognition of their acquired gender in the United Kingdom need not make an application for recognition. On the issue of a gender recognition certificate the person concerned will be entitled to a new birth certificate reflecting the acquired gender (provided a United Kingdom birth register entry already exists for that person) and will be able to marry someone of the opposite gender to his or her acquired gender. However, clergymen of the Church of England and the Church in Wales,

who are under an obligation to solemnise marriages, will not be obliged to marry persons reasonably believed to have changed gender under the Act. Although a person is regarded of being of the acquired gender, he or she will retain their original status as either father or mother of a child. The marriages in another country or territory of persons who have changed gender will have no standing under United Kingdom law until they have gained recognition in the acquired gender in the United Kingdom and only if no other valid marriage has been entered into in the interim and so long as one party had already changed gender in the other country or territory and the other party was not also of that acquired gender. The recognition of the acquired gender will only affect the distribution of property under a will or other instrument made after the Act enters into force and persons whose expectations are affected thereby can ask a court to make such order as it considers just. Bodies responsible for regulating participation in competitive sporting events may prohibit or restrict the participation in such events of a person who is recognised in an acquired gender and is seeking to compete in it if this is necessary to secure fair competition or the safety of other competitors. The Act has no effect on the descent of any peerage, dignity or title. It is an offence to disclose information obtained in an official capacity about a person's application for a gender recognition certificate or about the gender history of a successful applicant. A Gender Recognition register will also be established which will not be open to public inspection or search. The previous impossibility for a transsexual to marry a person of the sex to which he or she had belonged prior to gender reassignment surgery because for the purposes of registers of civil status they belonged to the same sex was held in *KB v National Health Service Pensions Agency* (Case C-117/01), [2004] All ER (EC) 1089 to entail inequality of treatment with regard to a necessary precondition for the grant of a widower's pension – which constituted pay - contrary to Article 141 EC

Positive aspects

The enactment of the Gender Recognition Act 2004.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The decision, in the absence of authorisation by a court, to override a mother's objections to the proposed treatment of her child, who is severely mentally and physically disabled, was found in Eur.Ct.H.R. (4th sect.), *Glass v United Kingdom* (Appl n° 61827/00) judgment of 9 March 2004 (final) to be an unjustified interference with the child's right to respect for his private life, and in particular his right to physical integrity, under ECHR Article 8.

Legislative initiatives, national case law and practices of national authorities

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has amended the Immigration Act 1971 to make it clear that an immigration officer may ask a carrier to provide a copy of a document relating to a passenger and containing passenger information, including the biodata page of a passport. This Act also provides for the electronic monitoring (through use of voice recognition technology, tags confirming his or her presence or absence from a specified location and tracking technology) of persons subject to immigration control who are at least 18 years of age where a residence restriction has been imposed, a reporting restriction could be imposed and where immigration bail is granted subject to a recognisance or bail bond. This requires the person concerned to cooperate with arrangements for detecting and recording his location at specified times, during specified periods of time or throughout the currency of the arrangements.

The decision to lift a stay on the operation of a modification to an order prohibiting publication of certain information which might lead to the identification of a child (S) whose mother was charged with the murder of her other child whereby a proviso was added that nothing in the order shall of itself prevent any person publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private was upheld in *Re S (a child)(identification: restriction on publication)* [2004] UKHL 47, [2004] 4 All ER 683, notwithstanding S's submission that harmful publicity concerning his family could damage his health and well-being and that a proportionate response would be to permit only newspaper reports which did not refer to the family name or incorporate photographs of family members. The appellate committee of the House of Lords considered that, given the number of statutory exceptions to the general principle of open justice, the court had no power to create further exceptions by process of analogy except in the most compelling circumstances. They noted that in the Children and Young Persons Act 1933, s 39(1), in regard to children such as S who were not concerned in a criminal trial, there had been a legislative choice not to extend the right to restrain publicity to them and that was a factor that could not be ignored. Their Lordships considered that, while ECHR Article 8(1) was engaged and that none of the factors in Article 8(2) justified the interference, the nature of the relief sought, being the grant of an injunction beyond the scope of s 39, was a step too far and that the interference with Article 8 rights, however distressing for S, was not of the same order when compared with cases of juveniles who were directly involved in criminal trials. In addition they considered that the rights under ECHR Article 10, by contemporaneous reporting of criminal trials in progress, promoted the values of the rule of law and the consequence of the grant of the proposed injunction would be that informed debate about criminal justice would suffer.

Where a newspaper published a number of articles about a celebrated fashion model revealing that she was a drug addict, she had been receiving treatment for her addiction, she was attending Narcotics Anonymous (NA), details of the treatment and a visual portrayal by means of photographs, covertly taken, of her when leaving the meetings, it was held in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 All ER 995 that, while she accepted that the newspaper had been entitled, in the public interest, to disclose the information that she was a drug addict and was receiving treatment as she had previously falsely and publicly stated that unlike many others in the fashion business she was not a drug addict, her claims for breach of confidence and compensation under the Data Protection Act 1998 should be allowed with respect to the additional information and the photographs. Their Lordships (3-2) considered that the details of the model's therapy from NA were, like details of a medical condition or its treatment, private information which imported a duty of confidence and that the private nature of the meetings, which helped addicts to face up to their addiction, encouraged them to attend them in the belief that they could do so anonymously so that the therapy was at risk of being damaged if details such as where, when and how often it was being undertaken were made public. Their Lordships also considered that ECHR Articles 8 and 10 were neither absolute nor in any hierarchical value since they were of equal value in a democratic society and that in the instant case there were no political or democratic values at stake, nor was there any pressing social need for publication identified so that the infringement of the model's right to privacy could not be justified.

In upholding the dismissal of an appeal against the rejection of a claim for unfair dismissal where an employee had been dismissed by a charity concerned with promoting the development of young offenders after it had discovered that he had been cautioned for committing an offence contrary to the Sexual Offences Act 1956, s 13 (consensual homosexual activity in a public lavatory), it was held in *X v Y (Employment: Sex offender*), EWCA, *The Times*, 16 June, that the right to privacy under ECHR Article 8 was not engaged in such circumstances and the private-sector employer was entitled to treat the caution as an acceptance that a criminal offence had been committed and as gross misconduct within its disciplinary code, notwithstanding argument as to the discriminatory aspect of the 1956 Act –

it applied only to activity between men - and the fact that since the time of the offence the gender-specific nature of the particular offence had been removed by legislation.

Positive aspects

The recognition in *Campbell v MGN Ltd* of some limits on the disclosure of information about public figures.

Reasons for concern

The ability to override a parent's objections to the proposed treatment of a child without the authorisation of a court.

Family life

Protection of family life (in general, developments in family law)

Legislative initiatives, national case law and practices of national authorities

Guidance in relation to claims for damages for breach of rights under ECHR Article 8 was given in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] 1 All ER 833. It was accepted that this provision was likely to have been infringed if members of a family were prevented from living together and that, while it was capable of imposing on a state a positive obligation to provide support, it was hard to conceive of a situation in which the predicament of an individual would be such that Article 8 required him to be provided with welfare support where his predicament was not sufficiently severe to engage Article 3. It was considered that Article 8 might more readily be engaged where a family unit was involved; where the welfare of children was at stake, Article 8 might require the provision of welfare support in a manner which enabled family life to continue. It was further considered that there had to be element of culpability before inaction could amount to a lack of respect for private and family life and at the very least there had to be knowledge that the claimant's private and family life were at risk but, where the domestic law of a state imposed positive obligations in relation to the provision of welfare support, breach of those positive obligations might suffice to provide the element of culpability required provided that the impact on private or family life was sufficiently serious and had been foreseeable. In addition it was considered that maladministration of the type being considered in the instant appeals – failure to provide accommodation meeting the special needs of a family member, delay in granting refugee status and delay in granting permission for a refugee's family to join him - would only infringe Article 8 where the consequence was serious and, in considering whether the threshold of Article 8 had been reached it was necessary to have regard both to the extent of the culpability of the failure to act and to the severity of the consequence; the more glaring the deficiency in the behaviour of the public authority, the easier it would be to establish the necessary want of respect for Article 8 rights, with isolated acts of even significant carelessness being unlikely to suffice. It was stated that damages were not recoverable as of right in the case of a claim brought under the Human Rights Act 1998 for breach of ECHR rights and where there was no pecuniary loss involved the question whether the other remedies that had been granted to a successful complainant were sufficient to vindicate the right that had been infringed, taking into account the complainant's own responsibility for what had occurred, should be decided without a close examination of the authorities or an extensive and prolonged examination of the facts; the critical message was that the remedy had to be 'just and appropriate' and 'necessary' to afford 'just satisfaction' with the approach being an equitable one. In cases of maladministration where the consequences were not of a type which gave rise to any right to compensation under civil law, the scale of damages should be modest.

Removal of a child from the family

Legislative initiatives, national case law and practices of national authorities

The Children Act 2004 has amended the Crime and Disorder Act 1998 so that the making of a parenting order replaces the making of a care order as the sanction for breach of a child safety order which has been made where a child under 10 has committed an act that would be an offence for someone over 10, where necessary to prevent a child under 10 committing such an act, where a child under 10 has contravened a ban imposed by a local child curfew scheme or where a child under 10 has behaved in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as the child. A parenting order can require the parent to comply with the requirements specified in it and to attend certain counselling and guidance sessions. The change has been made as the sanction of a care order was seen as a barrier to the making of a child safety order, which places the child under the supervision of a responsible officer from either a social services department or youth offending team and requires the child to comply with specified requirements with the aim of ensuring that the child receives appropriate care, protection and support, is subject to proper control and does not repeat the behaviour leading to the making of the order. It remains open to a court concluding that a child is beyond parental control to direct the local authority to consider applying for a care order.

Positive aspects

The replacement of a care order by a parenting order as the sanction for breach of a child safety order.

The right to family reunification

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

See the discussion in Article 33 ('Other relevant developments').

Private and family life in the context of the expulsion of foreigners

Legislative initiatives, national case law and practices of national authorities

In setting aside a determination of the Immigration Appeal Tribunal that S, who had come to the United Kingdom when he was 17 years old and who was financially independent and employed but who had lived with at least one of his adult brothers or sisters – none of whom were dependent upon him - until his application for asylum was refused four years later, that a person in his position could not bring himself within ECHR Article 8 as he had reached the age where normally someone would be expected to be leading an independent life and he was doing so, it was held in *Senthuran v Secretary of State for the Home Department* [2004] EWCA Civ 950, [2004] 4 All ER 365 that the family life of adult siblings living together was capable of engaging Article 8 and that, whilst some generalisations were possible, each case would be fact-sensitive and that placed an obligation on both adjudicators and the appeal tribunal to identify the nature of the family life asserted and to explain quite shortly and succinctly why Article 8 was or was not engaged. In the instant case the reasoning of the appeal tribunal had not brought into the equation the striking features about his age on arrival, the continuous living with one or more of his siblings ever since and the four years elapsing between his arrival and the refusal of asylum which were manifestly relevant to the consideration of Article 8, both in relation to the existence of family life and the proportionality of any interference with it so that the tribunal's reasoning had not been

adequate to support its conclusion that Article 8 was not engaged and the case should be remitted for rehearing.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Prison Reform Trust has called on the Home Office to address the fall in the number of prison visits by family members and friends despite there being record numbers in jail. In the course of the last five years there has been a fall in the number of visits by a third despite an increase of 20 %in the prison population to a record 75,485. There is concern that the fall is linked to prisoners being held in jails further from their homes as a result of the increased prison population. The Trust also observed that families and friends have difficulty in finding out about how to book visits, with the booking lines often busy or not available at convenient times. In some prisons restrictions on visits, last minute cancellations due to staff shortages and unsuitable visiting times compound the problem (press release, 14 April).

Reasons for concern

The fall in the number of visits to prisons.

Article 8. Protection of personal data

Protection of the private life of the worker and the prospective worker

Legislative initiatives, national case law and practices of national authorities

In upholding a challenge by a social worker to the disclosure under the Police Act 1997, s 115(7) of his arrest in relation to two incidents of indecent exposure that was followed by an acquittal as the complainant failed to make a positive identification (which was made after a request by a social work agency for an enhanced criminal record certificate for him from the Criminal Records Bureau), it was held in *R (on the application of X) v Chief Constable of the West Midlands Police* [2004] EWHC 61 (Admin), [2004] 2 All ER 1 that, although the provision gave a very wide and apparently subjective discretion to a chief constable, the rules of natural injustice or procedural fairness had not been excluded and the discretion had to be exercised in compliance with ECHR Article 8. It was further held that the disclosure of information which had not been the subject of judicial adjudication, which was highly contentious and which, if disclosed, was likely to render the claimant permanently unemployable in his chosen profession plainly required the justification of a pressing social need to make disclosure appropriate and, although the protection of children and vulnerable adults was such a need, its extent would depend on the facts of the individual case. The court considered that the chief constable should form an opinion that the information was relevant because, viewed objectively, it was taken as a whole reliable, the threshold being that he believed it to be true, having investigated the matter with an open mind and thereafter he had to identify the factors he had weighed and explain why he had given weight to some and not to others; the fact that a number of officers might have believed the person to be guilty was only one factor in a much wider equation and was not one that weighed heavily in the scales. It was held that the decision in the instant case was flawed because this exercise had not been carried out properly and also because there had been no opportunity for the person affected to make representations on his own behalf, without which it was not possible to balance fairly the risk of disclosure and non-disclosure. The court also indicated that it would only be in exceptional circumstances that an individual who had not been convicted of an offence, nor gone through some other judicial process, should have allegations of serious misconduct disclosed without his previously being told the case against him and being permitted to make observations.

Intelligence and security services

Legislative initiatives, national case law and practices of national authorities

The parliamentary Joint Committee on Human Rights has endorsed the view of the Newton Committee in 2003 (see Article 6 'Other relevant developments') that police powers conferred by Part 10 of the Anti-terrorism, Crime and Security Act 2001 to identify people and to retain fingerprints indefinitely ought not to have been included in emergency legislation and should be limited to cases where a person has been charged with an offence or is authoritatively certified as of ongoing importance in a terrorist investigation and that the power to remove and confiscate disguises should be limited to situations where a senior police officer believes that the measure is necessary in response to a specific terrorist threat. It also endorsed the conclusions of the Newton Committee that: retention of and access to communications data should be based on a coherent statutory framework which should be part of mainstream rather than terrorism legislation; retention should be limited to one year; and the whole retention and access regime should be subject to unified oversight by the Information Commissioner (*Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, HL38/HC381).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The retention of the fingerprints and DNA samples lawfully taken from two persons who had been charged, as well as DNA profiles derived from the samples, pursuant to the Police and Criminal Evidence Act 1984, s 64(1A) (which authorised this where they had fulfilled the purposes for which they had been taken and where they would be used only for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution) was held (4-1) in *R (on the application of S) v Chief Constable* [2004] UKHL 39, [2004] 4 All ER 193 not to engage ECHR Article 8(1) but, if it did, there is plainly an objective justification for it under Article 8(2) and the difference in treatment between those whose fingerprints and samples are retained and the general body of persons who had not had them taken did not involve a breach of Article 14 as the comparators were not in analogous situation or would be justified by the public interest in the prevention and detection of crime and the measured and proportionate response to the legislative aim of dealing with serious crime. However, the Northern Ireland Human Rights Commission has recommended that the time-limit on the retention of finger-prints – removed by the Anti-terrorism, Crime and Security Act 2001 – be restored, that a form of review of the necessity for retention be instituted and that a statutory commitment to the application of the Data Protection Act 1998 in this context be made (*Countering Terrorism and Protecting Human Rights*).

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

Marriage

Legislative initiatives, national case law and practices of national authorities

Under the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 notice must be given to the superintendent registrar by both parties to a marriage together where one of them is a person subject to immigration control and the registrar may only accept it – and thus issue the certificate under which a marriage will be solemnised – if satisfied that the party subject to immigration control holds entry clearance for the purpose of marriage, has written permission from the Secretary of State or is in an exempt category to be specified by regulation.

See the discussion of the Gender Recognition Act 2004 under Article 7.

Positive aspects

None additional to those under Article 7.

Legal recognition of same-sex partnerships

Legislative initiatives, national case law and practices of national authorities

The Civil Partnerships Act 2004 enables same-sex couples to obtain legal recognition of their relationship by forming a civil partnership. The possibility of registering as civil partners of each other arises for two persons of the same sex so long as they are not already in a civil partnership or lawfully married, not within the prohibited degrees of relationship and both aged 16 or over, although parental consent is required in respect of persons under 18. Provision is also made in the Act for separation orders and the dissolution or nullity of a civil partnership (together with arrangements to promote reconciliation), property and financial arrangements (including succession), child support, social security and tax credits and issues with respect to children (all generally putting civil partners on the same footing as married couples), as well as for civil partnerships formed and dissolved abroad. The parliamentary Joint Committee on Human Rights has noted that the extension of benefits and protections to unmarried same-sex couples who register as civil partners gives rise to the need for justification of less favourable treatment of unmarried heterosexual couples on grounds of marital status (*Civil Partnership Bill*, HL 136/HC 855).

Good practices

The introduction of the possibility of civil partnerships.

Recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Gender Recognition Act 2004 under Article 7.

Positive aspects

None additional to those under Article 7.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In rejecting claims for declarations that the consent given by the male partner of a couple 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 man's gametes could - notwithstanding his wish for them to be allowed to perish - be transferred to the woman concerned to enable her become pregnant, it was held in *Evans v Amicus Healthcare Ltd* [2004] EWCA (Civ) 727, [2004] 3 All ER 1025 that the 1990 Act drew clear distinctions throughout between the acts of creation, storage and use in order to ensure continuing consent from the commencement of treatment to the point of implant and the male partner was thus entitled to withdraw his consent, the effect of which was to prevent both the use and the continued storage of the embryo fertilised with his sperm. It was further held that the 1990 Act could not be read down so as to make the withdrawal of his consent immaterial to the continuation of the woman's treatment since mutuality was required at the point where the treatment services were being provided and so the requirement of continuing consent was inescapable. Although the refusal of treatment to the woman was an interference with her right to respect for private live under ECHR Article 8, it was considered proportionate to the need which made it legitimate, namely, bilateral consent to implantation. Moreover the factors which rendered the material provisions proportionate under art 8(2) also afforded objective justification for legislative discrimination between women seeking treatment whose partners had withdrawn their consent and those whose partners had not, or between women who could conceive through sexual intercourse and those who could not, so that a claim under art 14 could not succeed.

Article 10. Freedom of thought, conscience and religion

Reasonable accommodation provided in order to ensure the freedom of religion

Legislative initiatives, national case law and practices of national authorities

A Home Office steering group has carried out a review of the Government's interface with faith communities which: offers guidelines to help Government departments improve their engagement with citizens from faith communities in matters of national policy; suggests various approaches which the faith communities can themselves adopt to get most out of their dealings with Government; deals with the issue of nationals days and celebrations and how to involve the different faith communities in these in a way that reflects the multi-faith diversity of the United Kingdom without compromising the integrity of the different faiths; focuses on how central government can follow the precedent set by many local authorities and engage effectively with faith communities and inter-faith bodies on the local and regional levels; and discusses whether existing arrangements for dialogue between Government and faith communities are fit for their purposes and whether changes would be desirable (*Working Together: Co-operation between Government and Faith Communities*).

Positive aspects

The dialogue between Government and faith communities.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The conclusion that members of a church who occupied community houses owned by the church under conditions of residence which created a genuine and legally enforceable liability on their part to make payments in respect of their occupation did not occupy the building on a commercial basis and thus were not entitled to housing benefit under reg 7 of the Housing Benefit (General) Regulations 1987, SI 1987/1971 (as a result of an amendment made in 1988) was held in *Campbell v South Northamptonshire District Council* [2004] EWCA Civ 409, [2004] 3 All ER 387 to be based on a question of fact; the arrangements were, for religious reasons, non-commercial. It was further held that reg 7 was not a material interference with their religious practices as it was not part of the church's statement of faith and practice that the communal living which is considered desirable should necessarily take place in property owned by the church or persons and organisations connected with it. Nor was the regulation or its operation considered disproportionate as Article 9 did not confer a right to have the manifestation of their religious beliefs subsidised by the state. In addition it was held that, even if housing benefit were regarded as a 'possession' for the purposes of Protocol 1, Article 1 (which was doubted), the refusal of it to the members pursuant to the 1988 amendment to reg 7 was not because of their religious beliefs but because the arrangements are non-commercial.

Article 11. Freedom of expression and of information

Freedom of expression and information (in general)

Legislative initiatives, national case law and practices of national authorities

In discharging an injunction that restrained publication of confidential information, supplied to a newspaper by the former financial controller of a company, which she claimed showed illegal and improper activity by the group of companies to which it belonged, the appellate committee of the House of Lords held in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617 that, on the true construction of the Human Rights Act 1998, s 12(3), the court could not make an interim restraint order unless it was satisfied that the applicant's prospects of success at the trial were sufficiently favourable to justify such an order being made in the particular circumstances of the case and the general approach should be that the courts would be exceedingly slow to make interim restraint orders where the applicant had not satisfied the court that he would probably ('more likely than not') succeed at trial. It was accepted that a lesser degree of likelihood might be sufficient where the potential adverse consequences of disclosure were particularly grave (e.g., a grave risk of personal injury to a particular person) or where a short-lived injunction was needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal but the group of companies had shown no sufficient reason for departing from the general approach and on the evidence it was more likely to fail than succeed at trial.

A challenge by a prisoner who had been sentenced to six life sentences for six murders to the provision in para 34(c) of Prison Standing Order 5 that a prisoner's general correspondence could not contain material intended for publication if it was about his crimes or past offences was dismissed in *Nilsen v Governor of Full Sutton Prison* [2004] EWCA Civ 1540, 17 November. In the court's view this provision was not incompatible with ECHR Article 10 as it was not disproportionate for imprisonment to carry with it some restrictions on freedom of expression nor for those restrictions to have regard to the effect of the exercise of that freedom in the world outside the prison walls. It also considered that the fact that, 19 years ago, an account of the claimant's crimes had been published was not likely to diminish the

public outrage that would be felt if the prison service permitted the claimant himself to publish his own account.

Reasons for concern

The scope of the restriction of publications by prisoners about their crimes or past offences.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

It was held in *Jameel v Wall Street Journal Europe SPRL* [2003] EWHC 2945 (QB), [2004] 2 All ER 92 that there was nothing inherent in the values of the ECHR in general or of Article 10(2) in particular that required foreign corporations with a recognised cause of action in defamation to be deprived of a remedy by way of vindication for no better reason than that they were unable to establish, on the balance of probabilities, that they had suffered actual financial loss; a presumption of damage was not a presumption of substantial loss and it followed that it was not inherent in the principle that claimants were entitled to rely upon a presumption of damage, once the publication of a libel had been established, that any remedy achieved by a corporate claimant was bound to be disproportionate. In the court's view the right of journalists to freedom of expression should not be given so high a priority that those foreign corporations which were able to overcome the applicable jurisdictional hurdles should nevertheless be deprived of remedies which would be open to United Kingdom corporations which had been libelled merely because they were unable to prove that actual financial loss had been caused.

The Electoral Commission has concluded that a statutory code on political advertising would be unsustainable because of the protection given to political free speech by the Human Rights Act 1998 and because it would be inconsistent with, and stricter than, the regulation of other non-broadcast advertising. It considered that any regulation of political advertising would, therefore, need to be voluntary but that, even with a voluntary code, any attempt to seek to control misleading and untruthful advertising, given the often subjective nature of political claims, would be inappropriate and impractical. With respect to political advertising that might offend against common standards of decency, it considered that a code could be in the public interest by protecting against gratuitously offensive material but noted that for many forms of paid-for advertising inappropriate material was checked by existing editorial controls. The Commission doubted that a system considering complaints would deliver sufficiently prompt adjudications to be of value and that it would be acceptable to require pre-clearance of advertising copy. It was concerned that a code might be open to spurious claims and it considered that the only realistic sanction for breach of the code would be adverse publicity, which it was not convinced would be a sufficient deterrent. Although the adjudicatory would need to have sufficient independence and authority to carry out its role effectively, the Commission could not take on this task as its own independence might be perceived to be compromised. It noted the lack of support from political parties for a code and concluded that the difficulties in implementing one meant that it would be impractical. The Commission agreed that political advertising should remain exempt from the Code of Advertising Practice, which is interpreted and applied by the Advertising Standards Authority, and did not consider that there should be a separate code, the Commission recommended that political advertisers be guided by the principle in the Code of Advertising Practice that 'all marketing communications should be prepared with a sense of responsibility to consumers and society (*Political advertising*).

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

The Northern Ireland Parades Commission has reported that 69 contentious parades had been permitted to proceed without any restriction in 2003 and 162 had been restricted in some way. The restrictions were generally as regards the route (83%) but other restrictions applied to music (7%), bands or timing (*6th annual report*, p. 10).

An instruction to stop coaches carrying persons who were intending to join a demonstration against the war in Iraq some five kilometres from the air force base at which it was taking place was held in *R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary)* [2004] EWHC 253 (Admin), [2004] 2 All ER 874 to have been a justified preventive measure as it was reasonably and honestly believed that, if the coaches were permitted to proceed, some at least of their occupants (not including the claimant) would cause or contribute to a breach of the peace. The court indicated that such action was only justified where there was a real risk of breach of the peace in close proximity both in time and place, the possibility of a breach was real and the preventive measures were reasonable. Furthermore the imminence or immediacy of the threat to the peace would determine what action was reasonable, bearing in mind that the degree of imminence might not be so great as to justify anyone's arrest. Moreover the police were entitled to have regard to what was practical, which could include a consideration of the number of the people from whom a breach of the peace was apprehended. However, the instruction that the coaches and all their occupants should be escorted back to London – which took two and a half hours - was unlawful as there was no immediately apprehended breach of the peace to justify even transitory detention, detention on the coach went far beyond anything which could conceivably constitute transitory detention and, even if there had been any justification, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace.

Freedom of political association

Legislative initiatives, national case law and practices of national authorities

It was held in *R v Hundal*, *The Times*, 13 February that a person in the United Kingdom could commit the offence under section 11(1) of the Terrorism Act 2000 of belonging to a proscribed organisation even if he had joined or taken part in the activities of that organisation in another jurisdiction where the organisation was not banned in any way.

Freedom of association for trade unions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee on Social Rights has concluded that sections 15 and 65 of the Trade Union and Labour Relations (Consolidation) Act 1992, which respectively make it unlawful for a trade union to indemnify an individual member for a penalty imposed for an offence or contempt of court and restrict the grounds on which a trade union might lawfully discipline members, continue to represent unjustified incursions into the autonomy of trade unions and are not in conformity with Article 5 of the European Social Charter (*Conclusions XVII-1*). The Committee also concluded that the limitations in section 174 of the 1992 Act on the grounds on which a person might be refused admission to or expelled from a trade union were

not in conformity with Article 5 as they went beyond what was required to secure the individual right to join a union and were an excessive restriction on the rights of trade unions to determine their conditions for membership.

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Employment Relations Act 2004 under Article 28.

Positive aspects

None additional to those under Article 28.

Reasons for concern

The interference in the autonomy of trade unions effected by sections 15, 65 and 174 of the Trade Union and Labour Relations (Consolidation) Act 1992

Article 13. Freedom of the arts and sciences

No significant developments.

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

In ruling on a challenge by a child of compulsory school age against different phases of his exclusion from school after he had been suspected of being one of the pupils responsible for a fire deliberately started there, it was held in *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628 that the head teacher and the governing body bore the primary duty to educate a child who had been accepted in their school and, as a corollary, not to exclude him except as authorised by law and the school was not relieved of its obligations or of the legal consequences of failing to discharge them by the existence of the local education authority's fallback duty, together with the child's right to seek to enforce it. The initial phase of exclusion – when the child was told to stay away from the school until it was known what the police were going to do – was held to be of such a character as to amount on the face of it to a denial of the right to education because it purported to be indefinite and a second phase of exclusion – until the end of some examinations - was also found to be illegal, despite being for a finite period, because the requirement to involve the governing body had not been observed but it was considered that the provision of self-assessing work in preparation for the examinations during these two phases afforded the child sufficient access to education to answer his ECHR claim. This conclusion was considered to be equally applicable to a third phase – where the exclusion was for a maximum period of 45 days but the requisite information about the right to make representations to the governing body had been provided - when an offer by the school to provide the child with work was not taken up. However, it was held that the quality of a breach of the law could not be divorced from its sequel, so that the provision or offer of homework was material, where the pupil's continued temporary exclusion thereafter had been incontestably unlawful in the sense that it had been done in defiance of a clear statutory prohibition and was thus a legal nullity as opposed to being imposed in proper circumstances but in an improper form. As a result it was held that in this phase the pupil's right to education had been denied, notwithstanding that the school was still offering to provide him with substitute work to do at home. In addition it was held that

there was a further denial of his ECHR right when his name was deleted from the school roll without there being any lawful ground for so doing.

In dismissing an application for a local authority to provide the claimant, a fifteen year old, with suitable education by way of home tuition on the basis that the claimant was out of school for an 'or otherwise' reason within the Education Act 1996, s 19(1) after he had been withdrawn from his school following a seven days' exclusion for involvement in a fight (for which he was considered to have been predominantly to blame) and allegations by his father that it had failed to take appropriate steps to deal with the constant bullying to which he was subjected, it was held in *R (on the application of G) v Westminster City Council* [2004] EWCA Civ 45, [2004] 3 All ER 572 that section 19 required an authority to make provision for suitable alternative education, otherwise than in the specified cases of illness or exclusion, in any situation in which it was not reasonably possible for a child to take advantage of any existing suitable schooling and the authority would be in breach of s 19 where a child was not receiving suitable education and there was no suitable education available that was reasonably practicable for the child. It was considered that, in assessing what was reasonably practicable, the unreasonable objections of parents to their child attending a particular school had to be disregarded and that in the instant case the claimant's father had not acted reasonably in refusing to allow him to return to the school when there was no alternative school available. However, it was observed that, if a school is unable to prevent a child being subjected to persistent bullying, it may be reasonable for the parents to withdraw that child from the school since in such circumstances it will not be reasonably practicable for the child to continue to attend it.

The Higher Education Act 2004 permits higher education institutions to set their own fees up to a specified amount and, provided they have an approved plan, fees up to a specified higher amount. It is intended that loans will be made available, on an income-contingent basis and with no real rate of interest, to enable students to defer payment of fees. Provision is made in the Act for a Director of Fair Access to Higher Education, whose role will one of approving and monitoring plans by institutions wishing to set fees up to the higher amount and to identify and promote good practice in relation to the promotion of equality of opportunity in access to higher education. There is also provision for the making of regulations to require institutions to include in their plans outreach provisions, with a view to widening participation by attracting students who might not otherwise consider either higher education at all or applying to particular institutions. One of the requirements that could be imposed is financial assistance for such students. In addition the Act provides that liability to repay student loans cannot be written off on a person's discharge from bankruptcy. However, in rejecting a challenge to the refusal to the application by the claimant, who was 58, for a student loan for a part-time higher education course on the basis that part-time students were only eligible for loans under reg 30 of the Education (Student Support) Regulations 2002 if they were under the age of 55, it was held in *R (on the application of Douglas) v North Tyneside Metropolitan Borough Council* [2003] EWCA Civ 1847, [2004] 1 All ER 709 that the division of education in practice into primary, secondary and tertiary was, in one sense, artificial as it was a continuing process but, although there was no obligation under Protocol 1, Article 2 to establish education of any particular type, once a state provided education of a particular type at a particular level the prohibition against denial in the provision's first sentence applied. However, it was also held that, while arrangements for loans to students facilitated education, they were one stage removed from the education itself and were not within the scope of Article 2. Furthermore it was considered that the absence of funding arrangements might make it more difficult for a student to avail himself of his Article 2 rights but were not so closely related as to prevent him from doing so and thus Article 14 was not engaged, requiring the Secretary of State to justify any age discrimination in the provision of loans under the 2002 regulations.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

A report by the Office of Standards in Education in collaboration with Her Majesty's Chief Inspector of Prisons on the education and training of girls under 18 serving Detention and Training Orders found that the establishments in which they were being held were, after an earlier review in 2002, still unable to provide sufficient quantity and quality of education and that, although there were some noticeable and welcome improvements, the girls for the most part received inadequate education, ill-suited to their needs. However, this provision was still better than what they had received before custody or would be likely to receive on their return to the community. It was observed that, ill-equipped for their return to society, they were inadequately prepared for or supported when they did so and the chances of re-offending were inevitably high. Although the report considered that girls should not be held in Prison Service custody, it called for improved educational provision and continuing support and opportunity for young women who have, perhaps for the first time, been able to develop and learn in a stable environment (*Girls in Prison*).

Reasons for concern

The shortcomings in education and training provided to girls under 18 serving Detention and Training Orders.

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

No significant developments.

Article 16. Freedom to conduct a business

No significant developments.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

The Hunting Act 2004 makes it an offence for a person knowingly to permit land which belongs to him or her to be entered or used, or to permit a dog which belongs to him or her to be used, to hunt a wild mammal with a dog other than where the hunting comes within certain specified exemptions.

The conclusion that a tenant who erroneously served a positive counter-notice (i.e., an acceptance) in response to the landlord's notice of termination of tenancy could not then serve a negative counter-notice (in order to seek a new tenancy) within the two-month period for counter-notices prescribed by the Landlord and Tenant Act 1954 was held in *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100, [2004] 2 All ER 665 to engage but not violate ECHR Protocol 1, Article 1 as there were obvious economic benefits to both landlord and tenant in having certainty at that stage, if possible, and that was so even if it were rare for a positive counter-notice to be given and this view was not undermined by the fact that hardship would occur in an exceptional case. Furthermore Article 6(1) was not engaged as the refusal to hear the application was more naturally seen as a bar on the substantive right than as a procedural bar.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The scheme under the Water Industry Act 1991, whereby a person who had sustained loss or damage as a result of a sewerage undertaker's contravention of his general duty to provide a system of public sewers so as to ensure that its area was effectually drained had no direct remedy under the Act but could bring proceedings against a sewerage undertaker in respect of its failure to comply with an enforcement order if one was made by the regulator, was considered in *Marcic v Thames Water Utilities Ltd* [2003] UKHL 66, [2004] 1 All ER 135 to be not unreasonable in its impact on householders whose properties were periodically subject to sewer flooding and thus complied with ECHR Protocol 1, Article 1, notwithstanding that in the instant case matters had plainly gone awry and that, several years after the sewerage undertaker knew of the claimant's serious problems, there had still been in the foreseeable future no prospect of the necessary work being carried out.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities

Significant changes have been made to the process of handling claims for asylum by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004. In particular it is now an offence for a person not to produce an immigration document at a leave or asylum interview in respect of either himself or a child with whom he claims to be living or travelling unless, inter alia, he has a reasonable excuse for not having such a document, he or the child travelled to the United Kingdom without one or he produces a false document with which he or the child so travelled. The burden of proving any defence on the balance of probabilities rests on the defendant and the deliberate destruction of a document cannot be used for this purpose unless it was done for a reasonable cause (which will not include improving chances of admission) or in circumstances beyond his control. In addition the Act sets out various behaviours which a deciding authority is required to take account of as being damaging to credibility when deciding whether to believe a statement made by or on behalf of a person making an asylum or human rights claim. These cover: behaviour thought to be designed or likely to conceal information, mislead or obstruct or delay the handling of the claim; the non-production of passports without reasonable explanation, the production of false passports as if valid and the failure to answer questions without reasonable explanation; failure to take a reasonable opportunity to make an asylum application in a safe third country; and the making of a claim only after being notified of an immigration decision or extradition proceedings. In addition the Act has unified the appeals system, establishing a single-tier tribunal rather than a system of appeal to an adjudicator and then to a tribunal under previous legislation. However, it is possible for a party to an appeal to apply to a court for an order requiring the tribunal to reconsider its decision if the court considers that the tribunal has made an error of law but the matter may instead be referred directly to an appellate court if the case is considered to raise a matter of importance. Such an application must be made within 5 days (28 if it comes from abroad).

It was held in *R (on the application of G) v Immigration Appeal Tribunal* [2004] EWHC 588 (Admin), [2004] 3 All ER 286 that the court's jurisdiction to subject a decision to judicial review had not been removed by the Nationality, Immigration and Asylum Act 2002, s 101 – which provided for the possibility of applying to the High Court by way of a paper application for a review of a refusal by the Immigration Appeal Tribunal of an application for permission to appeal against a refusal of appeal - but it was clearly Parliament's intention that statutory

review should take the place of judicial review and thus the latter review should not be permitted unless there were exceptional circumstances. It was further held that a claim for judicial review on grounds which were or could have been raised in statutory review could never be regarded as one to which exceptional circumstances applied and a failure to use statutory review would certainly prevent any attempt to use judicial review. As a consequence it was ruled that to seek judicial review where it was not possible to show exceptional circumstances would be regarded as an abuse of process and be summarily dismissed. The court, having regard to Eur.Ct.H.R. (Grand Chamber), *Maaouia v France* (Appl 39652/98) judgment of 5 October 2000 (final), also ruled that ECHR Article 6 did not apply to procedures for the expulsion of aliens.

In *R (on the application of Pharis) v Secretary of State for the Home Department* [2004] EWCA Civ 654, [2004] 3 All ER 310 it was held that, in future, the lodging of a notice of appeal in the court of Appeal in an immigration or asylum case when the refusal of a High Court judge to grant permission to apply for judicial review is under challenge should not be interpreted as giving rise to an automatic stay of deportation process. If an appellant wishes to seek a stay, he or she must make an express application for this purpose which the staff of the Civil Appeals Office must place before a judge of the Court of Appeal for a ruling on paper, as already happens when a stay is sought in connection with possession proceedings when the execution of a warrant of possession is imminent.

Reasons for concern

The potential for the changes made to the handling of claims for asylum to lead to persons being returned to countries where they will face persecution.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

The parliamentary Joint Committee on Human Rights has expressed concern about the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002 which states that it applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention, namely, the exception to the principle that refugees cannot be returned to persecution where, having been convicted of a particularly serious crime, the refugee constitutes a danger to the community to the country of refuge. Section 72 of the 2002 Act creates a presumption that a person has been convicted of a particularly serious crime and constitutes a danger to the community in the United Kingdom if convicted of an offence specified by order of the Secretary of State under the power conferred by section 72(4). The Committee is concerned that the Order is ultra-vires the order-making power as it includes within its scope a number of offences – e.g., theft, entering a building as a trespasser intending to steal, aggravated taking of a vehicle, criminal damage and possession of a controlled drug - which do not amount to 'particularly serious offences' within the meaning of Article 33(2) of the Convention, properly interpreted, as these are a very narrow category. Although ECHR Article 3, if relied upon, may prevent return to persecution in such cases, claimants for asylum still suffer the detriment of being denied refugee status (*The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002*, HL 190/HC 1212).

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has abolished the entitlement to backpayments of income support, housing benefit and council tax benefit for those who are recorded as refugees. However, the Act has introduced a power for the Secretary of State to make regulations enabling him to make loans to refugees. These regulations will include provision as to the interest payable and repayment through deduction from a social security benefit.

Reasons for concern

The breadth of the definition given to particularly serious crimes in the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2002.

Unaccompanied minors seeking asylum

Legislative initiatives, national case law and practices of national authorities

The refusal of an asylum request by children who had escaped from an immigration detention centre in Australia and then entered the British Consulate in Melbourne was held in *R (B, Children) v Secretary of State for the Foreign and Commonwealth Office*, UKCA, *The Times*, 25 October 2004 not to have infringed ECHR Article 3 as the threat to their safety was neither sufficiently immediate nor severe, although it was accepted that actions taken abroad by diplomatic and consular officials were to be governed by domestic human rights law.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Where two former destitute asylum seekers had been allocated accommodation in Glasgow by the National Asylum Support Service (NASS), an agency established to operate the system of support for such persons under the Immigration and Asylum Act 1999 (which included dispersal throughout the country according to the availability of accommodation), challenges to the refusal to provide them accommodation in London as homeless persons after they had been given leave to remain in the United Kingdom were upheld in *Al-Ameri v Kensington and Chelsea Royal London Borough Council* [2004] UKHL 4, [2004] 1 All ER 1104 on the basis that residence in a district of a local authority in accommodation provided to a destitute asylum seeker under the 1999 Act was not capable of being regarded as residence in that district of the asylum seeker's own choice for the purpose of the Housing Act 1996 since it was a cardinal feature of the NASS scheme that they would not be able to choose where they were accommodated while awaiting the determination of their asylum claims and s 97(2)(a) of the 1999 Act expressly provided that no regard was to be had to any preference that the asylum seeker might have as to the locality in which the accommodation was to be provided. However, the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 has subsequently provided that asylum seekers provided with accommodation under the 1999 Act will establish a local connection with the district of the local authority where the accommodation is provided.

The requirements of the Immigration and Asylum Act 1999, ss 95 and 122 – the former providing that an asylum seeker and any dependants who do not have 'adequate' accommodation or any means of attaining it will be 'destitute and thus be an 'eligible person' for whom the secretary of State for the Home Department through the National Asylum Support Service (NASS) might provide or arrange for the provision of support and the latter providing a duty, when the household of an eligible person included a child and it appeared to the Secretary of State that 'adequate accommodation' was not being provided for the child, for the Secretary of State to exercise his powers under s 95 by offering, and if his offer was accepted, by providing or arranging for the provision of adequate accommodation for the child as part of the eligible person's household – were clarified in *R (on the application of A) v National Asylum Support Service* [2003] EWCA Civ 1473, [2004] 1 All ER 15 which arose out of challenges brought by an asylum seeker, whose dependants included two disabled children. It was held that, in respect of either provision, 'adequacy' took its meaning from its context and had to be tested by reference to the needs of the persons to whom the duty was owed. The context for asylum seekers was the provision of accommodation which prevented

such people being destitute and which provided for their essential living needs but the circumstances of each individual, including dependants, with the ages of children, whether anyone suffered from a disability, whether the family would be destitute and the period for which the accommodation was likely to be occupied all being relevant. It was further held that the duty to provide adequate accommodation was a continuing one and thus what might have been suitable at one moment becoming unsuitable later, including accommodation accepted as adequate by an asylum seeker. In addition it was considered that adequacy might also be fact-specific in that accommodation might be adequate in one area, if that were where the NASS had accepted a family should stay but it would not be adequate in other areas where much more suitable accommodation was available and if the accommodation in the one area became such that it was impossible to survive as a family in it, the NASS would be entitled to offer accommodation in other areas. It was also considered that, when exercising its s 95 powers the NASS was entitled to place persons in accommodation which would be adequate in the short term until they found accommodation for the slightly longer term. Moreover, where there were disabled children, a balancing exercise had to be carried out, with at the forefront the question whether the accommodation was adequate for the needs of those children in the circumstances which persisted at that moment in time.

The House of Commons Select Committee on Home Affairs has concluded that about half of asylum claimants could justifiably be regarded as economic migrants rather than refugees and that the United Kingdom has become an increasingly attractive destination because of a perception of low removal levels, long appeal proceedings, the absence of systematic identity checks, the strength of the economy and the opportunity to work illegally. It did not believe that the United Kingdom was a soft touch for asylum seekers but did consider there to be some weaknesses in the system. It considered that there had been undue delay in setting up a unified frontier service, as previously recommended. It also believed that fast-track processes are justified in principle but that those subject to them should be treated humanely and receive a fair hearing, with safeguards to ensure that any genuine refugees who have been sifted have their rights protected. The Committee hoped that the Prison Inspectorate would continue to monitor conditions at asylum detention centres and was not satisfied that enough had been done to ensure that adequate legal advice was available to asylum seekers, reiterating its previous recommendations on steps to be taken. It supported plans for accommodation centres for asylum-seekers, providing board, education, health, interpretation and purposeful activity on one site and recommended that there be a move as quickly as possible to a situation where all asylum seekers were processed through such centres, induction centres or fast-tracking facilities. The Committee considered that a language analysis scheme as part of the asylum screening process should be developed as quickly as possible. It also considered that there were still grounds for concern about the poor quality of much initial decision-making by immigration officers and caseworkers, with the pressure to speed up the process and increase through-put having an impact. It recommended the provision of good quality legal advice and interpretation services at the initial stage as serving the interests of justice and eliminating the need for appeals and also called for a review of the calibre and training of immigration officers and caseworkers. It emphasised the importance of adequate resources and called for extra investment in the asylum system. The Committee recognised that it was becoming more difficult for genuine asylum seekers to make claims because of border control and other measures – including those in what is now the Asylum and Immigration (Treatment of Claimants etc) Act 2004 – and considered that there was a moral obligation to provide alternative legitimate routes by which refugees can gain access to the United Kingdom, to assist refugees closer to their country of origin and to tackle the roots of enforced migration. It recommended that the ban on asylum-seekers working should be maintained while the application process is being streamlined but considered that in the long run the inability to work was not advantageous to asylum seekers or wider society. It was concerned about claims that section 55 of the Immigration and Asylum Act was causing real distress and that its operation might be having a counter-productive effect on policies of dispersal and on tracking asylum seekers. It welcomed the extension of the limit for claiming asylum from 24 to 72

hours but called for a review of the operation of section 55, as well as the position of welfare support for failed asylum seekers who are unable to return to their country or be removed. It called for a more fundamental attempt to integrate asylum decision-making, voluntary departure and compulsory removal so that there was better preparation for a positive or negative decision since those whose applications are currently rejected are left with no support and little advice about the options available to them. It recommended that the Government seek the implementation of concerted, pan-European policies of active assistance to refugees in or near the countries of origin and co-operation with UNHCR in accepting quotas of refugees and that it should make a commitment to increase the resettlement quotas proportionately as the number of successful asylum applications to the United Kingdom declines. It thought that more radical options to deal with asylum applications could be more costly and time-consuming (*Asylum Applications*, HC 218).

Reasons for concern

The continued difficulties facing asylum-seekers in obtaining basic support for living.

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

Prohibition of removals of foreigners to countries were they face a real and serious risk of being killed or being subjected to torture or to cruel, inhuman and degrading treatments.

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about the United Kingdom's "reported use of diplomatic assurances in the "refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear and thus cannot be assessed for compatibility with article 3 of the Convention" (CAT/C/CR/33/3, 25 November 2004, para 4(d)). It has requested details on "how many cases of extradition or removal subject to the receipt of diplomatic assurances or guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases" (para 5(i)). In addition it has recommended the application of "articles 2 and/or 3, as appropriate, to transfers of a detainee within a State party's custody to the custody whether de facto or de jure of any other State" and that "the State party should consider offering, as routine practice, medical examinations before all forced removals by air and, in the event that they fail, thereafter" (para 5(e) and (n)).

Legislative initiatives, national case law and practices of national authorities

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 contains a continuation of the deeming provision that certain countries (those bound by Council Regulation (EC) 343/2003 or the Dublin Convention) are safe for Refugee Convention purposes. It also adds a limited human rights deeming provision that prevents challenge on the basis of onward removal from the third country in breach of human rights. In addition not only can certain countries continue to be certified as 'safe' for a given individual but also it will be possible for human rights claims to be certified as clearly unfounded unless the Secretary of State is satisfied that they are not so clearly unfounded. In these cases a person can be removed from the United Kingdom without substantive consideration of his or her asylum claim and there is little, if any scope, to challenge such action. However, in remitting for a rehearing of the Secretary of State's successful appeal against a finding that on both political and religious grounds there was a real risk of torture or inhuman treatment contrary to the ECHR faced by an Iranian, who had claimed asylum by reason of his political opinions and who had made a

sincere conversion to Christianity, when the appeal tribunal relied on in-country data to conclude that he would be able to practise his new religion without running any risk or persecution either by the authorities or by individuals, it was held in *Shirazi v Secretary of State for the Home Department* [2003] EWCA Civ 1562, [2004] 2 All ER 602 that, whilst it was not a ground of appeal that another tribunal had reached a different conclusion on very similar facts, it was a matter of concern that the same political and legal situation, attested by much the same in-country data from case to case, was being evaluated differently by different tribunals and in any one period a judicial policy (with the flexibility that the word implied) had to be adopted on the effect of the in-country data in recurrent classes of case. It was thus considered that in the circumstances of the instant case, where there was no consistent line of factual decisions, the issue of the consequences of religious apostasy had not been adequately addressed by the tribunal. It was further held that the claimant's appeal to the appeal court was not to be treated as abandoned by reason of his absence from the United Kingdom for twenty-four hours as the provision for abandonment of appeals in the Immigration and Asylum Act 1999, s 58 did not apply to appeals to that court, which had always had its own system and principles for dealing with appeals which were either abandoned or become moot, and as it was contrary to principle, except in obedience to an unequivocal statutory requirement, to introduce a rule which arbitrarily truncated access to justice.

Human Rights Watch in its report *Neither Just nor Effective* called upon the United Kingdom government not rely upon diplomatic assurances in the form of framework agreements to return a person in danger of being subjected to torture or prohibited ill-treatment – as is being contemplated for foreign terrorist suspects - to any country for which there is substantial and credible evidence that torture and prohibited ill-treatment are systematic, widespread, endemic or a recalcitrant or persistent problem, to any country where government authorities do not have effective control over the forces in their country that perpetrates acts or torture or ill-treatment or to any country where the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group and the person subject to return is associated with that group.

Reasons for concern

The use of deeming provisions to prevent a challenge to the supposed safety of a country to which someone is to be removed and the readiness to accept diplomatic assurances despite significant evidence of the practice of using prohibited treatment in the country concerned.

Subsidiary protection

Legislative initiatives, national case law and practices of national authorities

The appellate committee of the House of Lords recognised in *R (on the application of Ullah) v Secretary of State for the Home Department* [2004] UKHL 26, [2004] 3 All ER 785 that the possibility of a breach of articles of the ECHR other than Article 3 resulting from the removal of someone from the United Kingdom could be raised to resist extradition or expulsion. Articles 2, 4, 5, 6, 7 and 8 were specifically instanced in this regard but it was made clear that successful reliance would demand presentation of a very strong case. Furthermore, while considering it hard to conceive that a person could successfully resist expulsion in reliance on Article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on Article 3, it was accepted that such a possibility in principle could not be ruled out. However, in the present appeals the claimants' cases – which were based on the difficulties that would be faced as adherents respectively to the Ahmadhiya faith in Pakistan and to the Roman Catholic faith in Vietnam - were not considered to come within the possible parameters of a flagrant, gross or fundamental breach of Article 9 such as to amount to a denial or nullification of the rights conferred by it. Applying the reasoning in the *Ullah* case, the

appellate committee in *R (on the application of Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 3 All ER 821 dismissed an appeal against a finding that the Secretary of State could not properly have certified a claim to be manifestly ill-founded where the claimant, an Iraqi of Kurdish origin, sought to resist his return to Germany – where he had unsuccessfully sought asylum and asserted he had been detained, subjected to racist abuse and told he would be returned to Iraq – on the basis that this would be detrimental to his mental and physical well-being and that he would make a serious attempt to kill himself. It was considered by their Lordships (3-2) that, if the claimant's extreme fear of removal to Germany were found to be genuine, the possibility of a finding, properly made, that return there would violate his right under ECHR art 8 could not be ruled out in limine. Furthermore it was held in *Sadutto v Governor HMP Brixton* [2004] EWHC 563 (Admin) that it would not be in the interests of justice to return an Italian national to Italy where he would no right of appeal against a conviction in his absence for which he had been sentenced to imprisonment.

Positive aspects

The potential widening of the scope of subsidiary protection by the ruling in *Ullah*.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee against Torture has expressed concern about "allegations and complaints against immigration staff, including excessive use of force in the removal of denied asylum seekers" (CAT/C/CR/33/3, 25 November 2004, para 4(i)).

Legislative initiatives, national case law and practices of national authorities

Although failed asylum seekers with dependent children receive asylum support until such time as they leave the United Kingdom or fail to comply with a removal direction if sooner, the Asylum and Immigration (Treatment of Claimants Etc) Act 2004 allows for such support to be stopped if the Secretary of State certifies that, in his opinion, such a person has failed without reasonable excuse to take reasonable steps to leave the United Kingdom voluntarily or to place himself in a position in which he is able to do so (e.g., by cooperating in efforts to obtain travel documents). The children in the family may still be supported by a local authority. The Act also provides for the continued provision of accommodation of failed asylum seekers to be conditional upon their performance of or participation in community activities.

The quashing of a local authority's decision to offer both a national of Guyana (who had stayed after the expiration of her visitor's visa and who was the subject of proceedings before the Immigration Appeal Tribunal but who, pursuant to paras 9(1)(g) and (7) of the Nationality, Immigration and Asylum Act 2002 was not eligible for support and assistance because she was in the United Kingdom in breach of the immigration laws and was not an asylum seeker) and her daughter (who was a British citizen with a father who had indefinite leave to remain in the United Kingdom) one-way air tickets to Guyana and to provide them with accommodation for twenty-one days pending removal, it was held in *R (on the application of M) v Islington Borough Council* [2004] EWCA Civ 235, [2004] 4 All ER 709 that such power as the authority had to offer tickets was severely circumscribed by the rights of the various parties under the ECHR but, if it could be concluded that that power could be exercised without infringing those rights, it would not be open to the authority to exercise it in a way that encouraged or in practice enforced the expulsion of the child before the effect of her citizenship on the mother's immigration status had been decided by the proper authority for that purpose, the Immigration Appeal Tribunal. It was further held that, where travel

arrangements had not been made by the Home Office, it was open to an authority to provide accommodation for a period longer than the ten days specified in guidance issued by the Secretary of State since, although the power in reg 3 of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 (which governed the ability to arrange accommodation for persons who were in the United Kingdom in breach of immigration laws and who were not asylum seekers) referred to 'temporary' accommodation, the categorisation of something as 'temporary' in the context of immigration law was not synonymous with duration of extreme brevity but meant no more than 'lacking permanence'. In addition it was held that the thrust of the guidance and the power given to the authority was consistently linked with the existence of travel arrangements being in place and so it followed that the accommodation had the power to provide the mother with accommodation under Sch 3 of the 2002 Act.

An appeal against the refusal of an application by W (who had been living in London since 1990 and who had been committed pursuant to the Extradition Act 1989 in respect of offences occurring between 1978 and 1987) for habeas corpus, relying on s 11(3)(b) which provided that the court was to order an applicant's discharge if it appeared in relation to each of the offences in respect of which his return was sought that by reason of the passage of time since he was alleged to have committed the offence that it would be unjust or oppressive to return him, was dismissed in *Woodcock v Government of New Zealand* [2002] EWHC 2688 (Admin), [2004] 1 All ER 678 that s 11(3)(b) required the court to decide whether, having regard to the passage of time, it would be unjust to return a person for trial, not whether it would be unjust to try him, and that required the court to have regard to the safeguards existing in the domestic law of the state requesting extradition to ensure that the person would not be subjected to an unjust trial there. It was considered that if, the court were to conclude that the domestic court in the requesting state would be bound to hold that a fair trial was impossible, plainly it would be unjust or oppressive to return the person for trial. Equally the court would have no alternative but to reach its own conclusion on whether a fair trial would be possible in the requesting state if it were not persuaded that the courts of that state had what it would regard as satisfactory procedures of their own akin to the abuse of process jurisdiction in the English courts but, as these existed in New Zealand, it would not be unjust for W to be returned. Furthermore it was considered that there was nothing in his circumstances to make it oppressive to return him to New Zealand to stand trial and it was observed that the court should be wary when considering the concept of oppressiveness in s 11(3)(b) of paying excessive heed to any hardship to an accused resulting from changes in his circumstances following upon his move to another country when equivalent hardship was likely to have occurred even had he remained in his country of origin. In addition it was considered that there was no period of time beyond which extradition was inevitably to be regarded as unjust or oppressive.

The Asylum and Immigration (Treatment of Claimants Etc) Act 2004 provides the Secretary of State and an immigration officer with the power to retain documents (including a passport or birth certificate) whilst it is suspected that the person to whom the document relates is liable to removal and retention is likely to facilitate their removal. It is also an offence under this Act to fail, without reasonable excuse, to take certain action such as obtaining or providing documents or providing fingerprints where this would facilitate the obtaining of a travel document on behalf of the person concerned.

An analysis of medical data by the Medical Foundation for the Care of Victims of Torture has disclosed patterns of apparent abuse in the course of attempts to deport immigration detainees from the United Kingdom, involving in particular misuse of restraint or force methods. Although the sample was small, the repetitive data pointed to systemic problems in the company or companies carrying out the removals. The persons affected also reported the use of verbal abuse of a racial nature (*Harm on Removal: Excessive Force against Failed Asylum Seekers*). The Home Office subsequently announced that closed circuit television cameras

would be installed in the vans carrying failed asylum-seekers to and from airports (press release, 4 November).

Reasons for concern

The amount of force used in removing failed asylum-seekers and the withdrawal of social security as a device to secure their departure.

CHAPTER III : EQUALITY

Article 20. Equality before the law

Equality before the law

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A prosecution under legislation which at the time made it a criminal offence to engage in homosexual activities with men under 18 years of age while the age of consent for heterosexual relations was fixed at 16 was held in Eur.Ct.H.R. (4th sect.), *B B v United Kingdom* (Appl 53760/00) judgment of 10 February 2004 (final) to constitute a violation of Article 14 of the ECHR taken with Article 8. A change in the law in 2001, which was not applicable to the events on which this prosecution was based, had equalised the age of consent in the United Kingdom for heterosexual and homosexual activity.

Legislative initiatives, national case law and practices of national authorities

The appellate committee of the House of Lords found in *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411 that, pursuant to the Human Rights Act 1998, s 2, paragraph 2 of Sch 2 to the Rent Act 1977 – which allowed the spouse of a protected tenant to succeed to the tenancy on the tenant's death – was to be read so that 'spouse' included the survivor of a same-sex partnership since discrimination on grounds of sexual orientation was by common accord not acceptable as a basis for different treatment and, as the survivor of a married couple was protected even if by reasons of age or otherwise there was never any prospect of either member of the couple having a natural child, the difference in treatment of cohabiting homosexual partners did not pursue a legitimate aim. Furthermore in *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343, 15 October, it was held that the calculation, pursuant to the Child Support (Maintenance Assessment and Special Cases) Regulations, of maintenance payments without reference to the income of a person's same-sex partner (which would not have occurred if she had been cohabiting with an opposite-sex partner and which had the effect of increasing her payments) was a breach of ECHR Article 8 with Article 14 and that the regulations should be read so as to require regard to be had to the income of the same-sex partner.

The appellate committee of the House of Lords also ruled in *A v Chief Constable of West Yorkshire* [2004] UKHL 21, [2004] 3 All ER 145 that the Police and Criminal Evidence Act 1984, s 54(9) – which required a search of persons who had been arrested or were in custody to be carried out by a police constable of the same sex as the person searched – was to be interpreted as applying to a transsexual person in his or her reassigned gender so that the application of a male-to-female transsexual who had undergone gender reassignment surgery to become a police constable could not be rejected on the ground that she would be unable to perform all the duties required of a constable. This conclusion was reached in reliance on the prohibition in art 2(1) of Council Directive (EC) 76/207 of any discrimination whatsoever on grounds of sex either directly or indirectly – under which a transsexual person was to be regarded as having the sexual identity of the gender to which he or she had been reassigned - and on the absence of any strong policy reasons for not interpreting s 54(9) in this way. Furthermore, following the enactment of the Gender Recognition Act 2004, it will not be possible to invoke the genuine occupational requirement exemption in the Sex Discrimination Act 1975 where, for example, the nature of the job requires a woman in such a way as to allow an employer to show that it is reasonable to treat a male to female transsexual person as being unsuitable for the job; for the purposes of employment the person must be treated as being of their acquired gender. However, the exemption for discrimination in the 1975 Act in

respect of employment, authorisation or qualification for the purposes of an organised religion where that employment, authorisation or qualification is limited to persons who are not undergoing or have not undergone gender reassignment has not been affected.

Appeals by an air force officer dismissed, pursuant to a policy that homosexuality was inconsistent with service in the armed forces, after stating in the course of a security clearance interview that he was homosexual and by a teacher who retired on ill health after a sustained campaign of verbal abuse from pupils because she was a homosexual that they had suffered unlawful discrimination on grounds of sex within the Sex Discrimination Act 1975, s 1 were dismissed in *MacDonald v Advocate General for Scotland* [2003] UKHL 34, [2004] 1 All ER 339 on the ground that there was no justification – Council Directive 2000/78/EC not yet having direct effect - for interpreting s 1 expansively so as to include cases of discrimination solely on the ground of sexual orientation and in the first case the policy was gender neutral and in the second one the treatment would have been the same for a male homosexual teacher. It was further held that there was no principle of law that comparison with a person of the other sex was not relevant where harassment was gender-specific and the words 'less favourable treatment' rendered the need for comparison inevitable.

A review for the Northern Ireland Office of the equality duty in section 75(1) of the Northern Ireland Act 1998 has concluded that: it is proving effective in moving public authorities towards compliance and mainstreaming of equality in the public sector; the single equality approach has been beneficial; significant organisational learning has occurred in the public sector; more organisations have been able to integrate statutory duty processes into existing practices and procedures than had been predicted; and there are signs of the development of a skilled and professional equality community beginning to emerge within both the public and non-governmental sectors. However, various weaknesses were identified, including: the quality of the first guide and practical guidance was not optimum; equality schemes approved by the Equality Commission have not always been clear as to how new policies are developed and at which points in the process of policy development consultation with those likely to be affected will occur; the short and intermittent duration of devolved structures institutions has meant that local political parties and cross-party Assembly committees had not achieved their full potential before the suspension of devolution in October 2002; this suspension has had led to some confusion in the operation of section 75(1); there are unaddressed issues as to the relationship between section 75(1) processes and European and United Kingdom wide legislation and policy reforms; there is a lack of public awareness of section 75(1); there is a lack of additional resources to promote the more labour-intensive policy processes required by section 75(1); this provision and the processes it prescribes facilitate an excessive emphasis on process rather than outcomes in the actual achievement of mainstreaming; there appears to be some misunderstanding among some public authorities that equality of opportunity requires equal treatment on each occasion and between all the nine dimensions of the section, resulting in resources being made available for only certain types of provision; there is some misunderstanding or excessive expectation that the section is capable of producing 'equality of outcomes' rather than producing mainstreaming of equality of opportunity in the design and delivery of policies and services; the capacity of the entire community and the voluntary sector to engage in policy-making partnerships is under-developed and under-resourced; procedures need to be further developed for consultation with children and young people and others who are not usually consulted with directly; there is a problem of lack of co-ordination of consultation and policy development leading to multiple and overlapping consultations; there is a danger of certain organisations and of equality officers becoming the sole gatekeepers or equality custodians; the local legal profession has little awareness of section 75(1) and postgraduate education is also lacking; and particular difficulties arise for some authorities with regard to certain of the nine dimensions, notably religious belief, political opinion and sexual orientation. A series of recommendations addressing these weaknesses was also made (*The Section75 Equality Duty – An Operational Review*).

The Trades Union Congress has produced a guide for trade unions on the approach to monitoring the implementation of the Employment Equality (Sexual Orientation) Regulations 2003 and the Gender Recognition Act 2004, aiming to ensure that the rights of lesbian, gay, bisexual and transgender workers are respected. It recommends that such monitoring be treated with particular sensitivity as otherwise it will fail to produce useful results and points out that, although not legally required, monitoring can be a useful tool to achieve equality (*Monitoring LGBT Workers*).

Positive aspects

The rulings allowing same-sex partners to succeed to tenancies and requiring persons whose gender has been reassigned to be treated as having the new gender for the purpose of service in the police.

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

The Justice (Northern Ireland) Act 2004 establishes a Judicial Appointments Commission whose membership is as far as possible to be reflective of the community in Northern Ireland and which has the key objective of securing a judiciary in Northern Ireland that is as reflective of Northern Ireland society as can be achieved consistently with the requirement of appointment on merit. However, the Committee on the Administration of Justice has drawn attention to obstacles to ensuring that the personnel in criminal justice agencies become more reflective of the society served, citing in particular the failure of the prosecution service to differentiate its staffing figures from the wider Northern Ireland office personnel statistics which makes it difficult to assess what problems exist and the lack of knowledge of the make-up of the judiciary, as well as delays in implementing a system of 'equity monitoring' with regard to the impact of the system on victims, suspects and defendants (*Annual Report 2003-2004*, pp 18-19). The interim findings of a formal investigation by the Commission for Racial Equality into the Police Service of England and Wales found that 3 out of 43 police authorities did not have a race equality scheme, as required under the Race Relations Act 1976 (as amended), and that only one of a sample of 15 police force schemes was fully compliant with the requirements of the legislation, while none of the five police authority schemes examined were fully compliant (press release, 14 June).

An analysis of ethnicity by the Scottish Executive based on the 2001 Census data shows that compared to white Scots, ethnic minorities suffer from higher rates of unemployment, overcrowding and poor health (*Analysis of Ethnicity in the 2001 Census*).

The Committee on the Administration of Justice has noted that, despite recommendations several years ago from Her Majesty's Inspector of Constabulary, the police in Northern Ireland still had no agreed definition of sectarian crime and thus no systematic means of monitoring this kind of hate crime (*Annual Report 2003-2004*, p. 50). However, the Justice (Northern Ireland) Act 2004 has imposed a duty on certain criminal justice organisations including the court, police and prosecution services - in the Northern Ireland to carry out their functions in accordance with relevant international human rights standards.

In determining a preliminary point on a claim for unlawful racial discrimination brought be a doctor against a society open to medical and dental practitioners and others connected with the medical and dental professions under the Race Relations Act 1976, s 11 (which made it unlawful for organisations of workers to discriminate against its members and which

contained a similar obligation for organisations whose members carry on a profession, it was held in *Sadek v Medical Protection Society* [2004] EWCA Civ 865, [2004] 4 All ER 118 that the language of the 1978 Act did not draw a distinction between 'workers' and 'professionals' and medical and dental practitioners engaged under contracts of employment in the NHS or as independent contractors in the private sector were workers carrying out employment so that the society was an 'organisation of workers' within the first category of s 11. However, a complaint of race discrimination and victimisation arising from the dismissal of a Croat national, who had falsely indicated that he had the right of abode in the United Kingdom and did not need a work permit despite the acknowledgement of whose application for asylum explicitly informing him that he could not work in the United Kingdom without permission, was held to have been justifiably dismissed in *Vakante v Addey & Stanhope School* [2004] EWCA Civ 1065, [2004] 4 All ER 1056 as the employee had been solely responsible for his illegal conduct in working for the respondent and creating an unlawful situation, on which he had to rely in order to establish that there was a duty not to discriminate against him, which meant that that his complaints were so inextricably bound with the illegal conduct that the tribunal would appear to condone that conduct were it to permit him to recover compensation for discrimination.

An equality impact assessment of the Electoral Fraud (Northern Ireland) Act 2002 prepared by the Northern Ireland Office has concluded that there was no evidence that the Act, which has restored integrity to the electoral system through improving the accuracy of the register and reducing the opportunity for fraud at polling stations, had had an adverse impact on the ability of any group to participate fully in the electoral process. Nonetheless it has highlighted certain concerns in respect of certain operational matters relating to registration and voting generally and measures to deal with these will be undertaken. In particular efforts will be made: to assist those who find the registration process complicated and the form difficult to complete, to further the participation of ethnic minority groups in electoral matters; to increase the awareness of hard to reach groups, including young people and people from disadvantaged and marginalised groups; and to ensure that those without eligible identification and young people are aware of the identification requirements and have the opportunity to apply for an Electoral Identity Card (*Electoral Fraud (Northern Ireland) Act 2002 Equality Impact Assessment*).

Reasons for concern

The failure to implement measures to tackle discrimination within the criminal justice system

Remedies available to the victims of discrimination

Legislative initiatives, national case law and practices of national authorities

Concern about the lack of funding from the Equality Commission in Northern Ireland for complainants in discrimination cases and the lack of clarity in its strategy for funding or not funding cases has been expressed by the Committee on the Administration of Justice, which also indicated its inability to understand why certain cases involving political discrimination, the treatment of ex-prisoners and access to bus passes by senior citizens were not thought sufficiently strategic to support (*Annual Report 2003-2004*, p.31).

Reasons for concern

The lack of sufficient funding to support complainants bringing discrimination cases.

Reasonable accommodation of the specific needs of certain groups, especially religious or ethnic minorities

Legislative initiatives, national case law and practices of national authorities

A report by Maternity Alliance has drawn attention to inappropriate maternity care for Muslim women and their babies. The most common complaint of Muslim women relates to the failure to respect their privacy during pregnancy and childbirth, with their wish not to be treated by male staff being overlooked or not accommodated because of a lack of female staff. Other problems identified included poor communication between professionals and Muslim patients, a severe shortage of interpreters and a lack of appropriate, easy-to-understand information about pregnancy, childbirth and the postnatal period. The report suggested that these problems from a lack of understanding amongst NHS staff about Islamic beliefs and practices, exacerbated by insufficient resources within hospitals and too few staff. However, it also stated that the poor quality and insensitive care received by some Muslim parents appeared to be the result of discriminatory attitudes held by staff, with many of the women interviewed experiencing stereotypical and racist comments during the course of their maternity care (*Muslim Women's Experiences of Maternity Services*).

Reasons for concern

Insufficient consideration of cultural differences in the provision of maternity care.

Positive actions aiming at the professional integration of certain groups

Legislative initiatives, national case law and practices of national authorities

A survey commissioned by the Commission for Racial Equality found that most white people (94%) had few or no ethnic minority friends while nearly half of the non-white people (47%) said most or all of their close friends are white (press release, 19 July 2004).

Protection of Gypsies / Roms

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

It was held in Eur.Ct.H.R.(1st sect.), *Connors v United Kingdom* (Appl 66746/01) judgment of 27 May 2004 (final) that the summary eviction of the applicant, his wife and four children – for alleged misbehaviour and causing considerable nuisance - in the early hours from a local authority caravan site for gypsies, where they had lived, with a short absence, for some 14 or 15 years had not been attended by the requisite procedural safeguards, namely, the requirement to establish proper justification for the serious interference with his rights, and consequently could not be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued so that it was in violation of ECHR Article 8. It was particularly significant that a summary procedure was not possible in respect of evictions from privately-run sites and that gypsies did not benefit from any special regime in that there was a duty on local authorities to ensure that there was sufficient provision for them or in the making of special allowances in the planning criteria applied to applications for permission to station caravans on private sites. The Court considered that the situation in England as it had developed, for which the authorities had to take some responsibility, placed considerable

obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decided to take up a more settled lifestyle.

Legislative initiatives, national case law and practices of national authorities

Immigration officers operating at Prague Airport were held in *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55, 9 December, to have discriminated on racial grounds – contrary to the Race Relations Act 1976, s 1(1)(a) - against Roma seeking to travel from that airport to the United Kingdom by treating them more sceptically than non-Roma when determining whether to grant them leave to enter the United Kingdom. However, the dismissal of a claim that it was contrary to customary international law and obligations under the Geneva Convention and Protocol relating to the Status of Refugees that if a national of country A, wishing to travel to travel to country B to claim asylum, applied in country A to officials of country B, he could not be denied leave to enter country B without appropriate enquiry into the merits of his asylum claim.

The Commission for Racial Equality launched a strategy in April on Gypsies and Travellers, aiming to seek better site provision for them, to improve their education, health and employment, as well as their treatment by the police and the courts, to bring legal challenges against discrimination that impact most on them, to work for better ethnic monitoring (including a census category for them) and to encourage fair reporting on them in the media. It subsequently announced that it was to work towards the elimination of all 'No Gypsies and Travellers' signs in Wales by May 2006 (press release, 4 May).

The House of Commons Select Committee on the Office of the Deputy Prime Minister is concerned about the confusion surrounding definitions of Gypsies and Travellers, who are increasingly adopting a sedentary lifestyle, and recommended that any new definition should comprise both the alternatives of ethnic origin or similar and nomadic lifestyle. It agreed with an approach of self-identification but considered that this should be supported by evidence. It welcomed the Office's support for research to improve the accuracy and usefulness of the bi-annual count of Gypsy caravans and families, considering that the count should be made compulsory as it was the only way to quantify demand and that there was a need for safeguard against inaccurate completion by authorities. It also considered that planning policies should strive to produce a surplus of sites rather than a continuing under-supply since this would help reduce unauthorised camping. In addition the Committee considered that a range of accommodation options should be available through private and local authority provision, including stopping places, transit sites and permanent residential sites, recommending trials on the feasibility and usefulness of short-stay sites and the piloting of group housing schemes. It considered that all regional development plans that failed to make adequate provision for Gypsies and Travellers should be rejected and that the re-introduction of the statutory duty to provide accommodation for them should be considered by a proposed Gypsy Taskforce. It also recommended that a capital grant be provided to enable local authorities to develop new sites which are consistent with revised design guidelines and that consideration be given to encouraging motorway contractors and other large employers of Gypsies and Travellers who may have land available to provide sites for the duration of their employment. It recommended that all sites be small and not disproportionate to the community in which they are placed as smaller ones facilitate better integration with the local settled community, with control on the number of long-term visitors being enforced by the site manager. It also recommended that sites be in areas appropriate for general residential use, within realistic access of services and allow interaction between Gypsies and Travellers and settled communities. The Committee accepted that minimal notice periods from sites were unjust but was concerned that the *Connors* ruling (see above) might make it difficult for site managers to move people on quickly if conflicts emerge. It called for improved training for site managers. In addition it recommended that, when sufficient numbers of sites are in place, the number of days that must pass before evictions can be effected should be reduced since most illegal

encampments stem from a lack of legal places to stop (*Gypsy and Traveller Sites*, HC -633-I). However, the Housing Act 2004 has extended the meaning of 'protected site' in the Caravans Act 1968 to sites owned by county councils providing accommodation to gypsies so that they become subject to provisions governing the minimum length of notice, protection from unlawful eviction and harassment and the suspension of eviction orders. It also removes the exclusion of certain caravan occupants, including most Gypsies and Travellers, from eligibility to receive a disabled facilities grant and requires local housing authorities to review the accommodation needs of Gypsies and Travellers in their district when carrying out reviews of housing needs under the Housing Act 1985.

Positive aspects

The efforts being made by the Commission for Racial Equality to tackle discrimination.

Reasons for concern

The absence of sufficient sites where Gypsies and Travellers can lawfully camp and the protection afforded to them against eviction.

Article 22. Cultural, religious and linguistic diversity

Protection of linguistic minorities

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The Committee of Ministers of the Council of Europe, having taken note of the evaluation of the Committee of Experts in its report of 29 August 2003 (ECMRL (2004) 1) and comments made on it by the British authorities, has recommended that account be taken by those authorities of all the observations of the Committee of Experts and that, as a matter of priority, they should: (a) make primary and secondary education in Scottish Gaelic generally available in the areas where the language is used; (b) with regard to Scottish Gaelic and Welsh, establish a system for monitoring the measures taken and progress achieved in regional or minority language education, including the production and publication of reports of the findings; (c) provide information and guidance to those responsible for implementing the undertakings chosen for Scottish Gaelic, in particular in the fields of education and administration; (d) facilitate the establishment of a television channel or an equivalent television service in Scottish Gaelic and overcome the shortcomings in Scottish Gaelic radio broadcasting; (e) improve the public service television provision and facilitate the broadcasting of private radio in Irish; (f) improve the use of Welsh in social care facilities, particularly hospitals and care of the elderly; and (g) create conditions for the use of Scots and Ulster Scots in public life, through the adoption of a language policy and concrete measures, in co-operation with the speakers of the languages (Recommendation RecChL(2004)1 of the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by the United Kingdom, 24 March 2004).

Legislative initiatives, national case law and practices of national authorities

The Welsh Language Board has reported that early indications of the policy of mainstreaming of the Welsh language into the work of all Government departments and all Welsh Assembly Sponsored Public Bodies were encouraging. The Board has also established a research unit to measure the use of Welsh across the communities and the effectiveness of policies aimed at its future development. As part of its policy to ensure support for the language at the community level, the Board has, in cooperation with the broadcaster S4C, organised an initiative to promote Welsh language pop music to young people. It has also continued to

incorporate the language in the field of information technology, forming a partnership with Microsoft to enable computer users to choose a Welsh language interface free of charge (*Annual Report 2003-2004*).

Positive aspects

Efforts to mainstream the Welsh language in Government departments.

Reasons for concern

The overall adequacy of support for minority languages.

Article 23. Equality between man and women

Gender discrimination in work and employment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The International Labour Organisation's Committee of Experts on the Application of Conventions and Recommendations has noted studies on pay and income showing only limited progress in closing the gender gap, with women's average hourly earnings (excluding overtime) amounting in 2002 to 81.6 per cent of men's in Great Britain (an increase of only 0.7 per cent since 1999), while in Northern Ireland women's earnings had reduced from 87.6 per cent of men's in 2000 to 86.6 per cent of them in 2001. It also noted the government's statement that the relative position of women part-time workers had worsened in comparison with male full-time workers and that the average hourly wage for women working part-time dropped to 58.6 per cent of the average hourly wage of male full-time workers in 2001. It asked the government to provide information on the application and enforcement of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, as amended (which prohibit employers from treating part-time workers less favourably than comparable full-time workers in terms of their conditions of employment unless different treatment can be objectively justified, allow part-time workers to compare themselves with a full-time colleague, irrespective of whether either part's contract is permanent or fixed-term, and remove a two-year limit to the period that may be taken into consideration by a tribunal making an award against an employer for less favourable treatment in respect of access to an occupational pension scheme) and their impact on the application of the principle of equal pay for work of equal value (*Individual Observation concerning Convention No. 100, Equal Remuneration, 1951, United Kingdom*, 2004)

Legislative initiatives, national case law and practices of national authorities

A report by the Equal Opportunities Commission revealed that women make up less than 10% of the most senior positions in many areas of British public life, comprising just 7% of the senior judiciary, 7% of senior police officers, 9% of top business leaders and 9% of national newspaper editors. However, they do account for 23% of the Civil Service top management and 36% of public appointments (*Sex and power: who runs Britain?*). The gender division is seen in other areas f employment as well; only 1% of construction jobs and 8% of engineering jobs are held by women but almost all nursery nurses and childminders are women. Moreover, on average, women working part-time earn 40% less per hour than men in full-time employment and female full-time employees earn 18% less per hour than men in full-time employment. Furthermore jobs held by women are twice as likely to pay less than the minimum wage than jobs held by men (*EOC Annual Report 2003-04*). Furthermore sexism and prejudice was found in an investigation by the Fawcett Society to bar many experienced women lawyers from reaching the top in the criminal justice system, with 7 women out of 42

chief crown prosecutors, seven women out of 107 High Court judges and three women out of 37 Lord Justices of Appeal and women recorders and circuit judges respectively constituting 12 and 11% of the total. Its report recommended that public bodies in the criminal justice system be required to promote equality of opportunity and that diversity should be taken into account in recruitment procedures (*Women and the Criminal Justice System*). The Equal Opportunities Commission have also published a study showing that, while 22% of employers have checked or are now checking that their pay system is fair to women, more than half (57%) had no plans to do an equal pay review (*Monitoring progress on equal pay reviews*).

Reasons for concern

The failure of woman to be represented appropriately in senior positions and the continued gap between the pay levels of men and women.

Participation of women in political life

Legislative initiatives, national case law and practices of national authorities

A research report for the Electoral Commission has found that, while there is no gender gap in voter turnout at elections and women were more likely than men to be involved in cause-oriented activities such as signing a petition or boycotting a product, women are less likely than men to participate in campaign-orientated activities, such as contacting a politician and donating money to, working for or becoming a member of a political party. It also found that women were less likely than men to join voluntary organisations. Furthermore ethnic minority women were significantly less likely to vote than their male counterparts. The activism gap was found to be smaller among better-off households and graduates and larger amongst those with the lowest levels of education. Married men are more likely to participate than married women and there is a significant gap among those with children, closing when children do not live at home. Women were found to have a weaker sense of their own ability to make a political difference than men are less interested in politics. In addition it was found that the presence of women as representatives increases women's activism and this may have implications for strategies to increase the number of women being selected and standing for election. Measures by political parties to modernise the culture and practices of their organisations might also assist the inclusion of more women as members and activists. Furthermore as women are more interested in local than national politics, local campaigns might motivate them to become more politically involved generally and making voting more accessible might also increase participation (*Gender and political participation*). See also above.

Reasons for concern

The comparatively low level of political participation by women.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A friendly settlements involving payments for any pecuniary or non-pecuniary damage was reached in Eur.Ct.H.R.(4th sect.), *Owens v United Kingdom* (Appl 61036/00) judgment of 13 January 2004 in respect of complaints that a social security benefit which was payable to a female spouse on the death of her husband where she looked after their children and he had worked (the Widowed Mothers' Allowance) was not payable to a male surviving spouse where the couple's roles had been reversed. ??

Article 24. The rights of the child

Alternatives to the removal from the family

Legislative initiatives, national case law and practices of national authorities

See the discussion of the Children Act 2004 under Article 7

Positive aspects

None additional to those under Article 7

Juvenile offenders

Legislative initiatives, national case law and practices of national authorities

See the discussion under Article 4.

Reasons for concern

None additional to those under Article 4

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In order to ensure a voice for children and young people at the national level, the Children Act 2004 has created the post of Children's Commissioner. The role of the Commissioner will be to promote awareness of the views and interests of children (and certain groups of vulnerable young adults) in England. The Commissioner will also be able to hold inquiries on direction by the Secretary of State or on his own initiative – into cases of individual children with wider policy relevance in England. Both these roles can also be performed by the Commissioner in other parts of the United Kingdom with respect to non-devolved matters. In addition the Act seeks to make arrangements to support better integrated planning, commissioning and delivery of children's services in England and Wales and to provide clearer accountability. Thus it places a duty on local authorities to make arrangements through which key agencies co-operate to improve the well-being of children and young people and widen services' powers to pool budgets in support of this. Furthermore in order to ensure that, within this partnership working, safeguarding children continues to be given priority, the Act places a responsibility for key agencies to have regard to the need to safeguard children and promote their welfare in exercising their normal functions. It also establishes statutory Local Safeguarding Children Boards to replace the existing non-statutory Child Protection Committees and provides for regulations to require children's services authorities to publish a Children and Young People's Plan which will set our their strategy for services for children and relevant young people. The Act allows for the creation of databases holding information on all children and young people in order to support professionals in working together and in sharing information to identify difficulties and provide appropriate support. There is also provision requiring local authorities to put in place a director of children's services to be accountable for, as a minimum, the local authority's education and social services functions in so far as they relate to children and to designate a lead member for children's services to mirror the director's responsibilities at a local political level. In order to ensure a shared approach across inspections, provision is made in the Act for the creation of an integrated inspection framework and for inspectorates to carry out joint reviews of all children's services provided in an area. The Act also creates a new duty for local authorities to promote the

educational achievement of looked after children and an associated power to transmit data relating to individual children in monitoring this. However, the parliamentary Joint Committee on Human Rights was concerned as to whether the various duties imposed by the Act were sufficiently robust to prevent breaches of the positive obligations under ECHR Articles 2 and 3 and it considered that the duty on agencies to promote and safeguard the welfare of children should have been a direct rather than a procedural duty. It also thought that it should have been applied to private bodies providing services to children under contract to public authorities and that asylum and immigration agencies should not have been excluded from the arrangements. In addition it was concerned about the implications for the right of children to privacy of the provisions for information sharing by agencies (*Children Bill*, HL161/HC 537).

The Electoral Commission has concluded that there is insufficient current justification for a change in the voting age at present and recommended that it should remain at 18 years for the time being. However, it also recognised that circumstances might change over the next few years – particularly as citizenship teaching might improve the social awareness and responsibility of young people and there might be a wider debate about the general age of majority that can better inform consideration of individual age-based rights – and proposed further research on the social and political awareness of those around age 18 with a view to undertaking a further review of the minimum age for electoral participation in the future. The Commission did, however, that the minimum age of candidacy be reduced to 18 years as the candidate selection process of the political parties and the electoral process already provided the public with the means to prevent individuals they consider insufficiently mature from being elected and there was, therefore, no reasonable argument why the candidacy age should not be harmonised with the voting age (*Age of electoral majority*).

Good practices

The introduction of the office of Children's Commissioner.

Article 25. The rights of the elderly

The possibility for the elderly to stay in their usual life environment

Legislative initiatives, national case law and practices of national authorities

The Social Justice and Regeneration Committee of the National Assembly for Wales has recommended that the Government should consider whether, at both local and national levels, the older people's forums established within the framework of the Strategy for Older People in Wales could also engage in the issue of housing and related services for older people. It suggested that the Government should encourage forums to give priority to enabling older people to engage in and influence the development and subsequent evaluation of housing strategies, structures and services that are intended for their benefits. In particular, it considered that the forums should expect to provide a focal point for the development and dissemination of advice, advocacy and information on support services to ensure that older people are aware of their rights and options. It also recommended that better joint working be encouraged between housing, health and social care agencies and made a number of detailed proposals with respect to meeting the housing needs of older people, including funding for home improvements and provision of support services (*Housing for Older People*).

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

In dismissing the school's appeal against the determination of the Special Educational Needs and Disability Tribunal that the proper comparator to be used, on a complaint that the school by virtue of the Disability Discrimination Act 1995, s 28B(1) had discriminated against a pupil who suffered from autistic spectrum disorder through treatment that had culminated in his temporary exclusion, was someone who was not disabled and who behaved properly, it was held in *McAuley Catholic High School v C*, [2003] EWHC 3045 (Admin), [2004] 2 All ER 436 that, having established that there had been less favourable treatment by reason of the pupil's disability, which was a question of fact for the tribunal, the comparator to be used was the school population as a whole who were not disabled and who had not misbehaved since there was nothing in the 1995 Act, as amended, to suggest that provisions for discrimination which were identical to those which had been in force in the discrimination in employment provision should not be construed in the same way.

Two challenges to possession orders against two secure tenants, one of whom was suffering from a depressive illness and the other of whom had a borderline personality disorder, which had been obtained in reliance on ground 2 of Schedule 2 to the Housing Act 1985, namely, that the tenant or a person residing in or visiting the dwelling house had been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, were unsuccessful in *Manchester City Council v Romano* [2004] EWCA Civ 834, [2004] 4 All ER 21, notwithstanding that the tenants had relied upon it being unlawful, under the Disability Discrimination Act 1995, s 22(3), for a person managing any premises to discriminate against a disabled person occupying those premises by evicting him. This was because such treatment could be justified under s 24(3)(a) if the discriminator reasonably held the opinion that it was necessary not to endanger the health or safety of any person and this was established in the instant case. However, it was held that, where a landlord was seeking possession under ground 2, the court, in order to interpret s 24(3)(a) in a way that was compatible with the rights of tenants and neighbours under the ECHR, had to ask whether the landlord held the opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that the health of an identified person or persons would not be put at risk and whether that opinion was objectively justified. It was made clear that health meant a state of complete physical, mental and social well-being, not merely the absence of disease and infirmity, and that trivial risks to a person's health should be disregarded.

It was held in *Horton v Higham* [2004] EWCA Civ 941, [2004] 3 All ER 941 that it would artificially extend the meaning of 'membership' of a trade organisation for the purposes of the Disability Discrimination Act 1995, s 13 to include pupillage in a set of barristers' chambers since the sum of the rights and duties of a pupil was not such as to bring the pupil within the concept of a member of chambers. As a consequence a claim could not be brought under s 13 in respect of the refusal of the chambers to allow a disabled person to defer the commencement of a pupillage, thereby effectively preventing him from taking a pupillage with them, where the deferral had been sought because of ill-health.

Professional integration of persons with disabilities: positive actions and employment quotas

Legislative initiatives, national case law and practices of national authorities

A *Disability Briefing* produced by the Disability Rights Commission in December, which draws on Labour Force Survey data, shows a gradual increase in the size of the working age disabled population from 6 million to 6.8 million in 2004 (a 14% increase compared with 6% for that of the non-disabled population), with half of this population are in work and a further 1.2 million disabled people without a job want to work. It also shows that the disabled people's overall employment rate has increased from 43% in 1998 to 50% in 2004 and that disabled people are more likely to work in manual and lower occupations. In addition it shows that the average gross hourly pay of disabled people is about 10% less than that of non-disabled employees and that disabled people are half as likely as non-disabled people to be qualified to degree level and are twice as likely to have no qualification at all but that the proportion of disabled people having a degree has increased to 10%.

Positive aspects

The increasing size of the disabled population in employment.

Reasonable accommodations

Legislative initiatives, national case law and practices of national authorities

A claim for discrimination contrary to the Disability Discrimination Act 1995, s 5(2) was upheld in *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144, [2004] 2 All ER 851 in respect of a carpenter's labourer whose employment was terminated on the basis that he could no longer work efficiently or safely after his right hand became painful and clumsy following an accident, the employer having failed to comply with the obligation under s 6 to take such steps as it was reasonable in all the circumstances for him to have to take in order to prevent any arrangements made by or on its behalf, or any physical feature of the premises it occupied, placing a disabled person at a disadvantage in comparison to persons who were not disabled. The court held that, although s 5(4) of the 1995 Act provided that for the purposes of s 5(2) failure to comply with the s 6 duty was justified if, but only if, the reason for the failure was 'both material to the circumstances of the particular case and substantial', what was material and substantial for the purposes of justifying an established failure to take such steps as were reasonable to redress disadvantage could not include elements which had already been, or could already have been, evaluated in establishing that failure. Furthermore, where a teacher began to suffer from a deteriorating visual condition and not all the steps which could have been taken by the employer were made so that she began a period of absence from work because of eyestrain which led to the employer putting her on half-pay in accordance with a policy whereby an absence of more than 100 days resulted in a reduction in sick pay, it was held in *Meikle v Nottinghamshire County Council* [2004] EWCA Civ 859, [2004] 4 All ER 97 that the proper approach was to ask whether the employer had shown that, if all the reasonable adjustments required by the Disability Discrimination Act 1995, s 6 to the employee's working conditions had been made, the employee would have been absent for over 100 days and thereby liable to the reduction in sick pay. It was considered that the appeal tribunal was correct to conclude that, if this had been done, the tribunal could not have avoided making a finding of unlawful discrimination under s 5(1) of the 1995 Act in respect of the decision to put the employee on half-pay.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

A formal investigation by the Disability Rights Commission has found that most websites (81%) failed to satisfy the most basic Web Accessibility Initiative category and that many had characteristics that made it difficult, if not impossible, for persons with certain impairments, particularly those who are blind, to make use of them. It also found that automatic testing tools alone could not verify effective compliance, that most disabled users were unaware of, or did not know how to use, useful accessibility features contained in the most widely used operating systems; users of assistive technology products need easier access to advice on the selection of products to suit their needs; that nearly half (45%) of the problems encountered by disabled users could not be attributed to violations of the Web Accessibility Initiative Checkpoints but to limitations in the Checkpoints themselves. The Commission recommended that service providers using websites should urgently improve the accessibility and usability of the services they provide through the medium of the Web and also made a series of detailed recommendations as to steps that should be taken to address the problems revealed in its findings (*The Web Access and Inclusion for Disabled People*).

Reasons for concern

The inaccessibility of websites for disabled users.

CHAPTER IV : SOLIDARITY

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

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

The Employment Relations Act 2004 seeks to give effect to the EC Directive on Information and Consultation (Directive 2002/14/EC) by enabling the Secretary of State to make regulations regarding the rights of employees, or their representatives, to be informed and consulted on matters covered by the regulations.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Employment Relations Act 2002 has introduced the possibility of a trade union making an application to the Central Arbitration Committee for a declaration that it should be recognised for the purposes of conducting collective bargaining on behalf of a group or groups of workers employed by an employer in a particular bargaining unit and also for the Committee to determine a bargaining procedure where the parties are unable to agree one after the conclusion of an agreement on recognition. It also modifies the rules governing the holding of ballots of employees on the issue of recognition or non-recognition.

Article 28. Right of collective bargaining and action

The right of collective action (right to strike) and the freedom of enterprise or the right to property

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee on Social Rights has concluded that the ability of employers to offer financial benefits to employees who agree to forgo collective bargaining (the subject previously of an adverse ruling in Eur.Ct.H.R.(2nd sect.), *Wilson and Others v United Kingdom* (Appl nos 30668/96, 30671/96 and 30678/96) judgment of 2 July 2002 (final)) while it is impossible for other workers to claim that such favourable treatment is detrimental to them and that they are discriminated against by omission is not in conformity with Article 6(2) of the European Social Charter (*Conclusions XVII-1*) (but see below). The Committee also concluded that the scope for workers to defend their interests through lawful collective action was excessively circumscribed, entailing a lack of conformity with Article 6(4), in that the Trade Union and Labour Relations (Consolidation) Act 1992, s 244 limits trade disputes to ones between workers and the employer since this means that secondary action is not lawful and since it has also been interpreted as excluding action concerning a future employer and future terms and conditions of employment in the context of a transfer of a part of a business. In the addition the Committee concluded that the requirement to give notice to an employer of a ballot on industrial action is excessive and not in conformity with Article 6 (4), notwithstanding that pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992, s 226A there was no longer an obligation to identify the workers who were being balloted but only the number, categories and place of work of those concerned, since in any case unions must issue a strike notice before taking action. A further lack of conformity with Article 6(4) was concluded to exist in that the protection against dismissal of workers taking industrial action applied only for eight weeks and then only to official action. The Committee also found that the fact that it was not lawful for a trade union to take industrial action on behalf of workers dismissed for unofficial action was a serious restriction on the right to strike. However, the Committee reserved its position as to whether the ability given by section 235A of the 1992 Act to third parties, including individual consumers, to take action to prevent a strike entailed a lack of conformity with Article 6(4) pending the receipt of information as to the conditions to be met and the its possible effect.

Legislative initiatives, national case law and practices of national authorities

The Employment Relations Act 2004 responds to the ruling in Eur.Ct.H.R. (4th sect.), *Wilson and Others v United Kingdom* (Appl. nos 30668/96, 30671/96 and 30678/96) judgment of 2 July 2002 (final), that it was contrary to ECHR Article 11 for the law not to prevent employers from offering inducements to employees in order to surrender their collective representation but also endeavours to address other situations considered comparable. It thus gives a worker a right not to have an offer made to him by his employer where the latter's sole purpose is to induce the former not to be or seek to be a member of a trade union, not to take part in the activities of a union or to make use of its services outside working hours or when otherwise permitted and to be or to become a member of a trade union. There is also a similar right not to have an offer made with the sole or main purpose of securing that the terms of the workers will not be determined by an agreement. The Act also amends the exclusion from the conduct that can be the basis for expelling someone from a union so that it is no longer covers current or former membership of a political party.

The Employment Relations Act 2004 seeks to clarify the union members to whom a union is required to give an entitlement to vote in an industrial action ballot. It also extends the protection against dismissal for taking part in lawfully organised industrial action from 8 to 12 weeks from its commencement and also provides that 'locked out' days are disregarded in computing this period

Positive aspects

The response to the ruling in *Wilson and Others v United Kingdom*.

Article 29. Right of access to placement services

No significant developments.

Article 30. Protection in the event of unjustified dismissal

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

It was suggested in *Kataria v Essex Strategic Health Authority* [2004] EWHC 641 (Admin), [2004] 3 All ER 572, which was concerned with an appeal against a decision which prevented a doctor working within the National Health Service but not from otherwise working as a doctor, that the right to work within this service might be a 'civil right' for the purposes of ECHR, Article 6.

Article 31. Fair and just working conditions

Health and safety at work

Legislative initiatives, national case law and practices of national authorities

In allowing an appeal against a ruling that the manufacturer of a piling rig which had killed someone in the course of being operated could only be prosecuted under the Supply of Machinery (Safety) Regulations 1992 (which implemented Council Directive (EC) 98/37 and under which offences were triable summarily and punishable only by a moderate fine) and not the Health and Safety at Work etc Act 1974, s 6 (under which there was a duty for anyone who designed, manufactured or supplied any article for use at work to ensure that the article would be safe at all times when it was being used by a person at work and which allowed for an unlimited fine to be imposed) because para 7 of Schedule 6 to the 1992 regulations should be read as incorporating the enforcement but not the prosecution provisions of the 1974 Act into the regulations, it was held (3-2) in *R (on the application of Junttan Oy) v Bristol Magistrates' Court* [2003] UKHL 55, [2004] 2 All ER 555 that there was no sensible contextual purpose served by the restrictive construction of 'any action' in para 7, which was wide enough to include the power of prosecution and it could hardly have been the purpose of the 1992 regulations that even the worst conceivable failure to ensure safety of machinery resulting in many deaths could only be prosecuted summarily, with penalties which would be derisory, rather than on indictment under the 1974 Act. Moreover, even if read restrictively, it was considered that there was nothing in the regulations that prevented a prosecution under s 6 or was capable of displacing the general rule of interpretation that where an act constituted an offence under two or more provisions the offender was liable to be prosecuted under either of them unless a contrary intention appeared and the co-existence of the 1974 Act and the 1992 regulations did not undermine the purposes of the directive. However, the presence of a tiny hole in one of the boots supplied to the driver of a milk tanker, whereby the penetration of water in freezing conditions led to a mild frostbite in his little toe which kept him away

from work for some months and left him with a permanent sensitivity to cold in that toe, was considered (3-2) in *Fytche v Wincanton Logistics plc* [2004] UKHL 31, [2004] 2 All ER 221 not to involve a breach of the employer's obligation under reg 7 of the Personal Protective Equipment at Work Regulations 1992 that such equipment be in 'efficient state, in efficient working order and in good repair' as the duty of repair did not extend to repair and maintenance which had nothing to do an item of equipment's personal protective function and the boots had been adequate for the claimant's ordinary conditions of work, namely, to protect his toes from impact injuries from, for instance, falling milk churns.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Low Pay Commission has indicated that it continues to believe that it is right to make a significant increase in the relative level of the minimum wage (previously recommended in its Fourth Report in 2003) and that this is sustainable in the current economic climate (*Protecting Young Workers The National Minimum Wage*). It also concluded that a minimum wage of GBP 3 for 16-17 year olds should be introduced – this age group has been excluded because its members are predominantly in education or preparing for work – in order to put a stop to clear exploitation while neither encouraging young people out of education nor harming the supply of training places. However, it recommended the retention of the current exemption from the minimum wage for apprentices under the age of 19 and the exemption from the 16-17 year old rate of 16-17 year old participants on specified pre-apprenticeship programmes. It also indicated that the introduction of this minimum wage would mean that work on enforcement and awareness must be extended to this age group.

The Employment Relations Act 2004 has extended the powers of minimum wage enforcement officers with regard to the use and supply of information, enabling them to communicate the employer's position to the worker and vice-versa.

Good practices

The increased powers of minimum wage enforcement officers to obtain information.

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

No significant developments.

Article 33. Family and professional life

Employers' initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

A survey by the Maternity Alliance has found that, while 68% of parents had their request for flexible work agreed or reached a compromise, 27% ended up with worse conditions and had to accept a cut in their salary or job status. The survey also found that 25% of parents did not know they had a right to ask for flexible work arrangements, 25% of parents had their request refused (often when only minor changes were being sought), 45% of parents said that their employer did not know or did not follow the correct procedure for dealing with a request and 25% of parents had their request agreed and said it was going well (*Happy Anniversary? The Right to Request Flexible Work One Year On*). The report called for a right of parents to reduce their hours if they return to work within a year of their baby's birth, a code of practice to help employers deal with requests and a right for parents to be accompanied by a companion of their choice at a meeting to discuss flexible work

Reasons for concern

The obstacles to some parents obtaining flexible work arrangements.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee on Social Rights concluded that the United Kingdom was not in conformity with Article 16 of the European Social Charter because full equality between spouses as regards matrimonial property continues not to be guaranteed in Northern Ireland (*Conclusions XVII-1*). The Committee also confirmed its previous finding that the situation with regard to family reunion was not in conformity with Article 19(6) of the Charter in that the government had failed to show that applications for family reunion in respect of migrant workers' children aged between 18 and 21 are granted in practice and applications for family reunion are systematically refused if this could entail an increase in social benefit financed from public funds paid to the migrant worker. In addition it confirmed its finding that the United Kingdom was not in conformity with Article 19(8) in that family members of a migrant worker who are nationals of Contracting Parties that are not members of the EEA or EU, as well as children of a migrant worker who are nationals of EU member states or parties to the EEA but are aged under 17 years of age, are liable to expulsion following a migrant worker's deportation. As a result of both these conclusions, the Committee concluded that the United Kingdom was not in conformity with the requirement of equal treatment for the self-employed under Article 19(10) of the Charter.

Reasons for concern

The continuing absence of equality between spouses in Northern Ireland with regard to matrimonial property and the obstacles to family reunion for migrant workers.

Article 34. Social security and social assistance

Measures promoting the right to housing

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Committee on Social Rights concluded that the Habitual Residence Test as a condition of eligibility for housing benefit and access to long-term tenancies in social housing was not in conformity with Article 19(4) of the European Social Charter as it discriminated against migrant workers (*Conclusions XVII-1*).

Legislative initiatives, national case law and practices of national authorities

The number of homeless households trapped in temporary accommodation has risen by 123% since 1997 to 100,810 (Shelter press release, 13 December). An earlier report by Shelter indicated that homelessness was rising twice as fast for black and minority ethnic households (77%) as for the general population (34%). Furthermore black and minority ethnic households are seven times more likely to live in overcrowded conditions than white households and twice as many of the former households live in conditions deemed officially unfit for human habitation as compared to white households (*The Black and Minority Ethnic Housing Crisis*). Another report by Shelter has warned that plans to improve housing conditions and to

regenerate areas in the North of England could be pricing local people out of the market and leading to homelessness (*On the Up*).

Reasons for concern

The growth in homelessness and the use of the Habitual Residence Test as a condition for eligibility for housing benefit.

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Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The JobSeekers Allowance for single persons appeared inadequate to the European Committee on Social Rights but it reserved its position as to whether it was in conformity with Article 12 of the European Social Charter pending the receipt of details about any additional benefits for which such persons would be eligible (*Conclusions XVII-1*). However, the Committee considered that the position of applicants for social assistance was not in conformity with Article 13(1) of the Charter as they must satisfy the Habitual Residence Test which may entail a length of residence requirement.

Article 35. Health care

Drugs (regulation, decriminalisation, substitutive treatments)

Legislative initiatives, national case law and practices of national authorities

Cannabis was reclassified from 29 January as a Class C rather than a Class B drug. As a controlled drug, its production, supply and possession remains illegal but the penalty for possession has been reduced from 5 to 2 years' imprisonment and, in guidance to police, there is a presumption against arrest for adults but not young people; arrest is likely only where there are aggravating factors such as smoking in a public place or repeat offending, although there has been concern on the part of the police that the guidance is insufficiently clear.

MIND has called into question the drug regulatory system that has allowed the prescription of antidepressants to rise in the course of the last decade to 13 million per year (press release, 6 December 2004).

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Health Protection Agency Act 2004 has established this new agency as a United Kingdom-wide non-departmental public body to undertake health and radiation protection functions of existing bodies. These more integrated arrangements are intended to improve the ability to tackle the problems posed by infectious disease and other hazards, including the response to chemical, biological, radiological and nuclear (CBRN) terrorism.

Good practices

The establishment of the Health Protection Agency.

Article 36. Access to services of general economic interest

No significant developments.

Article 37. Environmental protection

No significant developments.

Article 38. Consumer protection

No significant developments.

CHAPTER V : CITIZEN'S RIGHTS

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

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

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A blanket restriction on the right to vote of those prisoners who were convicted of crimes sufficiently serious to warrant an immediate custodial sentence, which applied irrespective of the length of their sentence or of the nature or gravity of their offence, was held in Eur.Ct.H.R.(4th sect.), *Hirst v United Kingdom (No 2)* (Appl 74025/01) judgment of 30 March 2004 (referred to the Grand Chamber of the Eur.Ct.H.R.) to be disproportionate and a violation of Article 3 of ECHR, Protocol 1.

Reasons for concern

The extent of the restriction on the right of convicted prisoners to vote.

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

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Provision was made in the European Parliamentary and Local Elections (Pilots) Act 2004 for the piloting in certain regions in England of all-postal voting at the 2004 European Parliamentary and combined local elections. Postal votes were to be returned along with a 'declaration of identity' carrying the signature of the elector, along with the signature, name and address of a witness. Provision is also made in the Act for the application generally on a permanent basis of this procedure to future local elections in England and Wales. In the report on the pilot required under the Act, the Electoral Commission found that turnout was just over 5 percentage points higher than the 37.11% in non-pilot regions and, although there were public concerns about abuses, it was not yet in a position to conclude whether the system had led to an increase in fraud and malpractice. It noted that many electors found the process difficult either because of the design of the ballot packs or the numbers of elections involved. It also found a lack of public support for a swap from postal voting on demand to all-postal voting. The Commission considered that further measures were needed to improve the security of postal voting and that all-postal voting should not be pursued for use at statutory elections. It undertook to report on further ways of introducing additional voting channels (*Delivering democracy? The future of postal voting*).

Reasons for concern

The scope for abuse in postal voting.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

No significant developments.

Article 46. Diplomatic and consular protection

No significant developments.

CHAPTER VI : JUSTICE

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

Access to a court

Legislative initiatives, national case law and practices of national authorities

A claim brought against three prison officers by a prisoner, who was engaged in various legal proceedings, for breach in bad faith of the Prison Rules 1964 and 1999 with regard to correspondence with his legal adviser had been dismissed because there was no resulting damage to him in the form of financial loss or physical or mental injury. However, his appeal was allowed in *Watkins v Secretary of State for Home Affairs* [2004] EWCA Civ 966, [2004] 4 All ER 1158 on the basis that the infringement by a holder of a public office of a right identifiable as a constitutional right, together with the requisite mental element (malicious intent or awareness of the infringement with recklessness as to its consequences) could give rise to a cause of action for infringement of that right without proof of special damage. The court considered that the right of every citizen to unimpeded access to the court was a right of that level of importance so that when the three prison officers had maliciously infringed that right the prisoner's cause of action in misfeasance in public office was complete. A nominal award for general damages was made against those three officers and the case was remitted to the county court for determination of whether exemplary damages should be awarded and, if so, in what amount.

Appeals against certain applications by tenants being held – pursuant to the Landlord and Tenant Act 1927, s 23 - to be out of time as a consequence of it being irrebuttably deemed that the notices which gave rise to them being sent by landlords through the post by recorded delivery to the addressees at their place of abode had been served on the date of posting were rejected in *Beanby Estates Ltd v Egg Stores (Stamford Hill) Ltd* [2003] EWHC 1252 (Ch) and *C A Webber (Transport) Ltd v Railtrack* [2003] EWCA Civ 1167 on the basis that the legislature was entitled to balance certainty, and allocation of risk in the way that it had done in s 23 and that there was no infringement of their right of access to the courts under ECHR Article 6. Moreover no denial of effective access to the courts was considered as likely to result in *Perotti v Collyer-Bristow (a firm)* [2003] EWCA Civ 1521, [2004] 2 All ER 189 if the claimant was not legally represented in applications for permission to appeal as nothing in those applications required the provision of such representation in order to enable the court to grasp the principles involved and the facts material to those principles when called upon to decide the question which would be before it, which was whether there was a real prospect of success or whether there was an important point of principle or practice or whether there was some other compelling reason why the appeal should be heard. In addition it was held that the court had no power to grant legal representation in civil proceedings but, although this was a matter for the discretion of the Legal Services Commission, public funding was likely to be made available if the court were to indicate that legal representation was necessary in order to ensure a fair hearing and the applicant qualified on financial grounds.

In upholding the dismissal of a claim for damages in respect of delayed access to a solicitor while being held in police custody on suspicion of having been concerned in acts of terrorism in circumstances not permitted under the right of access conferred by the Northern Ireland (Emergency Provisions) Act 1987, s 15, the appellate committee of the House of Lords held (3-2) in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2004] 2 All ER 237 that the duty under s 15 was a quasi-constitutional right imposed for the benefit of the public at large, not for the protection of a particular class of individuals and denial of that right by itself (i.e. where it did not cause or prolong unlawful detention) was incapable of causing loss or injury of a kind for which the law normally awarded damages. Their

Lordships held that, as a public law right, the remedy for breach of the right to access to a solicitor under s 15 was judicial review.

A challenge to the making of an interim anti-social behaviour order under the Crime and Disorder Act 1998 in respect of persons who were said to be linked to the drug trade in the local area on the basis that it had been made at a hearing of which the claimant had had no notice was rejected in *R (on the application of M) v Secretary of State for Constitutional Affairs and Lord Chancellor* [2004] EWCA Civ 312, [2004] 2 All ER 531 as it was considered that there was nothing intrinsically objectionable about the power to grant such an order without notice. In the court's view it was impossible to say that such an order determined civil rights since an application for one without notice could only be made when the justices' clerk was satisfied that it was necessary for the application to be made without notice and when the court considered that it was just to make such an order, which could only be made for a limited period, could be reviewed or discharged. Similarly professional disciplinary proceedings against a lawyer which led to a reprimand were held in *R (on the application of Thompson) v Law Society* [2004] EWCA Civ 167, [2004] 2 All ER 113 not to determine his civil rights and obligations and thus require an oral hearing since, although this might increase the cost of his professional indemnity insurance, his right to continue to practise his profession was not at stake. It was further held that there was also no such determination where either conditions were subsequently imposed on the lawyer's practising certificate, although if such conditions were imposed there was a right of appeal, with provision for a public hearing, or the lawyer was directed to pay compensation before there was a determination by the disciplinary tribunal that this direction was to be enforced. In addition it was held that a determination that the lawyer should refund costs received from the legal aid board was not capable of engaging any right under Protocol 1, Article 1 as it was doubted that he had any accrued right against the board and in any event the deprivation was as provided for by law.

Legal aid / judicial assistance

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

There were friendly settlements in Eur.Ct.H.R.(4th sect.), *Broadhurst v United Kingdom* (Appl n° 69187/01), judgment of 22 June 2004 (final) and Eur.Ct.H.R.(4th sect.), *Edwards and Others v United Kingdom* (Appl n° 38260/97) judgment of 16 November 2004 (final), cases arising out of complaints about the absence of legal assistance in proceedings that led to the applicants' imprisonment after failing to comply with a requirement to pay the community charge or to pay off arrears of this and the council tax and the detention itself, in which the applicants were paid sums ranging from GBP 2,700 to GBP 4,200 for any non-pecuniary or pecuniary damage, as well as their costs and expenses.

Legislative initiatives, national case law and practices of national authorities

The House of Commons Select Committee on Constitutional Affairs has concluded that the laudable aim of ensuring that costs were properly audited has resulted in a wasteful and self-defeating system of cost compliance auditing which bears little relation to quality or even shows much accuracy in the assessment of costs. It considered that there was a significant danger that the system will not survive if urgent efforts are not made to enable solicitors' firms to recruit young entrants into legal aid work, there being widespread evidence of serious recruitment and retention problems. It also considered that firms which do legal aid work subsidise the system in a way which is not sufficiently quantified by Government or acknowledged. Furthermore the Committee found that there was evidence of significant unmet need for legal services by many in society – often among those most vulnerable – and

that too much has been squeezed out of the Community Legal Service budget as a result of the twin pressures of criminal and asylum work. There was also seen to be a danger in focusing on too few firms for the provision of legal aid services as this will affect supply and the level of fees and there was also concern that over-specialisation prevented a holistic approach to the giving of advice. It considered that the highly desirable extension of provision and services had been possible only at the expense of cutting back on eligibility, scope and remuneration but that this process had now gone too far, with many persons of modest means being excluded. It recommended that: the civil and criminal legal aid budgets should be ringfenced so that the former is protected and considered quite separately; the cost calculation of policy initiatives should include an impact on the assessment of the legal aid budget; account should be taken of the needs of solicitors' firms for forward planning; legal aid lawyers should not be automatically excluded from employment tribunals as employers were often legally represented; there was a case for using knowledgeable advisers who were not lawyers to give advice in specific areas; there might be a case for some compulsion in the taking out of legal expenses insurance; and there should be further research on improving electronic means of access to advice, in particular to enable to enable less literate groups to use information technology (Fourth Report, HC 391-1).

Reasons for concern

The unmet need for legal services and the increasing constraints on the operation of the legal aid system.

Independence and impartiality

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Following the ruling in Eur.Ct.H.R.(Grand Chamber), *Grieves v United Kingdom* (Appl n° 57067/00) judgment of 16 November 2003 (final), it was found in Eur.Ct.H.R.(4th sect.), *G W v United Kingdom* (Appl n° 34155/96) and Eur.Ct.H.R. (4th sect.), *Le Petit v United Kingdom* (Appl n° 35574/97) judgments of 15 June 2004 (final) that the naval court martials by which the applicants had been tried did not constitute independent and impartial tribunals. A violation of Article 6(1) was also found in Eur.Ct.H.R.(4th sect.), *Miller and Others v United Kingdom* Appl nos 45825/99, 45826/99 and 45827/99) judgment of 26 October 2004 on the basis that their court martials had lacked structural independence and objective impartiality and such a violation was found on the same basis in Eur.Ct.H.R. (4th sect.), *Thompson v United Kingdom* (Appl n° 36256/97) judgment of 15 June 2004 (final) in respect of the summary proceedings before the applicant's commanding officer where the officer was central to the prosecution and was at the same time sole judge in the case. In the *Thompson* case there were also found to be violations of ECHR Articles 5(3) and (5) and Article 6(3)(c) as the commanding officer could not be regarded as a "judge or officer" for the purpose of the initial supervision of the applicant's initial detention, there was enforceable right to compensation in respect of this defect and legal representation from the summary trial had been excluded.

Legislative initiatives, national case law and practices of national authorities

The appellate committee of the House of Lords ruled in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, that the present practice whereby part-time judges in the Employment Appeal Tribunal might appear as counsel before a tribunal having previously sat with one or more lay members of the bench hearing the appeal should be discontinued as a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the lay member might be subconsciously biased, especially as

lay members looked to the judge for guidance on the law and could be expected to develop a fairly close relationship of trust and confidence with him or her.

Where a letter had been written to the original trial court in two cases by a juror after majority verdicts of guilty had been delivered which alleged that in one that other jurors had been racially prejudiced against the other and in the second that the other jurors had not properly considered the case as they had been concerned to reach a verdict as quickly as possible, it was held in *R v Connor* [2004] UKHL 2, [2004] 1 All ER 925 that the principle of the confidentiality of jury deliberations underpinned the independence and impartiality of a jury as a whole, reinforcing the values in ECHR Article 6 but (4-1) that the stipulation in the Contempt of Court 1981, s 8(1) that it was a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings was addressed to third parties, who could be punished for contempt, and not to the court which had the responsibility of ensuring that the defendant received a fair trial and so allegations suggesting that a defendant was not receiving or did not receive the fair trial to which he was entitled under Article 6(1) had to be considered and investigated within the limits set by the common law. However, it was considered in the instant cases that the rule that after the verdict had been delivered evidence directed to matters intrinsic to the deliberations of jurors was inadmissible applied and that the allegations were not bases for concluding that the verdicts were unsafe. The appellate committee also indicated that during the course of a trial it is a continuing duty of the trial judge to deal with any problems which arise with the jury and be alert to detect any signs which may lead to a risk of a mistrial and to this end the jury must be told of their right and duty both individually and collectively to inform the court clerk or the judge in writing if they believe that anything untoward or improper has come to their notice so that the judge can then deal with the matter in an appropriate way. In addition it was suggested that the adequacy of the existing video for jurors and the need for additional guidance for trial judges and court clerks should be reviewed.

Publicity of the hearings and of the pronouncement of the decision

Legislative initiatives, national case law and practices of national authorities

It was held in *Pelling v Bruce-Williams* [2004] EWCA Civ 845, [2004] 3 All ER 875 that statutory powers prohibiting the publication of material intended, or likely, to identify any child in any proceedings in a court in which a power under the Children Act 1989 might be exercised with respect to him or her, as well as rules requiring the hearing of such proceedings to be in chambers unless the court otherwise directs and rules imposing restrictions on the disclosure and inspection of documents in them, were essentially compliant with the rights to a public hearing and to freedom of expression under ECHR, Articles 6 and 10. However, it was also indicated that it would be desirable for the Master of the Rolls and the President of the Family Division to review the Court of Appeal's standard practice of restricting the identification of children in appeals, heard in open court from decisions made in proceedings under the 1989 Act

Reasonable delay in judicial proceedings

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

A violation of ECHR Article 6(1) was found in Eur.Ct.H.R.(4th sect.), *Eastaway v United Kingdom* (Appl no 74976/01) judgment of 20 July 2004 (final) in respect of various sets of proceedings brought against him after a group of companies had gone into receivership that had lasted eight years and eleven months. Such a violation was also found in Eur.Ct.H.R.(4th sect.), *Henworth v United Kingdom* (Appl no 515/02) judgment of 2 November 2004 (final) (in respect of criminal proceedings leading to a conviction for murder which had lasted some six years), Eur.Ct.H.R. (4th sect.), *King v United Kingdom* (Appl no 13881/02) judgment of 16 November 2004 (final) (in respect of tax penalty proceedings that had lasted thirteen years, ten months and twelve days) and Eur.Ct.H.R.(4th sect.), *Massey v United Kingdom* (Appl no 14399/02) judgment of 16 November 2004 (final) (in respect of criminal proceedings for indecent assault that had lasted four years, nine months and eleven days).

Legislative initiatives, national case law and practices of national authorities

The Criminal Procedure (Amendment) (Scotland) Act 2004 has reduced, in High Court cases only, from 12 to 11 months the period within which a trial on indictment must be commenced from the accused's first appearance which, if not observed, leads to the current proceedings falling and a bar on any further indictment on the charges concerned being issued. However, it also allows for this period and 12-month in sheriff court cases to be extended on cause being shown. In addition the Act provides that an accused may not be detained by virtue of a warrant committing him or her for trial for more than 80 days without an indictment having been served and that he or she shall be admitted to bail if one is not so served, as well as setting a limit to such detention of 140 rather than the current 1110 days for the commencement of the trial in High Court cases and introducing a limit of 110 days on the detention before the preliminary hearing introduced by the Act for such cases. The 110 day limit on detention is retained in sheriff court cases but in all forms of cases the present bar on prosecution where the limit is not observed is to be replaced by an entitlement to bail. There is also provision for the limits to be extended for cause being shown and detention may be continued for up to 72 hours where a prosecutor appeals against a refusal to extend a time limit.

On a reference on points of law raised by the Attorney General, the appellate committee of the House of Lords ruled (3-2) in *Attorney General's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 1 All ER 1049 that criminal proceedings could be stayed on the ground that there had been a violation of the reasonable time requirement in ECHR Article 6(1) only if a fair hearing was no longer possible or it was for any compelling reason unfair to try the defendant. Although once a breach of the reasonable time requirement was shown to have occurred it could not be cured, it was considered that it would be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of a defendant's other Article 6(1) rights in circumstances where the breach did not taint the basic fairness of the hearing at all and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all. If the breach were established before the hearing the appropriate remedy might be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant were in custody, his release on bail but if the breach were established after the hearing the appropriate remedy might be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to the acquitted defendant. Their Lordships further considered that, unless the hearing had been unfair or it had been unfair to try the defendant at all, it would not be appropriate to quash any conviction. They also ruled that, in the

determination of whether, for the purposes of Article 6(1), a criminal charge had been heard within a reasonable time, the relevant period commenced at the earliest time at which a defendant was officially alerted to the likelihood of criminal proceedings against him which in England and Wales would ordinarily be when he was charged or served with a summons.

Reasons for concern

Instances of unduly long criminal proceedings

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The trial in adult court of an 11 year old, who had tried to take the bag of an 87 year old, causing her to fall and fracture her arm, was held in Eur.Ct.H.R.(4th sect.), *S C v United Kingdom* (Appl n° 60958/00) judgment of 15 June 2004 (final) to violate ECHR Article 6(1) as, although an expert had found that "on balance" the applicant – who had a very low intellectual level for his age - had sufficient intelligence to understand what he had done was wrong and was fit to plead, the European Court of Human Rights was not convinced that it followed that he was capable of participating effectively in his trial to the extent required by that provision. The Court considered that, when a decision was taken to deal with a child, such as the applicant, who risked not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than through proceedings directed primarily at determining the child's best interests and those of the community, it was essential that he be tried in a specialist tribunal which was able to give full consideration to and make proper allowance for his particular difficulties and adapt its procedure accordingly.

Legislative initiatives, national case law and practices of national authorities

In dismissing an appeal against the granting of an application by the United States government for the enforcement of a confiscation order against the defendant's assets in the United Kingdom where the order had been confirmed after an appeal had been dismissed pursuant to the fugitive disentitlement doctrine (under which the court had a discretion to refuse to hear or decide an appeal on the ground that the defendant was a fugitive from justice), it was held in *Government of the United States of America v Montgomery (No 2)* [2004] UKHL 37, [2004] 4 All ER 289 that ECHR Article 6 was capable of being applied to the enforcement in an ECHR state of a judgment obtained in another state, whether or not the latter was an adherent to the ECHR but, as in the context of extradition or expulsion, an extreme degree of unfairness would have to be established amounting to a virtually complete denial or nullification of Article 6 rights. It was considered that the fugitive disentitlement doctrine was not an arbitrary deprivation of a party's right to a hearing but was intended to be a means of securing proper obedience to the orders of the court and, although the application of the doctrine could be regarded as failing to secure all of the protection required by Article 6, it was a rational approach which had commended itself to the federal jurisdiction in the United States. As a consequence it was held that it could not be described as a flagrant denial of the defendant's Article 6 rights or a fundamental breach of the requirements of that article.

The Vulnerable Witnesses (Scotland) Act 2004 makes provision for the use of special measures by child and vulnerable witnesses – adults the quality of whose evidence may be diminished either as a result of a mental disorder or due to fear or distress of the witness associated with giving their evidence - in civil proceedings, including the use of live television links and screens and being accompanied by supporters. A court should not allow

special measures to be continued if it is satisfied that the risk of prejudice to the fairness of the proceedings significantly outweighs the risk of prejudice to the witness.

A claimant, who had spent nearly ten years in prison and whose conviction had been quashed on the basis that his deportation to the United Kingdom – which had been contrary to the law of the deporting country and international law – had involved an abuse of process rendering the conviction unsafe, was held in *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 3 All ER 65 not to be entitled to compensation under the Criminal Justice Act 1988, s 133 – which provided for compensation where a miscarriage of justice is established - as there had been no failure in the trial process itself. It was further held that the Secretary of State was entitled not to make an award under an ex gratia scheme on the basis of treating as exceptional a case in which there appeared to him to be no reason to doubt the claimant's guilt. The ruling left open the question of whether the term 'miscarriage of justice' in s 133 only applied where it is established that the person concerned was clearly innocent or could also cover failures of the trial process.

Reasons for concern

The appropriateness of the arrangements for trying children.

Article 48. Presumption of innocence and rights of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

The Terrorism Act 2000, s 11(2) – which provides that it is a defence for a person charged with the offence under s 11(1) of belonging or professing to belong to a proscribed organisation to prove that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member and that he has not taken part in the activities of the organisation at any time while it was proscribed – was held in *Attorney General's Reference (No 4 of 2002)* [2003] EWCA Crim 762, [2004] 1 All ER 1 not to breach ECHR Article 6(2) as, although the defence imposes a legal rather than an evidential burden of proof on an accused, the ingredients of the offence are set out fully in s 11(1), which defines the gravamen of the offence even when read together with s 11(2) which identifies a very specific exception applicable to a limited class of defendants, and it is clear that Parliament intended that a person should be guilty of an offence under s 11(1) irrespective of whether or not he had played any active part in the proscribed organisation. It was also held that, even if the offence was not of the nature suggested, any interference was not disproportionate given the defendant is the person peculiarly able to establish the date on which he became a member of a proscribed organisation or first professed membership. In addition it was held that s 11 was also compatible with ECHR Article 10, subject to the caveat that there may be circumstances in a particular case in which a provision such as s 11 might involve a disproportionate infringement of an individual's freedom of expression, difficult though it may be to envisage such a situation in the abstract. Furthermore in *Attorney General's Reference (No 1 of 2004)*, *The Times*, 30 April 2004 the Court of Appeal that reverse burdens of proof would usually be justified if the prosecution had to prove the essential ingredients of the offence but it was fair and reasonable, in respect of a particular issue, to deny the defendant the general protection normally guaranteed by the presumption of innocence. It was emphasised that important considerations were that: the exception went no further than was reasonably necessary to achieve the objective of the reverse burden; the difficulty for the prosecution to establish the facts; and whether a fair trial would be prevented. It was also considered that the need for a reverse burden was not necessarily reflected by the gravity of the offence, although from a defendant's point of view the more

serious the offence the more important it was that there was no interference with the presumption of innocence.

The rules governing the evidence in criminal matters

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The use against the applicant in a criminal trial of transcripts of his examination by an official receiver in bankruptcy proceedings, which were obtained under the exercise of compulsory powers and which played a significant part in the case against him, was found in Eur.Ct.H.R.(4th sect.), *Kansal v United Kingdom* (Appl no 21413/02) judgment of 27 April 2004 (final) to infringe his right not to incriminate himself and thus deprived him of the right to a fair hearing under ECHR Article 6(1).

No reason was found in Eur.Ct.H.R.(Grand Chamber), *Edwards and Lewis v United Kingdom* (Appl nos 39647/98 and 40461/98) judgment of 27 October 2004, the Government having decided that it no longer wished to pursue a referral, to depart from the finding in the Chamber judgment of 22 July 2003 that 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. In this case 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.

Legislative initiatives, national case law and practices of national authorities

The Vulnerable Witnesses (Scotland) Act 2004 deals firstly with certain matters relating to the giving of evidence by vulnerable witnesses, defined as children under 16 at the time a complaint or an indictment is served on an accused or adults where the quality of whose evidence may be diminished either as a result of a mental disorder or due to fear or distress of the witness associated with giving their evidence. These include: a general rule that children under 12 are to give evidence away from a court building in cases of abduction, child theft and offences of a sexual or violent nature, with a power for the court to order otherwise either if the child concerned so wishes and the court considers this appropriate or if there is a significant risk of prejudice to the trial that significantly outweighs any risk of prejudice to the interests of the child; the possibility of making special measures for the giving of evidence by adult vulnerable witnesses, including the accused; the use of live television links for the giving of evidence; and the use of screens to conceal the witness from the accused; allowing witnesses to be accompanied by supporters; allowing previously recorded statements to be used as their main evidence without the need for them to be adopted. In addition it imposes a duty on a court to consider whether there are any vulnerable witnesses in a case, dispenses with the need for a vulnerable witness to identify the accused in the dock if there has been a previous identification procedure, prohibits an accused from conducting his or her own defence in cases of abduction, child theft or violent offences involving a child witness under the age of 12 and gives a power for the court to make such a prohibition in cases other than sexual and certain other offences involving vulnerable witnesses generally unless a significant risk of prejudice to the trial that outweighs any risk of prejudice to the interests of the witness and prohibits an accused from personally precognoscing a child witness (i.e., interviewing him or her to establish the evidence to be given) in cases where he or she is prohibited from conducting his or her own defence.

In dismissing appeals contending that it was incompatible with ECHR Article 6 for a judge to rule on a claim to public interest immunity in the absence of adversarial argument on behalf of the accused where the material which the prosecution was seeking to withhold was, or might be, relevant to a disputed issue of fact which the judge had to decide in order to rule on an application which would effectively determine the outcome of the proceedings, it was held in *R v H* [2004] UKHL 3, [2004] 1 All ER 1269 that the golden rule was that full disclosure of any material held by the prosecution which weakened its case or strengthened that of the defendants should be disclosed to the defence but that, in circumstances where such material could not be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest, some derogation from the golden rule could be justified, although this was always to be the minimum necessary to protect the public interest in question and had never to imperil the overall fairness of the trial. It was considered that the appointment of special counsel as an advocate in public interest immunity matters to represent a defendant in an ordinary criminal trial would be made where it was necessary to secure protection of his right to a fair trial but such an appointment would always be exceptional and should not be ordered unless and until the trial judge was satisfied that no other course would adequately meet the overriding requirement of fairness to the defendant. In the instant case it was held that the judge had not addressed the first question of what the material was which the prosecution sought to withhold – which should be addressed before considering in turn its impact on the cases of the prosecution or the defence, whether there was a real risk of serious prejudice to an important public interest, whether the defendant's interest could be protected without disclosure, whether the measures proposed to protect the defendant's interests represented the minimum derogation to protect the public interest, whether limited disclosure would render the trial process viewed as a whole unfair and whether that answer remained the same as the trial unfolded, evidence was adduced and the defence was advanced - and his decision to seek the appointment of special counsel had accordingly been premature.

A direction to a jury in the trial of the defendant for conspiracy to defraud that they were entitled under the Crime and Public Order Act 1994, s 34 to draw such inferences as appeared proper to them from his failure to mention when interviewed by the police (at which he had made no comment) that he was merely an innocent dupe where he gave no evidence at the trial and his defence was that the prosecution had not proved beyond reasonable doubt that he was involved in the conspiracy and that he was in fact an innocent dupe of the others involved was held in *R v Chenia* [2002] EWCA Crim 2345, [2004] 1 All ER 543 to be permitted by s 34 as it expressly contemplated that a fact might be relied upon by the defendant which was not put in evidence on his behalf and the trial judge had identified the essential facts relied upon by the defence. It was observed that it might not be appropriate not to give a direction under s 34 where the 'fact' not revealed in interview constituted the defence to the charge but that would only be in the simplest and most straightforward of cases and the instant case was not such a case. It was also held that it did not necessarily follow from the fact the judge had failed to direct the jury in accordance with the last part of the Judicial Studies Board's specimen direction, in that the judge had not identified the evidence on the basis of which the defence invited the jury not to hold it against him that he failed to mention a fact relied on, that there had been a breach of the right to a fair trial under ECHR Article 6 or that a conviction was unsafe and it was considered that in the circumstances of the instant case the defendant had been fairly tried and safely convicted.

It was held in *Mawdesley v Chief Constable of the Cheshire Constabulary* [2004] EWHC 1586 (Admin), [2004] 1 All ER 58 that a form requiring information under the Road Traffic Act 1988, s 172 as to the identity of the driver of a vehicle (sent to its owner with a notice of intended prosecution for driving in excess of the speed limit) that had been completed with some or all of the information required to be given but did not have a signature or mark in the designated space could not amount to a statement in writing purporting to be signed by the accused but would be a confession within the Police and Criminal Evidence Act 1984, s 82(1)

if it was to be properly inferred from the evidence that the entries in it had been completed by that person. Furthermore an unsigned form, being information obtained in accordance with a statutory requirement, fell within the exceptions to the need for a caution and was capable of giving rise to a case to answer. In addition it was held that the admissibility of such a confession obtained in response to the requirement in s 172 was not a disproportionate legislative response to the problem of maintaining road safety such that it was incompatible with ECHR Article 6. Furthermore it was not considered in *R v Senior* [2004] EWCA Crim 454, [2004] 3 All ER 9 that fairness required the exclusion, pursuant to the Police and Criminal Evidence Act 1984, s 78, of the questions and answers in routine questioning of persons who had been stopped when arriving through the green channel, including a request to identify their bags without any prior caution. This was because the questions were of a type which any traveller would expect to face upon entry to the country and there had thus been no surprise or unfairness at the time the questions were asked. Furthermore there had been no dispute over the content of the questions and answers and the defendants had not been put under any difficulty or disadvantage in the trial process in explaining their position to the jury.

The right to freely choose one's defence counsel

Legislative initiatives, national case law and practices of national authorities

In upholding a motorist's conviction for failing without reasonable excuse to provide a specimen of blood contrary to the Road Traffic Act 1988, s 7(6) despite an objection that he had been unable to consult a solicitor, in accordance with the Police and Criminal Evidence Act 1984, s58, prior to the commencement of the procedure, it was held in *Myles v Director of Public Prosecutions* [2004] EWHC 594 (Admin), [2004] 2 All ER 902 that the sample-taking process should not be delayed to any significant extent for the purpose of obtaining legal advice. It was further held that special reasons for expunging or reducing a term of disqualification below the minimum period – 12 months - could not be widened so as to include and permit the granting of just satisfaction where that was required in response to a breach of Article 6 such as the delay in the progress of the motorist's appeal but that this delay could be reflected by quashing the financial penalty that had also been imposed.

Other relevant developments

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

No reason to disagree with the acceptance by the Government that a failure to give a defendant (who had been charged with assault occasioning bodily harm and failure to answer bail) or his legal representative the opportunity to address a magistrates' court before an order was made binding him over to keep the peace was a breach of ECHR Article 6(1) and (3)(c) was found in Eur.Ct.H.R.(4th sect.), *Hooper v United Kingdom* (Appl n° 42317/98) judgment of 16 November 2004 (final).

Legislative initiatives, national case law and practices of national authorities

The Criminal Procedure (Amendment) (Scotland) Act 2004 extends the existing prohibition on a defendant conducting his own defence – in cases involving certain sexual offences and cases involving vulnerable witnesses (see above) – to representation at the mandatory preliminary hearing established by the Act. It also introduces a power for a court to proceed with a trial in the absence of an accused once evidence has been led which substantially implicates him or her where, having regard to the point at which the failure to appear occurred, it is in the interests of justice to do so and the court is satisfied that there is a solicitor with authority to act for the accused. This adds to the existing possibilities of trials in

the absence of an accused where the accused is insane or has been removed because of disruptive behaviour.

In allowing an appeal against the committal of the defendant – who was serving a sentence of imprisonment - for contempt of court when, by an administrative error, the prison service had not produced him for a hearing on an application for committal for failure to comply with certain disclosure obligations arising under a freezing order made against his assets, it was held in *Raja v van Hoogstraten* [2004] EWCA Civ 968, [2004] 4 All ER 793 that it could not be right (save in wholly exceptional circumstances) nor consistent with ECHR Article 6(3) for a judge to proceed with an effective hearing of an application to commit, in circumstances where he knew that the alleged contemnor wished to be heard in person but was prevented from being present by matters over which he had no control, on the ground that if the alleged contemnor were present there would be nothing that he could say that would alter the judge's view that the contempt had been established.

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

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

In rejecting the defendant's appeal against his conviction in 2002 of the rape of his then wife in 1970, it was held in *R v C* [2004] EWCA Crim 292, [2004] 3 All ER 1 that ECHR Art 7 did not prevent the proper conviction of a man for the rape of his wife at a time before what was, on analysis, the fiction of deemed consent had finally been dissipated in March 1991. The Court of Appeal found that it followed from the reasoning in Eur.Ct.H.R., *S W v United Kingdom*, judgment of 22 November 1995, analysis of the supposed immunity and a true understanding of the limits of its ambit, that a distinction based on the dates when the rapes which were the subject of decisions ruling that a relationship with the victim had no bearing on whether someone was a rapist had occurred and the date of the rape in the instant case could not be sustained.

Convictions for the offence of causing a public nuisance in two cases – one where the defendant had sent through the post, at the height of a security alert, an envelope containing salt which had leaked out at the sorting office, causing the evacuation of postal workers and the attendance of specialist police officers to determine whether the salt was anthrax and the other where the defendant had sent, over a nine-year period, several hundred postal packages containing racially offensive material – were upheld in *R v Goldstein* [2003] EWCA Crim 3450, [2004] 2 All ER 589. The court considered that this common law offence continued to exist and that its use did not involve any breach of ECHR Article 7 as the elements of the offence were sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his behaviour; a citizen, appropriately advised, could foresee that the conduct identified was capable of amounting to a public nuisance. The court also held that the offence was not capable of amounting to a breach of ECHR Articles 8 or 10 since it was a proper and proportionate response to the need to protect the public from acts or omissions which substantially interfered with the comfort and convenience of the public, as being taken in the interests of public safety, for the prevention of crime or disorder, for the protection of health or morals and, in particular, the need to protect the rights of others. It was considered that the level of imprecision in the offence was necessary to enable it to be applied flexibly to meet new situations.

There was also held to be no infringement of ECHR Article 7 in *R (on the application of Uttley) v Secretary of State for the Home Department* [2004] UKHL 38, [2004] 4 All ER 1 where the claimant, who had been sentenced in 1995 to twelve years' imprisonment for a number of sexual offences committed prior to 1983, had been released after serving two-

thirds of his sentence and the terms of his licence remained in force until he reached the three-quarters point of his sentence. Although his release would have been unconditional under the regime applicable at the time he had committed the offences, the court did not consider that he was being subjected to a heavier penalty than could have been imposed then as the 'applicable' penalty for the purposes of Art 7(1) was the maximum sentence that could have been imposed and the sentence of twelve years' imprisonment, with release on licence after serving eight years, was manifestly less severe than the possible sentence of life imprisonment, the maximum available in 1983.

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

APPENDIX: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (O.J. C-364 OF 18.12.2000

CHAPTER I: DIGNITY

Article 1: Human dignity

Human dignity is inviolable. It must be respected and protected.

Article 2: Right to life

1. Everyone has the right to life.
2. No one shall be condemned to the death penalty, or executed.

Article 3: Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

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

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

CHAPTER II: FREEDOMS

Article 6: Right to liberty and security

Everyone has the right to liberty and security of person.

Article 7: Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8: Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

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

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 10: Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Article 11: Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Article 12: Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 13: Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Article 14: Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

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

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Article 16: Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 17: Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

Article 18: Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

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

1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CHAPTER III: EQUALITY

Article 20: Equality before the law

Everyone is equal before the law.

Article 21: Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic
features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 22: Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Article 23: Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

Article 24: The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private

institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 25: The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 26: Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

CHAPTER IV : SOLIDARITY

Article 27 : Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

Article 28: Right of collective bargaining and action

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

Article 29: Right of access to placement services

Everyone has the right of access to a free placement service.

Article 30: Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

Article 31: Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

Article 32: Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education.

Article 33: Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Article 34: Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient
resources, in accordance with the rules laid down by Community law and national laws and practices.

Article 35: Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

Article 36: Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

Article 37: Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

Article 38: Consumer protection

Union policies shall ensure a high level of consumer protection.

CHAPTER V: CITIZENS' RIGHTS

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

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

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

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Article 41: Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her
adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of
confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

Article 42: Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

Article 43: Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

Article 44: Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

Article 45

Freedom of movement and of residence
1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Article 46: Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

CHAPTER VI : JUSTICE

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

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48: Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

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

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.
2. This Article shall not prejudice the trial and punishment of any person for any act or omission
which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.
3. The severity of penalties must not be disproportionate to the criminal offence.

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

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

CHAPTER VII: GENERAL PROVISIONS

Article 51: Scope

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

Article 52: Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Article 53: Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights

and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54: Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.