EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
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CFR-CDF

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE UNITED KINGDOM IN 2005

submitted to the Network by **Jeremy McBride**

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The EU Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon 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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PRELIMINARY REMARKS

The survey that follows is subject to the same caveats as those attached to previous reports, 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 some potentially positive legislative and case law developments in the course of 2005, some of which might come to be regarded as examples of good practice for wider emulation. These include:

- the extension of the jurisdiction of the Independent Police Complaints Commission to cases where persons have died or been seriously injured following some form of direct or indirect contact with the police where there is reason to believe that this contact may have caused or contributed to the death or serious injury;
- the enactment of the the Prohibition of Female Genital Mutilation (Scotland) Act 2005;
- the successful prosecution for torture in *R v Zardad* and the ruling in *A v Secretary of State for the Home Department (No 2)* that evidence obtained by torture was not to be admissible against a party to proceedings in a British court irrespective of where, by whom or on whose authority the torture had been inflicted, notwithstanding that the latter could be undermined by the relatively weak stance of the majority that doubt as to the use of torture is insufficient for evidence to be excluded;
- the financial support for voluntary organizations that provide services and support for young people at risk of becoming involved in prostitution and the substantial financial and technical assistance towards efforts to tackle the trafficking of children that originates in Asian countries;
- the protection from harassment in one's home provided by the offence created in the Serious Organised Crime and Police Act 2005;
- the conclusion in *Re Wyatt* that a clinician may refuse treatment for reasons of professional conscience but should not another from so acting should that clinician feel able to do so;
- the ruling in the *Denbigh High School* case that a school uniform policy cannot be insisted upon without first considering whether the requirements in it are necessary in a democratic society;
- the adoption of a power to direct excluded pupils to attend alternative educational provision;
- the extended scope of the protection against discrimination on grounds of disability;
- the plans to extend the payment of child benefit to include young people on unwaged vocational training or in full-time advanced education;
- the arrangements for judicial appointments in the Constitutional Reform Act 2005, which have the potential to reinforce judicial independence and to establish a clearer separation of powers between the executive and the judiciary.

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

- the lack of public disclosure before the tragic death of Mr Menezes of the fact that the tactics to deal with suspected terrorists had been changed;
- the length of time taken for the investigation into the shooting, which has still not been finalised;
- the time taken to correct inaccurate information given to, or circulating in, the media about the events and Mr Menezes;
- the conclusion that the status of occupying power was found insufficient in the *Al-Skeini* case to engage responsibility for the purposes of Article 2 ECHR ;
- the view on the part of the executive that there was nothing untoward in the use of indefinite detention or in the treatment of individual detainees;
- the continuing problem of overcrowding in prisons;
- the treatment of women suspected of being victims of trafficking for the purpose of prostitution ;
- the absence of any accurate, reliable data regarding the trafficking of children, the number of children involved in prostitution or in hazardous occupation;
- the apparent inadequacy of the protection for migrant workers against exploitation;
- the very low age of criminal responsibility and the high number of children in penal custody;
- the extent of the restrictions imposed in control orders made under the Prevention of Terrorism Act 2005;
- the inadequacy of the arrangements for communication between a Special Advocates and an appellant after they have seen cleared material;
- the conclusion in the *Al-Jedda* case that a United Nations Security Resolution was to be regarded as displacing the requirements of ECHR Article 5 rather being a possible authority for deprivation of liberty to be used consistently with them;
- the decision to maintain in force the reservation to the Convention on the Rights of the Child, whereby the rights in the Convention do not apply as regards the entry, stay in and departure form the United Kingdom of children subject to immigration control;
- the delay in fully implementing the ruling in the *Hashman and Harrup* case;
- the absolute requirement for 24 hours' notice before a demonstration can be held in a designated area within a kilometre from Parliament Square;
- the continuing inadequacy of the arrangements for education in prison;
- the five day time-limit for the filing of appeals against negative Asylum and Immigration Tribunal decisions;
- the use of unenforceable diplomatic assurances that individuals will not be ill-treated in an effort to facilitate their deportation to countries that do not currently fulfil their existing legal obligations not to use torture and inhuman and degrading treatment;
- the inadequacy of the measures being taken to protect Roma/Gypsies and Travellers from discriminatory treatment;
- the failure to accept rights of individual petition under Article 14 of CERD, and under the Optional Protocol to the ICCPR;
- the continuing gender pay gap;
- the high level of unemployment amongst the disabled; and
- the inadequacy of the lowest wages payable to young workers.

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 2006.

CHAPTER I . DIGNITY

Article 1. Human dignity

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 2. Right to life

Euthanasia (active, passive, assisted suicide)

Legislative initiatives, national case law and practices of national authorities

The guidance issued by the General Medical Council entitled *Withholding and Withdrawing Life-prolonging Treatment: Good Practice* was held in *R (on the application of Burke) v. General Medical Council* [2005] EWCA Civ 1003 not to be unlawful. It was considered that there was nothing in the guidelines that justified the fear of the claimant, who suffered from a congenital degenerative brain condition that would ultimately leave him in need of artificial nutrician and hydration ("ANH") by tube to survive but who would retain full cognitive faculties even during the end stage of the disease), that those caring for him might decide that his life was not worth living and withdraw ANH to bring it to an end, notwithstanding that he was able to communicate to them that he wished them to continue to keep him alive.

Other relevant developments

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

The Committee of Ministers has adopted an interim resolution (ResDH(2005)20, 23 February 2005) with respect to the measures taken or envisaged to ensure compliance with the judgments in Eur.Ct.H.R. (4th sect.) *Finucane v. United Kingdom* (Appl. no 29178/95) judgment of 1 July 2003), Eur.Ct.H.R. *Jordan v. United Kingdom* (3rd sect.) (Appl. no 24746/94) judgment of 4 May 2001, Eur.Ct.H.R. (3rd sect.) *Kelly and Others v. United Kingdom* (Appl. no 30054/96) judgment of 4 May 2001, Eur.Ct.H.R. (3rd sect.) *McKerr v. United Kingdom* (Appl no 28883/95, 4 May 2001), Eur.Ct.H.R. (4th sect.) *McShane v United Kingdom* (Appl. no 43290/98) judgment of 28 May 2002 and Eur.Ct.H.R. (3rd sect.) *Shanaghan v United Kingdom* (Appl. no 37715/97) judgment of 4 May 2001) in which the European Court of Human Rights had found violations of Article 2 ECHR in respect of various failings in the investigative procedures concerning the death of the applicants' relatives, namely: lack of independence of police investigators investigating the incident from the officers or members of the security forces implicated in the incident (*Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane);* the independent police investigation did not proceed with reasonable expedition (*McKerr, McShane);* lack of public scrutiny and information to the victims' families on the reasons for the decision of the Director of Public Prosecutions not to prosecute any officer in respect of relevant allegations (*Jordan, McKerr, Kelly and others, Shanaghan, Finucane);* the inquest procedure did not play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed (*Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane*); he scope of examination of the inquest was too restricted (*Shanaghan, Finucane*); there was no prompt or effective investigation into allegations of collusion (*Shanaghan, Finucane*); the persons who shot the deceased, and in the *McShane* case, the soldier who drove the armoured personnel carrier that fatally injured the applicant's husband, could not be required to attend the inquest as witnesses (*Jordan, McKerr, Kelly and others, McShane*); the non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the families' ability to prepare for and to participate in the inquest and/or contributed to long adjournments (*Jordan, McKerr, Kelly and others, Shanaghan, McShane*); the absence of legal aid for the representation of the victim's family (*Jordan*); the public interest immunity certificate had the effect of preventing the inquest from examining matters relevant to the outstanding issues in the case (*McKerr*); and the inquest proceedings did not commence promptly and did not proceed with reasonable expedition (*Jordan, McKerr, Kelly*

and others, Shanaghan, McShane). In particular it noted that certain general measures remained to be taken and that further information and clarifications were outstanding with regard to a number of other measures, including, where appropriate, information on the impact of these measures in practice. The Committee's on-going assessment of measures taken so far or envisaged covers "calling in" arrangements for police investigations (ie,requesting that an incident be investigated by officers from a police service from Great Britain) ; the role of the Serious Crimes Review Team whose remit is "to review a number of unsolved major crimes, including murder and rape, where it is thought that new evidential leads may be developed"; the possibility of judicial review of decisions not to prosecute under the Human Rights Act 1998; new practices with respect to the verdicts of coroners' juries at inquests; developments regarding disclosure at inquests (following the judgment in *R v. Her Majesty's Coroner for the Western District of Somerset, ex parte Middleton* [2004] UKHL 10, the Court of Appeal in Northern Ireland found on 10 September 2004 in the case of *Jordan* ([2004] NICA 29 and [2004] NICA 30) that Rule 16 of the Coroners' Rules for Northern Ireland could and must be read in such a manner as to allow the inquest to set out its findings regarding the contested relevant facts that must be determined to establish the circumstances of the death. This could be achieved either in the form of a narrative verdict or of a verdict giving answers to a list of specific questions asked by the coroner); legal aid for inquests under the previous *ex gratia* scheme; measures to give effect to recommendations following reviews of the coroners' system; and the Inquiries Bill intended to serve as a basis for a further inquiry in one of these cases. The Committee called on the United Kingdom government rapidly to take all outstanding measures and to continue to provide the Committee with all necessary information and clarifications to allow it to assess the efficacy of the measures taken, including, where appropriate, their impact in practice. It should be noted that since November 2000, there has been an independent Police Ombudsman in Northern Ireland, established by virtue of the Police (Northern Ireland) Act 1998, with the power to investigate all complaints against the police, including deaths alleged to have been caused by police officers acting in the course of their duty. Where it appears that the conduct of a member of the police service may have resulted in the death of a person the Chief Constable is required, under section 55(2) of the Act, to refer the matter to the Police Ombudsman. The Ombudsman does not adjudicate on guilt or punishment but, where the report of the investigation indicates that a criminal offence may have been committed by a police officer, the Ombudsman is required to send a report, together with any appropriate recommendations, to the Director of Public Prosecutions, who carefully considers the evidence, information and recommendations of the Ombudsman. It is for the DPP to decide if a prosecution should be commenced; this decision is based on the application of the test for prosecution, namely whether there is sufficient, admissible evidence to afford a reasonable prospect of conviction and, if there is, whether prosecution is in the public interest. In all cases, the DPP informs the Ombudsman by letter of the decision taken and the reasons for it.

It should also be noted that Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should ensure that the public inquiries recommended by the Cory report are capable of establishing the full circumstances surrounding the deaths of the four individuals concerned (Billy Wright, and Robert Hamill, Rosemary Nelson and Patrick Finucane) where the collusion of state actors had been alleged and meeting the legitimate interests of their families. The Commissioner also recommended that the United Kingdom should ensure the access of coroners to all relevant material held by the police and that inquests conducted into suspicious deaths in Northern Ireland prior to the adoption of the Human Rights Act are capable of satisfying the requirements of Article 2 ECHR.

In Eur.Ct.H.R. (3rd sect.) *Bubbins v. the United Kingdom* (Appl. no 50196/99 judgment of 17 March 2005 no violation of Article 2 on account of the actions of the armed police officer who had fired the shot killing the applicant's brother following a siege at his flat (having been mistakenly believed to have had a gun, having ignored previous warnings to give himself up and having conveyed on occasions a clear impression that he would open fire), the planning and control of the operation (which had remained at all times under the control of senior officers with the

deployment of the armed officers having been reviewed and approved by the tactical firearms advisers who had been summoned to the scene) or any failure to conduct an effective investigation. Although the Coroner had directed the inquest jury to return a verdict of lawful death, this had not deprived the proceedings of their effectiveness since, if an independent judicial officer such as a Coroner decided after an exhaustive public procedure that the evidence heard on all relevant issues clearly pointed to only one conclusion, and did so in the knowledge that his decision might be subject to judicial review, it could not be maintained that this decision impaired the effectiveness of the procedure. However, it did hold (6-1) that there had been a violation of the right to an effective remedy under Article 13 because, notwithstanding that the inquest procedure had provided in the circumstances an effective mechanism for subjecting the circumstances surrounding the killing to public and searching scrutiny, and had thereby satisfied the procedural obligations under Article 2, no judicial determination had ever been made on the liability in damages, if any, of the police on account of the manner in which the incident had been handled and concluded. In the instant case, the applicant, even if ultimately successful in a civil action against the police, had had no prospect of obtaining compensation for non-pecuniary damage since domestic law did not provide for such. On that account, it would also have been most improbable that she would have received legal aid to take civil proceedings.

Legislative initiatives, national case law and practices of national authorities

The death on 22 July of Jean Charles de Menezes, a Brazilian citizen, who was shot in the head seven times after officers wrongly suspected him of being a suicide bomber following a surveillance operation connected with several suicide bombings in London but without having first been challenged or warned by the police, has led to the public disclosure of 'Operation Kratos', the name given to a range of tactics used to defend against the threat from suicide bombers. Operation Kratos was developed by the Metropolitan Police Service, in partnership with the national body for policing in the United Kingdom, the Association of Chief Police Officers ("ACPO"), after the terrorist attacks in the United States on 11 September 2001. It was adopted as national policy and promulgated through the 'Terrorism and Allied Matters Committee' of the Association of Chief Police Officers to all Forces around the United Kingdom in January 2003 (*Suicide terrorism*, report by the Metropolitan Police Commissioner to the Metropolitan Police Authority, 27 October 2005). There are three separate plans under this generic title: Operation Andromeda is designed to deal with the spontaneous sighting by a member of the public of a suspected suicide bomber; Operation Beach is where there is an intelligence-led covert operation to locate and arrest persons suspected of involvement in acts of terrorism; and Operation Clydesdale is where intelligence has been received about a suicide attack on a pre-planned event. The options for all three operations range from an unarmed stop of the suspect by uniformed officers, through to the deployment of armed police officers but the detailed range of tactics involved is not in the public domain. Specially trained ACPO officers, acting as the 'Designated Senior Officer', (DSO) will command these operations. It is the DSO who will give the order to a firearms officer to shoot. Legal advice to support this stance has been obtained. There is a DSO on call 24 hours per day, seven days per week to deal with suspected suicide terrorist incidents. An important consideration in the tactics developed is the possible use by a suicide terrorist of a type of explosive that are extremely sensitive to impact, shock and electrostatic discharge and the advice of Government scientists that the use of baton guns, Taser, or firearms that impact on this material will cause it to detonate. Another important consideration is reliance on evidence that suicide bombers will spontaneously detonate their devices if they believe they have been identified, meaning that any tactics deployed have to involve officers acting covertly to retain the element of surprise and they have to ensure immediate incapacitation to eradicate any opportunity for the bomber to cause the device to function. It has been emphasised by the Metropolitan Police Service that this is not a 'shoot to kill' policy and that the tactics are wholly consistent with Section 3 of the Criminal Law Act 1967, which provides that 'A person may use such force as is reasonable in the circumstances in the prevention of crime, or in the effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large'. This legal requirement is also articulated in the ACPO Manual of Guidance on Police Use of Firearms. There is no specific legal requirement for an

officer to give a verbal challenge before firing and the ACPO Police Use of Firearms manual suggests that there will be occasions when it is not appropriate or practical to do so. The Metropolitan Police Service has stated there is a constant review of the threat and intelligence to ensure tactics are appropriate and proportionate and reviews of the policy have been undertaken within it and also at the national level. As a result of the former review the tactical options have been widened to cover a greater range of operational circumstances. There has also been a change to the terminology used in order to improve clarity around tactical selection. Training to update DSOs on these developments is imminent. The actual circumstances leading to the death of Mr Menezes is the subject of an investigation by the Independent Police Complaints Commission.

In dismissing appeals against the refusal of judicial review applications in respect of the alleged failure and/or refusal to conduct independent inquiries into the deaths of five persons shot in separate armed incidents involving British troops in Iraq and of a sixth person who died in a British military prison there, it was held in *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2005] EWCA Civ 1609 that the United Kingdom, although an occupying power, was not in effective control of Basrah City during the Iraq occupation from May 2003 until June 2004 for the purposes of the ECHR and therefore, with respect to the five persons shot, did not apply to acts of British troops there during that period. There had been a concession in respect of the sixth death that the United Kingdom was exercising extra-territorial jurisdiction and the 1998 Act applied accordingly to this case, which was remitted to the administrative for consideration of further evidence as to whether there had been an infringement of the United Kingdom's procedural obligations in respect of Articles 2 and 3 ECHR.

The Policing Board of Northern Ireland has decided to purchase a new plastic bullet, renamed the Attenuating Energy Projectile, which still has the potential to kill. British-Irish Rights Watch reported that no assessments had been carried out on the possible effects of the new bullet on children and young people, who have been over-represented among the casualties of former versions of the rubber and plastic bullet, and that the Board had failed to consult with those critical of this new generation of potentially lethal weapon; March 2005.

The Serious Organised Crime and Police Act 2005 amends Part 2 of the Police Reform Act 2002 to bring a new category of cases under the jurisdiction of the Independent Police Complaints Commission. The new category, 'death or serious injury matters', will cover cases where persons have died or been seriously injured following some form of direct or indirect contact with the police and there is reason to believe that the contact may have caused or contributed to the death or serious injury. They will be cases that do not involve a complaint or a conduct matter when first identified and categorised. Such cases may relate to the direction and control of a police force, which would normally be excluded by section 14 of the Act. On completion of the investigation, a final report into a death or serious injury matter will be submitted and the Independent Police Complaints Commission may make recommendations or give advice. Where the investigation reveals a conduct matter (a criminal or disciplinary offence), the matter will be treated as a conduct matter from that point forward.

In dismissing an application to quash the inquest verdict into the unexpected death of the claimant's father in a hospital following an elective surgical procedure, where the coroner had not called any witnesses other than the pathologist and the consultant but had available to him the deceased's medical records, the report of the post mortem, background information from the deceased's general practitioner and a medical report from the consultant who had carried out the procedure, it was held in *R (on the application of Goodson) v. Bedfordshire and Luton Coroner* [2004] EWHC 2931 (Admin), [2005] 2 All ER 791 that there was no separate procedural obligation under Article 2 ECHR where a death in hospital raised no more than a potential liability in negligence. In such cases the requirement of an effective investigation was linked to the positive obligation of the state to establish a framework of legal protection, including an effective judicial system, for determining the cause of death and any liability on the part of the medical professionals involved. An inquest played only a part in the discharge of the state's positive obligation under Article 2 to set up an effective judicial system and it could not be challenged on

the ground that by itself it was insufficient to meet the Article 2 obligation. The totality of available procedures, including the possibility of a civil claim in negligence, had to be looked at. It would only be in exceptional cases, where the circumstances gave rise to the possibility of a breach of the state's positive obligations to protect life under Article 2 that the separate procedural function would arise and an inquest might have to perform the function of dischargin that obligation. In the instant case there had been no question of any actual or possible breach of the state's positive obligations under Article 2 and the coroner had therefore been correct to refuse to conduct the inquest as an investigation for the purposes of Article 2. Moreover his decision had been otherwise lawful as his judgment that fuller investigation was not required had been reasonable on the material before him.

As part of its campaign to end the deaths of children in penal custody and to end the unnecessary use of penal custody for children (see also "Article 6"), the Howard League for Penal Reform has revealed that an average of two children die in prisonevery year and twenty-seven of the twenty-nine children who died since 1990 had taken their own lives, one was the victim of homicide and one boy died whilst being restrained by staff. Twenty-seven of the children died in prisons and two died in privately run jails for children, secure training centres. It also revealed that two boys had had died in prisons in 2005 : a 16 year old hanged himself in Lancaster Farms prison and a 17 year was found in his cell in Hindley prison with a ligature round his neck.; press release, 26 September 2005.

Positive aspects

The extension of the jurisdiction of the Independent Police Complaints Commission to cases where persons have died or been seriously injured following some form of direct or indirect contact with the police where there is reason to believe that this contact may have caused or contributed to the death or serious injury has the potential to eliminate uncertainties about the responsibility of the police for serious injuries or deaths.

Reasons for concern

Comment on the precise circumstances in which the use of force by the police led to the death of Mr Menezes would be premature but the lack of public disclosure before this tragic event of the fact that the tactics to deal with suspected terrorists had been changed is disconcerting. While full disclosure of them might well undermine the efficacy of preventive operations, some awareness that there had been a change of approach might have allowed for a thorough scrutiny of the adequacy of the arrangements in place to ensure that the new tactics could be implemented in a manner consistent with the requirements of Article 2 ECHR. The length of time taken for the investigation into the shooting, which has still not been finalised, is a matter of concern, as is the time taken to correct inaccurate information given to, or circulating in, the media about the events and Mr Menezes. There must also be concern about the conclusion that the status of occupying power was found insufficient in the *Al-Skeini* case to engage responsibility for the purposes of Article 2 ECHR.

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

Like the Female Genital Mutilation Act 2003 for England, Wales and Northern Ireland, the Prohibition of Female Genital Mutilation (Scotland) Act 2005 repeals and re-enacts for Scotland the provisions of the 1985 Act, gives extra-territorial effect to those provisions and increases the maximum penalty for FGM - procedures which include the partial or total removal of the external

female genital organs for cultural or other non-therapeutic reasons - in Scotland from 5 to 14 years' imprisonment. Further, it makes additional forms of FGM unlawful, allows the Scottish Ministers to modify the procedures which are offences and adds the offences under the Act to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act")(offences against children under 17 to which special provisions apply). This provides the additional powers of arrest without warrant specified in section 21 of the 1995 Act in respect of those offences. Further, by virtue of section 48 of the 1995 Act, the listing of FGM offences in Schedule 1 to the 1995 Act will allow a convicting court to refer a child who was the victim of an FGM offence as well as any child living in the same household as the victim or person convicted of the offence to the reporter to the children's panel. The listing of FGM offences in Schedule 1 to the 1995 Act will also give the reporter grounds of referral to refer a child who was the victim of an FGM offence, as well as any child living in the same household as the victim or person convicted of the offence, to a children's hearing. In addition to a referral at the time of the offence, the listing will also allow the reporter to refer to a children's hearing children who are or become or are likely to become members of the same household as either the victim or the offender, even where there was no subsequent conviction with regard to those children.

Positive aspects

The enactment of the Prohibition of Female Genital Mutilation (Scotland) Act 2005.

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

Centres for the detention of foreigners

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

In the CPT Report of its visit on 23 July 2004 (published in 9 June 2005) there is a note of an immediate observation, pursuant to Article 8(5), of the Convention, concerning three persons detained under the the Anti-terrorism, Crime and Security Act 2001 ("ATCSA"). The delegation stressed that it was clinically inappropriate to place the first of these persons, who was suffering from a most severe post-traumatic stress disorder and who had been transferred from Belmarsh Prison to Broadmoor Special Hospital, in an establishment that was mainly tasked with the care of dangerous and violent patients. It asked for him to be transferred as a matter of urgency to a different type of treatment facility. It also asked for immediate steps to be taken to ensure that the second person, who suffered from major physical disabilities, received the care and treatment warranted by his condition and it stressed that, if this person remained in his present conditions in Belmarsh, which did not offer the appropriate treatment facilities, his state of health was likely to deteriorate further. The delegation also asked for urgent consideration to be given to the transfer of the third person, who suffered from a disability (amputation of both forearms) that prevented him from urinating or defecating unaided and whose mental state had deteriorated seriously as a result of his detention, leading to both severe depression and post-traumatic stress disorder, to an establishment with proper facilities to deal with his physical disability and to treat his mental disorder, in a humane environment. It further stressed that psychiatric treatment for this detainee – which must not be delayed any longer – was both an acute, life-saving measure and an essential prerequisite for any rehabilitative effort. These persons were subsequently released on bail. In addition the CPT recommended that: staff at Belmarsh Prison to be reminded that ill-treatment of any form, including threats, abusive or aggressive language and mockery, will not be tolerated and will be the subject of severe sanctions; the necessary steps to be taken to ensure that ATCSA detainees whose state of health so requires benefit, without further delay, from treatment appropriate to their specific needs, in or with the support of appropriate care facilities capable of offering the therapeutic environment necessary for such treatment and a proper doctor-patient relationship; the approach to managing persons deprived of their liberty under ATCSA to be

reviewed, having due regard to the guidelines that it set out, and alternative approaches must be found if the prisobn system is unable to meet these needs; it should be expressly provided that persons certified under the ATCSA enjoy the right of access to notification of custody, the right of access to a lawyer and the right of access to a doctor as from the very outset of their deprivation of liberty, whatever their place of custody; it should be expressly provided that, where necessary, the assistance of a qualified interpreter must be organised to enable ATCSA detainees to benefit fully from the exercise of those three rights; steps to be taken to ensure that ATCSA detainees are informed in writing of all their rights in a language they understand; and proactive and constant efforts to be made to guarantee to persons detained under ATCSA humane and decent treatment preserving their physical and psychological integrity. In its comments the CPT stated that it trusts that, as part of the anti-bullying strategy developed by the Prison Service over several years, the United Kingdom authorities will take the necessary steps to ensure that Belmarsh Prison staff are alert to the risk of racist conduct by other prisoners towards ATCSA detainees and intervene appropriately whenever necessary. It also stated that the United Kingdom authorities must ensure that there are no more instances of ATCSA detainees not being able to have access to their lawyers In its response (9 June 2005) the United Kingdom Government categorically rejected the suggestion that at any point during their detention the ATCSA detainees were treated in an "inhuman or degrading" manner that may have amounted to a breach in the United Kingdom's international human rights obligations. It firmly believed that at all times the detainees received appropriate care and treatment in Belmarsh and had access to all necessary medical support, both physical and psychological, from medical support staff and doctors. The Government accepts that the individuals had difficult backgrounds prior to detention, but does not accept that "detention had caused mental disorders." Some of the detainees had mental health issues prior to detention, but that did not stop them engaging in the activities that led to their certification and detention.

It should also be noted that Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom take all possible measures to ensure that foreigners detained under Immigration Act powers are not held in ordinary prisons.

Reasons for concern

Concern about the approach to managing persons deprived of their liberty under ATCSA may be less pressing given the move to use of control orders without imprisonment under the Prevention of Terrorism Act 2005 (see 'Article 6' below) but the view on the part of the executive that there was nothing untoward in the use of indefinite detention or in the treatment of individual detainees is disturbing.

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

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should ensure that evidence suspected of having been extracted through torture is in no case admissible and in particular is not relied on in control order proceedings.

Legislative initiatives, national case law and practices of national authorities

An Afghan warlord was, pursuant to the Criminal Justice Act 1988, s 134 and the Taking of Hostages Act 1982, convicted of conspiring to torture and take hostages in Afghanistan in the 1990s in *R v. Zardad*, 7 April 2005. The defendant, who was sentenced to twenty years

imprisonment, was found to be capable of being treated as a public official on a *de facto* basis and the conviction relied in part on video identification procedures.

The Joint Committee on Human Rights has expressed its concern about the possible use of torture evidence by United Kingdom authorities. It has concerns about whether the Government has any system in place for ascertaining whether intelligence which reaches it in relation to people allegedly involved in terrorism-related activity has been obtained by torture. It observed that the Prevention of Terrorism Bill (now the 2005 Act) was silent on this question, despite the obvious concern that the material relied on by the Government to obtain control orders may well include material which has been obtained by torture. It recommended that the Government takes the opportunity presented by this Bill to implement the UNCAT recommendation that it give some formal effect to its expressed intention not to rely on or present in any proceedings evidence which it knows or believes to have been obtained by torture. This recommendation was not followed; *Prevention of Terrorism Bill*, HL 68/HC 334, 4 March 2005.

However, evidence obtained by torture was held in *A v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71 not to be admissible against a party to proceedings in a British court irrespective of where, by whom or on whose authority the torture had been inflicted and the cases of the appellants - who had been certified under the Ant-terrorism, Crime and Security Act 2001, s 21 as persons whose presence in the United Kingdom was a risk to national security and who were suspected of being a terrorist - were remitted to the Special Immigration Appeals Commission for reconsideration of the refusal to cancel the certificates, the commission having previously concluded that the fact that evidence relied upon for the purpose of issuing them had or might have been procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to its weight but did not render it inadmissible. All the Law Lords accepted that it was for an applicant to raise a plausible argument (but not to prove) that evidence may have been obtained through torture, with it then falling to the court to make necessary enquiries. However, while a strong dissenting minority of three Law Lords considered that evidence is inadmissible unless it can be proved that it was *not* obtained through torture, the majority (four Law Lords) held that where there remained *doubt* as to whether evidence is obtained through torture, it may be admitted, with no account being taken of this doubt. As Lord Bingham states in his minority opinion: “This is a test which, in the real world, can never be satisfied. The foreign torturer does not boast of his trade.” The ruling does not resolve the question of the extent to which, if at all, the executive can take account of evidence obtained by torture in actions that it might take but it it is likely to preclude any reliance on such evidence in proceedings concerned with the legality of those actions.

The grant to the mother of a young child (Z) - who suffered from beta thalassaemia major and whose best chance of a cure was by transplant of stem cells from a tissue compatible donor, where the probability of a such donor who was not a sibling being extremely low - of a licence under para 1(1)(d) of Schedule 2 to the Human Fertilisation and Embryology Act 1990 for IVF treatment, having the embryos tested for beta thalassaemia major by pre-implantation fenetic diagnosis (PGD) and for tissue compatibility with Z by human leukocyte antigen (HLA) typing was upheld in *R (on the application of Quintavelle) v. Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 All ER 555 on the basis that both PGD and HLA typing could lawfully be authorised by the authority as activities to determine the suitability of the embryo for implantation within the meaning of para 1(1)(d) since the concept of suitability was broad enough to include suitability for the purposes of the particular mother. Furthermore it was considered that Parliament had not intended to confine the authority’s powers to unsuitability on grounds of genetic defect; the limits of permissible embryo selection were for the authority to decide. The fact that decisions left by the 1990 Act to the authority might raise difficult ethical questions was no objection as it had been specifically created to make ethical decisions and, if Parliament should consider it to be failing in that task, it had regulatory powers in reserve.

Positive aspects

The successful prosecution for torture in *R v. Zardad* and the ruling in *A v. Secretary of State for the Home Department (No 2)* that evidence obtained by torture was not to be admissible against a party to proceedings in a British court irrespective of where, by whom or on whose authority the torture had been inflicted. However, the latter could be undermined by the relatively weak stance of the majority that doubt as to the use of torture is insufficient for evidence to be excluded and it remains to be seen how this will be applied in practice.

Reasons for concern

The absence of any acknowledgement on the part of the executive of its obligation to take action, or to press for the taking of action, against those who have provided it with evidence which has been, or could reasonably be suspected of having been, obtained by torture.

Protection of the child against ill-treatments

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

The European Committee of Social Rights has concluded that, as corporal punishment within the family had not been prohibited and the defence of reasonable chastisement still existed, the situation in the United Kingdom was not in conformity with Article 16 ESC. Mr L Francois dissented from this conclusion on the basis that it failed to distinguish between acts which could truly endanger the physical integrity, dignity and psychological development of a child and acts as innocent as a light slap on the hand or a smack on the bottom administered by parents, in the child's interests, to a young child who will not listen to reason and persists with dangerous behaviour. Since the adoption of the conclusions the Act 2004, s had come into force and precluded the use of reasonable chastisement as a defence to offences of (assault occasioning actual bodily harm, cruelty to persons under 16 and wounding and causing grievous bodily harm. It is expected that this will allow mild smacking but that any punishment causing visible bruising, grazes, scratches, minor swellings or cuts would lead to prosecution; *Conclusions XVII-2*. See also "Article 14".

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should ensure that the detention of minors for any period be authorised by a judicial authority, and be subject to periodic judicial review.

The Committee of Ministers has adopted a resolution (ResDH(2005)112, 26 October 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (2nd sect.) *Z W v. United Kingdom* (Appl. no 34962/97) judgment of 29 July 2003 (Friendly Settlement), namely, fulfilment of an undertaking to pay the applicant £77,000 in respect of a complaint that the local authority had failed to protect the applicant's welfare while she was in foster care and that she had had no legal remedy whereby she might express her complaints;

Legislative initiatives, national case law and practices of national authorities

The Drugs Act 2005 inserts a new section 4A into the Misuse of Drugs Act 1971 and stipulates the circumstances which a court must treat as aggravating factors in respect of the offence of supply of a controlled drug. New section 4A(2) requires a court to treat either or both of two conditions - when a person supplies a controlled drug on or in the vicinity of school premises when they are being used by children and young people and within one hour of any such time and when a person causes or permits a child or young person to deliver a controlled drug to a third person or to deliver a drug related consideration to himself or a third person in connection with the offence of

supply of a controlled drug - as aggravating factors and, where either condition is met, to state that the offence is so aggravated.

Other relevant developments

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should: address the problem of over-crowding in prisons through the construction of new detention facilities and greater investment in alternative sentences and non-custodial pre-trial supervision; improve the psychiatric support services in the adult prison estate; increase the capacity of National Health Service secure accommodation facilities so as to enable the transfer of all detainees in need of full time psychiatric treatment; improve the educational and psychiatric support services in juvenile and young offender detention facilities; ensure that purposeful activity targets in Young Offender Institutions are met; and, in Scotland, eradicate slopping out in all detention facilities.

Legislative initiatives, national case law and practices of national authorities

In response to Liberty's request for police to investigate allegations that CIA flights taking suspects to face torture have landed at United Kingdom airports, Greater Manchester Police Chief Constable Michael Todd has confirmed that he will look into "extraordinary rendition" flights on behalf of the Association of Chief Police Officers; press release, 19 December 2005.

Reasons for concern

The continuing problem of serious overcrowding in prisons.

Article 5. Prohibition of slavery and forced labor

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

Legislative initiatives, national case law and practices of national authorities

Anti-Slavery International has expressed concern about the treatment of 19 women suspected of being trafficked and rescued in a police raid in Birmingham. Those who were non-European Union citizens were held in a detention centre and none of them was referred to a specialist shelter, despite police suspecting they were trafficked. On 4 October, the Home Office announced that six of the women would be removed the following day but subsequently their removal was temporarily suspended. Anti-Slavery International has called on the United Kingdom to ratify the European Convention on Action Against Trafficking in Human Beings; 5 October 2005.

Five Albanian men were sentenced in London on 1 December to a total of 63 years for trafficking women to the United Kingdom from Lithuania.

Reasons for concern

The treatment of women suspected of being victims of trafficking for the purpose of prostitution.

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)

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

In a Individual Direct Request concerning Convention No. 182, Worst Forms of Child Labour, 1999, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations drew the Government's attention to the fact that, by virtue of Article 3(a) of the Convention, the sale and trafficking of children, including for labour exploitation, constituted one of the worst forms of child labour and are therefore prohibited for children under 18 years of age and expressed the hope that the proposed new law prohibiting the trafficking of persons for labour exploitation will soon be promulgated. The Committee took due note of the Government's indication that a best practice guide on trafficking for immigration officers, police and others potentially dealing with trafficking is being developed. This guide will raise awareness of the difference between trafficking and smuggling, and help those concerned to treat victims of trafficking fairly. The Committee took due note of the adoption of the Sexual Offences Act, 2003 which contains detailed provisions on the sexual exploitation of children. The Committee observed that, according to section 48 of the Act, a person (A) commits an offence if: (a) he intentionally causes or incites another person (B) to become a prostitute, or to be involved in pornography, in any part of the world; and (b) either: (i) B is under 18, and A does not reasonably believe that B is 18 or over, or (ii) B is under 13. The Committee noted that similar wording is used in several other provisions such as section 49 (controlling a child prostitute or a child involved in pornography) and section 50 (arranging or facilitating child prostitution or pornography). It noted with concern that a person who, for example, incites a child of 14 years to become a prostitute does not commit an offence in so far as he/she reasonably believes the child is 18 years old. It observed that only children under 13 years of age are protected, with certainty, from sexual exploitation. The Committee drew the Government's attention to the fact that, by virtue of Article 3(b) of the Convention the use, procuring or offering of a child for prostitution, or for the production of pornography or for pornographic performances is considered to be one of the worst forms of child labour, and that under the terms of Article 1 of the Convention, each member State which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. It also drew the Government's attention to the difficulty to ascertain the exact age of boys and girls. The Committee asked the Government to provide information on the meaning of the term "reasonably believes" and relevant court decisions in this regard. The Committee encouraged the Government to extend the scope of application of section 4(1) of the Children and Young Persons Act, 1933 – which prohibits anyone from causing or allowing a person under 16 to be used for begging - to children under 18. The Committee noted that the Government had initiated "Project Reflex" which is a practical multi-agency taskforce on organized immigration crime which includes people trafficking. It brings together all the key agencies involved in combating the problem, including the immigration service, the national criminal intelligence service, the security and intelligence agencies and key police forces. Under this project, a ground-breaking joint operational unit comprising the national crime squad and immigration services officers was set up. Its three main tasks are to develop intelligence leads for the operational arm, to carry out surveillance and to provide legal assistance to investigations with a view to future prosecutions. The Committee requested the Government to provide information on the achievements and impact of Project Reflex, especially with regard to child trafficking. The Committee took due note of the Government's indication, in its report, on the applicable penalties, including penal sanctions for person contravening the legal provisions regarding the worst forms of child labour. The Committee observed, for instance, that according to section 145 of the Nationality, Asylum and Immigration Act, 2002 a person who is convicted for the trafficking of a child under 18 years of age for the purpose of controlling him/her in prostitution is liable to imprisonment for a term not

exceeding 14 years, or/and an unlimited fine. Section 146(4) further states that when the offender is sentenced to imprisonment of at least 12 months, he/she will be disqualified from working with children in the future, whether in a paid or unpaid occupation. The Committee also noted that a person who pays for sexual services with a child of under 18 years of age, is liable to imprisonment for a term not exceeding 14 years (section 47(4) of the Sexual Offences Act, 2003). If the victim is under 13 years of age, the offender is then liable to life imprisonment (section 47(3) of the Sexual Offences Act). A person causing or inciting a child to become a prostitute or to be involved in pornography is liable to imprisonment for a term not exceeding 14 years (section 48(2)(b) of the Sexual Offences Act). The Committee further noted that an employer who contravenes the provisions on the employment of children shall be liable to a fine not exceeding £1,000 (section 21 of the Children and Young Person's Act 1933, as amended). The Committee noted that the Government had published the guidance on interagency working to safeguard and promote the welfare of children, which was reinforced and expanded by the "Safeguarding children involved in prostitution guidance - Supplementary guidance on working together to safeguard children" in 2000. The Committee also took due note of the information provided by the Government concerning the National Plan for Safeguarding Children From Commercial Sexual Exploitation published in September 2001. The guidance includes paragraphs on child pornography and the Internet, and children involved in prostitution. It aims at reinforcing cooperation between all agencies and professionals to work together to: (a) recognize the problem of the sexual exploitation of children; (b) treat the children involved primarily as victims of abuse; (c) safeguard children and promote their welfare; (d) work together to prevent abuse and provide children with opportunities and strategies to exit from prostitution; (e) investigate and prosecute those who coerce, exploit and abuse children through prostitution. The National Plan also provides for the establishment of Area Child Protection Committees (ACPCs). ACPCs bring together relevant statutory and voluntary bodies to consider both strategic planning and coordinating services to protect children from abuse, especially commercial sexual exploitation. The Committee took due note that the Department of Health had commissioned a short-term project to provide basic quantitative data to measure the extent to which the guidance is being implemented throughout the United Kingdom. However, the Committee observed that the data are not precise with regard to the number of children involved in prostitution. It solely shows that ACPCs are aware of children engaged in prostitution. The Committee asked the Government to continue to provide information on the achievements of the National Plan for Safeguarding Children From Commercial Sexual Exploitation, and its impact with regard to removing children from commercial sexual exploitation and providing for their rehabilitation and social integration. The Committee noted the Government's indication that the needs of children involved in drug trafficking are taken into account in the Home Office general guidance to police in respect of action to disrupt supply. However, no specific guidance has been produced to date to encourage police to proactively identify children involved in trafficking. The Committee also noted the Government's statement that the Home Office will ensure during 2002-03 that the support material for police forces includes specific reference regarding the need to work to reduce the numbers of children involved in trafficking through arrest and publicity of the risks involved in trafficking. The Committee asked the Government to provide information on the concrete measures taken to reduce the numbers of children involved in trafficking and their impact. The Committee noted that the National Plan for Safeguarding Children From Commercial Sexual Exploitation indicates that appropriate responses to the needs of particularly vulnerable groups shall be identified. The following are considered to be vulnerable groups: children in public care, children who go missing, refugees and asylum-seeking children and children involved in the entertainment and sports industries. The Committee observed that the Government financially supports voluntary organizations that provide services and support for young people at risk of becoming involved in prostitution. The Committee requested the Government to indicate the time-bound measures taken or envisaged to protect these children from commercial sexual exploitation. The Committee observed that the Government increased the resources available to the police to investigate computer pornography and established a Task Force on Child Protection on the Internet. The Task Force is considering the adequacy of the criminal law to protect children on the Internet, information and public awareness. The Committee requests the Government to provide

information on the findings of the Task Force and the impact of its actions. The Committee noted the Government's indication that the Home Office Crime Reduction programme is funding four projects concerning children and young persons who are either at risk of or actively engaged in sex work and sexual exploitation. The Committee asked the Government to provide examples of concrete measures taken pursuant to the Home Office Crime Reduction programme and the results attained. The Committee noted that the United Kingdom is a member of Interpol which helps cooperation between countries in the different regions especially in the fight against trafficking of children. It also observed that the Government signed in 1992 the United Nations Convention on the Rights of the Child; in 2000, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography; in 2003, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; the United Nations Convention for Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others. The Committee further observed that the Government provides substantial financial and technical assistance to ILO/IPEC and supports other international agencies such as UNICEF. It noted with interest that the Government works with other governments and non-governmental organizations to address the problem of child labour. Thus, the Department for International Development provided approximately £3 million for a programme in the Greater Mekong region, covering parts of Cambodia, China, Laos, Thailand and Viet Nam. This programme seeks to address the prevention, protection and rehabilitation of trafficked women and children. It also observes that the United Kingdom is working in India with the Government and the ILO on a state-based programme for the elimination of child labour in Andhra Pradesh, and on a national child labour survey. In Bangladesh, the United Kingdom is supporting primary education programmes which target hard to reach children engaged in hazardous labour and which plan to support the design of the Time-Bound Programme for the Elimination of Child Labour. In Pakistan, support has been provided for the programme to protect the rights and livelihoods of working children in football stitching and other industries. The Committee noted that the Government of the United Kingdom and the Philippines signed, in 1997, a Memorandum of Understanding to cooperate to combat the sexual exploitation of children. The Committee asked the Government to provide information on the impact of these technical cooperation programmes.The Committee observed that the Government is contributing to the EU STOP Programme, which provides support to member State organizations responsible for action against the trade in human beings and the sexual exploitation of children. The Committee further noted that the Government participated in the establishment of Asia-Europe Meeting (ASEM) resource centre. This centre aims at providing information about combating child sexual exploitation such as the legislation in force in ASEM countries, best practices in the implementation of policies and guidelines on child protection, and contacts in each country for police, prosecution, and immigration. The Committee noted the Government's and TUC's indications that there is currently no accurate, reliable data in existence within the United Kingdom regarding the trafficking of children, the number of children involved in prostitution or in hazardous occupations in the United Kingdom. Thus, the Government estimates that between 140 and 1,400 women and children are trafficked each year into the United Kingdom for the purposes of sexual exploitation. It also noted that due to the hidden nature of the act it is difficult to have such data. The Committee nevertheless strongly encouraged the Government to collate reliable statistics to establish the number, age, origins or destination of trafficked children, child prostitutes and children involved in the worst forms of child labour. Such statistics would be helpful to launch appropriate programmes of action.

Positive aspects

The substantial financial and technical assistance towards efforts to tackle the trafficking of children that originates in Asian countries.

Reasons for concern

The absence of any accurate, reliable data regarding the trafficking of children, the number of children involved in prostitution or in hazardous occupation.

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Legislative initiatives, national case law and practices of national authorities

A report from the Trade Union Congress on migrant workers in the United Kingdom shows many migrant workers, regardless of their immigration status, being forced to work very long hours, being paid below the minimum wage and enduring dangerous working conditions in a range of sectors including agriculture, construction, hospitality, food processing, contract cleaning, nursing and care homes. It cites examples of workers being threatened with deportation if they complained, the retention of their passports by employers preventing them from changing jobs, the use of bonded labour where employers held workers over a debt, and intimidation and use of violence towards workers with little English and limited knowledge of their rights. The report urges that the same rights apply to migrant workers as other workers in the United Kingdom and that the Government cracks down on employers who break employment law. It states that is vital that all workers have the right to organise and that all migrants are protected from abuse regardless of their status; *Forced Labour and Migration in the UK*, February 2005.

Reasons for concern

The apparent inadequacy of the protection for migrant workers against exploitation

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Pre-trial detention.

Legislative initiatives, national case law and practices of national authorities

The Drugs Act 2005 includes a provision allowing a court to remand a prisoner to the custody of a police officer where it is suspected that the prisoner has swallowed drugs to conceal evidence and avoid prosecution. Currently the police may detain a person in police detention under the Police and Criminal Evidence Act 1984 for a maximum of 96 hours prior to charge but this is not necessarily a sufficient period of time for swallowed evidence to be recovered.

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

A violation of Article 5(4) ECHR was found in Eur.Ct.H.R. (4th sect.) *Blackstock v. United Kingdom* (Appl. nº 59512/00) judgment of 21 June 2005 in respect of the lapse of time (22 months) between the reviews concerning his continued detention as a discretionary life prisoner and thus the delay in changing his security classification as part of the process to be followed towards open conditions and planned release prior to release. The Court further held that there had been a violation of Article 5(5) as there was no possibility of obtaining compensation at the relevant time in domestic law in respect of the violation of Article 5(4).

Legislative initiatives, national case law and practices of national authorities

In granting applications for judicial review of the Parole Board's refusal without an oral hearing to direct the release of two determinate sentence prisoners following the revocation of their release on licence for breach of the conditions on that licence, it was held in *R (on the application of Smith) v. Parole Board* [2005] UKHL 1, [2005] 1 All ER 755 that the Board, being empowered (a) to examine whether circumstances had arisen sufficient in law to justify further detention of a determinate sentence prisoner released on licence and, if so, (b) to decide whether the protection of the public called for the further detention of the individual detainee, would in its review only satisfy the requirements of Article 5(4) ECHR if it was conducted in a manner that met the requirements of procedural fairness. In each of the instant cases the Board had breached its duty of procedural fairness by failing to offer the prisoners an oral hearing of his representations against revocation of his licence and was accordingly in breach of Article 5(4).

However, it was subsequently held (Lords Bingham and Steyn dissenting) in *Roberts v. Parole Board* [2005] UKHL 45 that the Parole Board had express and implied power to withhold material relevant to a prisoner's parole review from his legal representatives and to disclose that material to a specially appointed advocate, who represents the prisoner at a closed hearing before the Board - as occurred in the present case on the grounds that the safety of the source of the information or evidence would be at risk if the material were disclosed - provided that in all the circumstances of the particular case significant injustice will not be done to the prisoner. It was considered that if the Board came to a decision in favour of the prisoner or revealed at least the gist of the case against the offender, then there might be no injustice to the prisoner but, if that was not what happened at the end of the proceedings, the Board would have to consider whether there had been compliance with Article 5(4) ECHR and the minimum requirements of fairness which were to be

implied from the nature of the Board's duty under the Criminal Justice Act 1991. If there had not been compliance then either necessary steps had to be taken to ensure compliance or the non-disclosed material could not be relied on.

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should: bring the age of criminal responsibility in the different jurisdictions of the United Kingdom in line with European norms; and provide greater investment in alternative sentences for juvenile and young offenders. He also recommended that the United Kingdom should raise to 16 the age at which children in breach of terms of Anti-Social Behaviour Orders may be sentenced to custody. Moreover the European Committee of Social Rights has concluded that, as the age of criminal responsibility – 10 in England, Northern Ireland, Wales and the Isle of Man and 8 in Scotland - was manifestly too low, the situation in the United Kingdom was not in conformity with Article 17 ESC; *Conclusions XVII-2*.

Legislative initiatives, national case law and practices of national authorities

As part of its camp to end the deaths of children in penal custody and to end the unnecessary use of penal custody for children (see also "Article 2"), the Howard League for Penal Reform has revealed that: the number of children in penal custody has risen from 3,130 in October 2004 to 3,423 in September 2005, an increase of 10% in a year; the majority of children are detained in prisons with 2,933 in Prison Service custody, 245 in local authority secure children's homes, and 245 held in secure training centres; the number of children remanded into Prison Service custody has increased by 26%, from 403 in October 2004 to 507; the number of girls in penal custody has increased by 35% from 198 in October 2004 to 267 in September 2005; the number of girls held in prisons has increased by 31% from 85 to 11; and the number of boys held in prisons has increased from 2,589 to 2,822 in a year (press release, 26 September 2005).

Following the conclusion in the Government's review of international human rights instruments that the reservation to the Convention on the Rights of the Child (also reflected in a reservation to the International Covenant on Civil and Political Rights) allowing for children to be detained alongside adults where there is a lack of suitable accommodation in separate facilities should remain in force, the Joint Select Committee on Human Rights concluded that the Government should establish a timetable for full provision of separate accommodation for children, and withdrawal of the reservation; *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.

Reasons for concern

The very low age of criminal responsibility and the high number of children in penal custody.

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

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom

should: provide for the automatic judicial review of the continuing administrative detention of foreigners under Immigration Act powers beyond three months; ensure that adequate legal representation is provided in such cases; ensure the public availability of comprehensive statistics relating to the detention of minors under Immigration Act powers; increase the use of alternative forms of supervision of families with children pending deportation; and ensure that the detention of minors for any period be authorised by a judicial authority, and subject to periodic judicial review.

Legislative initiatives, national case law and practices of national authorities

In *R (on the application of Khadir) v. Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114 it was held that paragraph 16 of Schedule 2 to the Immigration Act 1971 authorised detention so long as the Secretary of State remained intent upon removing a person liable to be removed and there was some prospect of achieving that, with the word 'pending' meaning no more than 'until'. The fact that it might become unreasonable actually to detain the person pending a long delayed removal did not mean that the power had lapsed; the person remained 'liable to detention' and the ameliorating possibility of his or her temporary admission in lieu of detention then arose under paragraph 21 of Schedule 2.

Other relevant developments

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom provide for the judicial authorisation of all control orders (see below) and ensure that the essential content of the right to a fair trial under Article 6 ECHR is guaranteed where necessary.

No violation of Article 5(1) ECHR was found in Eur.Ct.H.R. (4th sect.) *Kolanis v. the United Kingdom* (Appl. no 517/02) judgment of 21 June 2005 in respect of the compulsory detention of the applicant on account of a mental illness because treatment or supervision necessary to protect her own health and the safety of the community was not available. As, in the situation under consideration a failure by the local authority to use "best efforts" or any breach of duty by a psychiatrist in refusing care in the community would be amenable to judicial review, te Court was not persuaded that local authorities or doctors could wilfully or arbitrarily block the discharge of patients into the community without proper grounds or excuse, or that that was what occurred in the applicant's case. However, as for over a year, the applicant was unable to have the issues arising from supervening events as they affected her continued detention examined by a court and that the lapse of 12 months before it was reviewed on the Secretary of State's referral could not be regarded as sufficiently prompt to remedy that defect, the Court held that there had been a violation of Article 5(4). Furthermore, in the light of its finding of a breach of Article 5(4) and noting that the United Kingdom Government had accepted that there was no enforceable right to compensation before the entry into force of the Human Rights Act 1998, the Court further held that there had been a violation of Article 5(5) but that no separate issues arose under Article 13.

Legislative initiatives, national case law and practices of national authorities

The Prevention of Terrorism Act 2005 provides for the making of 'control orders' imposing obligations on individuals suspected of being involved in terrorism-related activity. 'Involvement in terrorism-related activity' for the purposes of the Act as: (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates or is intended to facilitate the commission, preparation or instigation of such acts; (c) conduct which gives encouragement or is intended to give encouragement to the commission, preparation or instigation of such acts;

(d) conduct which gives support or assistance to those known or believed to be involved in terrorism-related activity; and applies regardless of whether these relate to specific acts or to terrorism in general. These are preventative orders which are designed to restrict or prevent the further involvement by individuals in such activity. A control order may impose any obligations necessary for purposes connected with preventing or restricting an individual's further involvement in terrorism-related activity. The intention is that each order will be tailored to the particular risk posed by the individual concerned. Obligations that may be imposed include prohibitions on the possession or use of certain items, restrictions on movement to or within certain areas, restrictions on communications and associations, and requirements as to place of abode. It will be possible to make control orders against any individuals suspected of involvement in terrorism-related activity, irrespective of nationality, or terrorist cause. The Secretary of State is required to consult the chief police officer of the relevant police force about the evidence relating to the individual before he makes a control order to see if there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism. He is also required to inform that chief police officer when he has made a control order and the chief police officer is required to keep the investigation of the individual's conduct under review for the duration of the control order to see if prosecution for a terrorism-related offence becomes possible. Control orders that do not involve derogating from Article 5 ECHR, called 'non-derogating control orders', will be made by the Secretary of State. The Secretary of State must seek permission from the court to make a non-derogating control order. However, in cases of urgency, the Secretary of State can make an order without first seeking the permission of the court but he must refer it immediately to the court for confirmation. Control orders that do involve derogating from Article 5 ECHR will be made by the court itself on application from the Secretary of State. Such control orders are called 'derogating control orders'. All control orders will be subject to full hearings by the High Court or Court of Session Control order, involving the hearing of evidence in open and closed session with Special Advocates representing the interests of the individuals concerned in the latter. Rules may be made allowing the controlled person, or the Secretary of State, to apply for an order requiring the anonymity of the controlled person, even before court proceedings have begun. The Act amends the Regulation of Investigatory Powers Act 2000, s 18 to allow for the admission of interception evidence in control order proceedings or any proceedings arising from such proceedings. There will be a right of appeal on a point of law from a decision of the High Court or Court of Session. At a full hearing of a non-derogating order, the Court must consider whether any of the following decisions of the Secretary of State were flawed: his decision that there are reasonable grounds for suspecting that the person was involved in terrorism-related activity; his decision that a control order is necessary for purposes connected with protecting members of the public from the risk of terrorism; and his decisions on the imposition of each of the obligations imposed by the order. The civil standard of proof will apply to the question of involvement in terrorism-related activity in hearings relating to derogating control orders. The tests which the court must consider when deciding if a derogating control order can be made are that it must appear to the court that: (a) there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity; (b) there are reasonable grounds for believing that the obligations in the control order are necessary for purposes connected with protecting members of the public from a risk of terrorism; (c) the risk in question arises out of or is associated with a public emergency in respect of which there is a designated derogation from all or part of Article 5 ECHR; and (d) that the obligations in the control order are of a description set out in the designation order. In full hearings on control orders, the court can quash the control order, modify the obligations which it imposes or, in the case of non-derogating control orders, give directions to the Secretary of State to revoke or modify the control order. A non-derogating control order will last for 12 months and may be renewed, while a derogating control order will last six months, unless it ceases to have effect but can also continue for more than six months if the court renews it. There is provision in the Act for the arrest and detention of an individual in respect of whom the Secretary of State is seeking a derogating control order. He may be arrested and detained for 48 hours in the first instance, with the possibility of the court extending the detention for a further 48 hours. A constable may arrest someone under this section if the Secretary of State has applied to the court for a derogating

control order to be made and the constable considers that the individual's arrest and detention are necessary to ensure the individual is able to receive notice of the order when it is made. The constable must take the arrested individual to an appropriate "designated place" If it considers it necessary to ensure that the individual is available to receive any notice, the court may during the first 48 hours of such detention, extend the period of detention for up to a further 48 hours. The power of detention shall cease once a person becomes bound by a derogating control order (ie once it has been served) or once the court dismisses the application from the Secretary of State. Breach of an obligation imposed by a control order, without reasonable excuse, will be a criminal offence punishable, following conviction on indictment, with a prison sentence of up to 5 years, or a fine, or both; or, following summary conviction, to a prison sentence of up to 12 months (or 6 months in Scotland or Northern Ireland), or a fine, or both. There is provision for an independent review of the operation of the Act, with the first review to be carried out after the Act has been in operation for nine months and subsequent reviews to be carried out annually, and for reports by the Secretary of State to Parliament every three months on his exercise of the control order powers during that period. Where a derogation is in place which has been approved by Parliament, the need for further annual Parliamentary approval of the continuing need to rely on the derogation to make derogating control orders. Non-derogating control orders are currently being used in respect of nine persons. All eleven persons formerly detained under the powers in the the Anti-terrorism, Crime and Security Act 2001 were initially made subject to control orders but nine of them are now being held pursuant to deprtation orders while arrangements are made to obtain guarantees against them being treated in violation of Article 3 ECHR (see “Article 19”). The restrictions in the control orders in force invole an eighteen-hour curfew, limitations of visitors, meetings to those persons to be approved by the Home Office, no cellular communication or internet use and a geographical restriction on travel. They have been described as not falling far short of house arrest and as inhibiting normal life considerably (*First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, February 2006). It is likely that the need to use control orders and the previous use of detention under the 2001 Act is a consequence of the bar in section 17 of the Regulation of Investigatory Powers Act 2000 on the use of intercept evidence in criminal proceedings. The provisions in the 2001 Act have been repealed but, unlike them, the new powers are not limited to use against non-nationals.

The Joint Committee on Human Rights considered that, in the light of the Home Secretary's announcement that there was currently no need to derogate from Article 5 ECHR because there were no individuals in respect of whom deprivation of liberty could be said to be strictly required, there would seem to be no need for the Government to take in this legislation the power to make derogating control orders depriving individuals of their liberty by, for example, placing them under house arrest, ie, taking much wider powers than were at present strictly required; *Prevention of Terrorism Bill: Preliminary Report*, HL 61/HC 389, 25 February 25.

The House of Commons Constitutional Affairs Committee has concluded that there are a number of improvements which could be made to improve the fairness of the Special Advocate system as implemented in the Prevention of Terrorism Act 2005. Among these would be the establishment of an Office of the Special Advocates, to ensure that the Special Advocates get appropriate expert support and facilities. It further believes that additional steps should be taken to ensure that Special Advocates are better able to communicate with the appellant, with special arrangements for doing so after they have seen cleared material, and that appellants are offered, where practical, a choice of Special Advocate from a security-cleared pool; *The operation of the Special Immigration Commission*, HC 323 – I, 3 April 2005.

The Serious Organised Crime and Police Act 2005 has amended the powers of arrest available to a constable under the Police and Criminal Evidence Act 1984, which were based on the application of the concept of seriousness attached to the offence. The exercise of arrest powers will now be subject to a test of necessity based around the nature and circumstances of the offence and the interests of the criminal justice system. An arrest will only be justified if the constable believes it

is necessary for any of the reasons set out in the new section 24(5) of PACE. The exercise of the citizen's power of arrest will be limited to indictable offences.

The power under the Mental Health Act 1983, s 2, whereby a person could be admitted and detained for assessment on the ground that he was suffering from a mental disorder of a nature warranting such detention and that he needed to be detained in the interests of the health and safety of others, was held in *R (on the application of MH) v. Secretary of State for Health* [2005] UKHL 60 not to be incompatible with Article 5(4) ECHR simply because in that it was not attended by provision for the reference to a court of every case of someone detained where that person was incapable of exercising the right to make an application to a mental health review tribunal on his own initiative. Hospital managers were obliged under section 132 to take such steps as were practicable to ensure that the patient understood the effect of the provisions under which he was detained and the rights of applying to a tribunal. Moreover, although an application had to be in writing, it could be signed by anyone authorised by the patient to do so, provided the patient had sufficient capacity to give authority, and the reference could, as in the present case, be stimulated by a relative. Furthermore, although the operation of section 29(4) of the 1983 Act - which provided for the automatic extension of the 28-day detention period under section 2 where an authorised social worker applied to the county court for removal of the person's nearest relative from performance of his functions if, inter alia, the nearest relative was unreasonably objecting to the making of an application for admission for treatment or a guadianship application - could prove incompatible with Article 5(4) ECHR if the county court proceedings dragged on and the patient was detained indefinitely, there were means of ensuring that it did, namely, a reference under section 67 by the secretary of state to a tribunal or, if he failed to do so, judicial review to ensure he acted compatibly with the patient's ECHR rights.

The maintenance of a cordon around persons who had taken part in a demonstration, whose organisers had deliberately given no advance notice to the police that it would happen, under a police plan to release them once the cordon had become absolute in a direction away from the well-known shops and commercial premises that were the target of the protest was held in *Austin v. Metropolitan Police Commissioner* [2005] EWHC 480 (QB) not to have amounted to a violation of Article 5(1) ECHR where it had lasted for seven or so hours rather than the four originally expected on account of the violent behaviour of those within the crowd and of other groups converging on the same area. The court considered that the deprivation of liberty was justified on the basis that the claimants appeared to be about to commit a breach of the peace and in all the circumstances the police had not acted unreasonably.

In dismissing a claim for judicial review by a dual British/Iraqi citizen of the Secretary of State's decision to detain him in a divisional detention facility in Basra, Iraq without charging him and the refusal of the Secretary of State to transfer him from Iraq to the United Kingdom, it was held in *R (Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin) that, as obligations under a United Nations Security Council resolution overrode obligations under the ECHR, resolution 1546 concerning the maintenance of security in Iraq overrode the extra-territorial application of the Human Rights Act 1998, giving effect to the ECHR in United Kingdom law. The United Kingdom was thus entitled to disapply Article 5 ECHR to the extent permitted by that resolution. Furthermore there was no obligation upon the Secretary of State to repatriate the claimant to the United Kingdom since there was no power to do so under the resolution but only a power to intern him in Iraq.

The Serious Organised Crime and Police Act 2005 provides for a new offence of failing to obey a police direction to leave an exclusion area. It applies to those offenders, both adults and juveniles, who have had an exclusion requirement imposed as part of a community sentence, a suspended sentence order or a licence condition on release from custody. The offence carries the power of arrest without warrant. The maximum penalty is a term of imprisonment not exceeding 51 weeks or a fine not exceeding level 4 on the standard scale, or both. A constable may direct a person to

leave a place where he has reasonable grounds to believe that the person is in an exclusion area at a time when he is prohibited from entering that area under the requirements of his sentence or licence condition.

Reasons for concern

The extent of the restrictions imposed in control orders made under the Prevention of Terrorism Act 2005.

The adequacy of the arrangements for communication between a Special Advocates and an appellant after they have seen cleared material.

The conclusion in *Al-Jedda* that a United Nations Security Resolution was to be regarded as displacing the requirements of ECHR Article 5 rather being a possible authority for deprivation of liberty to be used consistently with them.

Article 7. Respect for private and family 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

The Committee of Ministers has adopted a resolution (ResDH(2005)68, 18 July 2005) with respect to the measures taken to ensure compliance with the judgments in Eur.Ct.H.R. (3rd sect.) *Khan v. United Kingdom* (Appl. no 35394/97) judgment of 12 May 2000, Eur.Ct.H.R. (3rd sect.) *P G and J H v. United Kingdom* (Appl. no 44787/98) judgment of 25 September 2001, Eur.Ct.H.R. (4th sect.) *Armstrong v. United Kingdom* (Appl. no 48521/99) judgment of 16 July 2002, Eur.Ct.H.R. (4th sect.) *Hewitson v. United Kingdom* (Appl. no 50015/99) judgment of 27 May 2003 and Eur.Ct.H.R. (3rd sect.) *Chalkey v. United Kingdom* (Appl. no 63831/00, 12 June 2003 and of the decision of the Committee of Ministers of 10 July 1998 under former Article 32 in *Govell v. United Kingdom* (Appl. no 27237/95), in which violations of Article 8 ECHR had been found in respect of the use of covert listening devices in residences or the workplace and in which, apart from *Hewitson*, violations of Article 13 ECHR had also been found due to the lack of effective remedies making it possible to challenge the interference with the private life at the domestic level. Following the finding of violations in the *Govell* case, on 22 February 1999, the relevant part of the Police Act 1997 (Part III) came into force, along with the Code of Practice on Intrusive Surveillance Work, explaining in more detail how the provisions of the legislation should be carried out. On 25 September 2000, the relevant part of the Regulation of Investigation Powers Act 2000 (Part II) also came into force. The installation of covert listening devices in residential premises and places of work is now regulated by these two statutory instruments and the Code of Practice, a system which is both legally binding and publicly accessible. As regards the violation of Article 13 ECHR, Part IV of the Regulation of Investigation Powers Act 2000 provides for the independent oversight of police powers by a Chief Surveillance Commissioner and establishes an independent tribunal to consider complaints concerning the use of surveillance powers. In addition, following the entry into force of the Human Rights Act in 2000, violations of the Convention may be considered unlawful under United Kingdom law and challenged before domestic courts.

The Committee of Ministers has adopted a resolution (ResDH(2005)100, 26 October 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (3rd sect.) *Perry v. United Kingdom* (Appl. no 53760/00) judgment of 17 July 2003, in whch it had been held that there had been a violation of Article 8 ECHR in respect of a complaint about the applicant having been videotaped without his knowledge by the police for identification purposes in the

context of criminal proceedings brought against him in 1997. The United Kingdom Government had drawn the Committee's attention to the fact that, on account of the specific circumstances of the case, new similar violations of the Convention could be avoided in the future by informing the authorities concerned of the requirements of the Convention: copies of the judgment had accordingly been sent out together with a circular to Chief Constables, Heads of Criminal Investigation Departments and human rights champions appointed within the police force. This circular draws attention to the standards existing under the relevant Code of Practice and to the consequences of a failure by police officers dealing with video film identification to apply these standards; in addition, the Court's judgment had been published in the *European Human Rights Report* under reference (2004)39 EHRR 3.

Legislative initiatives, national case law and practices of national authorities

In upholding the dismissal of applications for judicial review of authorisations relating to the whole of the Metropolitan district under the Terrorism Act 2000, ss 44 and 45, capable of being given where it was considered expedient for the purpose of preventing acts of terrorism and allowing police officers to stop and search pedestrians, drivers and passengers without any necessity for reasonable grounds for suspicion, and given on a rolling basis for 28 dayy periods, it was held in *R (on the application of Gillan) v. Metropolitan Police Commissioner* [2004] EWCA Civ 1067. [2005] 1 All ER 970 that it was entirely consistent with the framework of the legislation that a power of this sort should be exercised when a senior police officer considered that it was advantageous to exercise the power for the prevention of acts of terrorism and so interpreted the existence of sections 44 and 45 could not conflict with the ECHR. Furthermore the court should not readily interfere with the judgment of the authorities as to the action that was necessary but what action was or was not proportionate was an issue for the judgment of the court and it would usually place in the scales the authorities' evaluation of the action needed to avoid a terrorist incident as against the court's assessment of the effect on a member of the public. The stopping and searching of the claimants was justifiable under art 5(1)(b) as detention in order to secure the fulfilment of an objective prescribed by law but, while Article 8 ECHR applied to the stop and search process, Articles 10 and 11 ECHR could not be invoked as the limited powers of detention created by the 2000 Act did not threaten either freedom of expression or assembly . Moreover, given the history of global and national incidents of terrorism, the authorisation and confirmation of a random power of search could not, as a matter of general principle, be said to be an unacceptable intrusion that was neither necessary nor proportionate, into the human rights of those who were searched in the absence of some identified specific threat. The rolling programme of authorisations was considered to do no more than enable the commanders in a particular area to have the powers available when operationally required without going back to the Secretary of State for a particular use. Although the police commander had been entitled to decide that the section 44 powers should be used in connection with the arms fair where the claimants, a would-be demonstrator and journalist, had been stopped and searched, particularly given the fair's nature, its location and the protest taking place at it, the commissioner had not discharged the onus of showing that the interference with them was lawful.

The Drugs Act 2005 amends section 55 of the Police and Criminal Evidence Act 1984, which provides for an intimate search of a person where it is suspected that the person may have a Class A drug concealed on him, providing that such a search may only be undertaken where the person to be searched has consented in writing and requires that the person be informed that the search has been authorised and the grounds on which it has been authorised. An authorisation for the search, grounds for that authorisation and consent of the person to be searched must be recorded in the custody record. Provision is also made that appropriate inferences may be drawn by a court or jury where a person refuses without good cause to consent to an intimate search. The 2005 Act also inserts a new section 55A into the 1984 Act, enabling a police officer of at least the rank of inspector to authorise an x-ray or ultrasound scan (or both) of a person suspected of swallowing a Class A drug which he had in his possession with intent to supply or export unlawfully, where the

person has been arrested for an offence and is in police detention. An x-ray may not be taken or an ultrasound scan undertaken without the suspect's consent which must be in writing and the x-ray or ultrasound scan may only be taken at a hospital, registered medical practitioner's surgery or other place used for medical purposes and only by a registered medical practitioner or nurse. An authorisation for the x-ray or ultrasound, grounds for that authorisation and consent of the person to be searched is recorded in the custody record as soon as practicable after the x-ray has been taken or ultrasound carried out. Provision is also made that appropriate inferences may be drawn by a court or jury where a person refuses without good cause to consent to an x-ray or ultrasound scan. In addition the Drugs Act 2005 amends the 1984 Act so as to allow for the introduction of drug testing for a specified Class A drug of persons aged 18 and over after arrest. This power arises where the person has been arrested for a "trigger" offence or for any offence where a police officer of at least the rank of inspector has reason to believe the misuse of such a drug contributed to that offence and authorises the test.

The Serious Organised Crime and Police Act 2005 has amended the definitions of both non-intimate and intimate samples to make it clear that swabs of the coronal sulcus, shaft or glans of the penis from a male suspect and also perineum or vulval swabs and swabs from matted pubic hair from a victim or female suspect are intimate samples with the result that such a swab can only be taken with consent.

The Serious Organised Crime and Police Act 2005 has also introduced a new type of warrant known as an "all premises warrant". A constable will be able to apply for this type of warrant when it is necessary to search all premises occupied or controlled by an individual, but it is not reasonably practicable to specify all such premises at the time of applying for the warrant. The warrant will allow access to all premises occupied or controlled by that person, both those which are specified on the application, and those which are not. It will still be possible to obtain a warrant which relates to one set of premises, now known as a "specific premises warrant". In the case of an "all premises warrant" any entry into premises which have not been specified in the warrant to be authorised in writing by an officer of at least the rank of inspector.

Other relevant developments

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

The Committee of Ministers has adopted a resolution (ResDH(2005)83, 18 July 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (4th sect.) *Brown v. United Kingdom* (Appl. no 52770/99) judgment of 29 July 2003 (Friendly Settlement), namely, fulfilment of an undertaking to pay the applicant £52,500 in respect of a complaints relating to the investigation into the applicant's sexual orientation and his discharge from the Royal Air Force pursuant to the Ministry of Defence's policy, at that time, against homosexuals in the armed forces (which was lifted as from 12 January 2000).

The Committee of Ministers has adopted a resolution (ResDH(2005)99, 26 October 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (4th sect.) *B B v. United Kingdom* (Appl. no 53760/00) judgment of 10 February 2004) in which a violation of Article 14 ECHR in conjunction with Article 8 ECHR was found in respect of a complaint about the applicant having suffered discrimination on the ground of his sexual orientation on account of his indictment in 1993 of committing homosexual acts with a minor on the basis of legislative provisions fixing different ages of consent for heterosexual and homosexual acts (sixteen and eighteen years respectively). As noted in the judgment (paragraph 19), the Sexual Offences (Amendment) Act 2000, the relevant part of which came into force on 8 January 2001, had reduced the age of consent for homosexual acts to the same age as the age of consent for heterosexual acts, and the United Kingdom government had also indicated that the Court's judgment had been sent out to the authorities directly concerned.

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should reformulate Anti-Social Behaviour Order guidelines so that they neither encourage nor permit the excessive publicity of the making of orders against juveniles. In order to guarantee the right of children to privacy, the reproduction and public dissemination of posters reproducing the pictures of children submitted to ASBOs should be prohibited.

Legislative initiatives, national case law and practices of national authorities

The Serious Organised Crime and Police Act 2005 has created a new offence of harassment of a person in his home. A person will commit an offence if (i) he is present outside or in the vicinity of any premises that are used as a dwelling; (ii) he is there to represent to the resident or another individual, or persuade the resident or another individual, that he should not do something he is entitled to do or should do something he is not obliged to do; (iii) the person intends his presence to amount to harassment, alarm or distress to the resident or knows or ought to know that his presence is likely to do so; and (iv) his presence amounts to or is likely to result in harassment of the resident or another individual. It also makes it an offence for a person, where he is subject to a direction to leave the vicinity, to return within a period of up to 3 months (the precise length of time to be specified by a constable) for the purposes of representing to or persuading a person not to do something he is entitled to do, or to do something he is not obliged to do.

Positive aspects

The protection from harassment in one's home provided by the offence created in the Serious Organised Crime and Police Act 2005.

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

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should provide for the possibility of private family visits in prisons.

Legislative initiatives, national case law and practices of national authorities

It was held in *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] UKHL 40, [2005] 3 All ER 291 that the Court of Appeal had been wrong to allow the appeal of a child's father, who was a Saudi Arabian national, against the refusal to make an order that the child should continue in the care of his mother, who had dual Saudi Arabian and British nationality, but that they should both return to live in Saudi Arabia. The Judicial Committee of the House of Lords considered that, in determining any question directed to a child's upbringing, the welfare of the child was the court's paramount consideration. However, where the choice lay between deciding the question of what was best for any individual child in the United Kingdom or deciding it in a foreign country, differences between the legal systems could not be irrelevant. In particular if there were a genuine issue between the parents as to whether it was in the best interests of the child to live in the United Kingdom or elsewhere it had to be relevant whether that issue was capable of being tried in the courts of the country to which he was to be returned. If those courts had no choice but to do as the father wished, so that the mother could not ask them to decide, with an open mind, whether the child would be better off living in the United Kingdom or there, then the courts of the former had to ask themselves whether it would be in the interests of the child to enable that dispute to be heard. The absence of a relocation jurisdiction might be a decisive factor

but it might not be if it appeared that the mother would not be able to make a good cause for relocation. There were also bound to be many cases where the connection of the child and all the family with the other country was so strong that any difference betweeen the legal systems should carry little weight, In the instant case the trial judge was found to have been wrong to leave out of account the absence of a jurisdiction in the home country to enable the mother to bring the child back to the United Kingdom without the father's consent.

In upholding a successful appeal against the grant of a declaration of paternity to the male partner of a former (unmarried) couple where fertilised embryos using donated sperm had been successfully implanted in the female partner after their relationship had come to an end, albeit unknown to the clinic concerned, and a child had been born, it was held in *Re R (a child)* [2005] UKHL 33, [2005] 4 All ER 433 that the Human Fertilisation and Embryology Act 1990, s 28(3) made provision for the relationship of parent and child to be conferred on people who were related neither by blood nor marriage only where the embryo was placed in the mother at a time when the treatment services were being provided for the woman and the man together. If the circumstances which were taken into account when the couple were together changed dramatically it better served the purposes of the 1990 Act if the matter had to be reconsidered and fresh counselling offered before a further attempt at implantation was offered. Moreover it was important that the very significant relationship of parenthood should not be based on fiction.

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

Following the conclusion in the Government's review of international human rights instruments that the immigration and nationality reservation to the Convention on the Rights of the Child, whereby the rights in the Convention do not apply as regards the entry, stay in and departure form the United Kingdom of children subject to immigration control, should remain in force, the Joint Select Committee on Human Rights reiterated its previously stated view that this reservation is contrary to the object and purpose of the Convention and undermines the United Kingdom's commitment to protecting children's rights, and should therefore be withdrawn; *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.

Reasons for concern

The decision to maintain in force the reservation to the Convention on the Rights of the Child, whereby the rights in the Convention do not apply as regards the entry, stay in and departure from the United Kingdom of children subject to immigration control.

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

Legislative initiatives, national case law and practices of national authorities

It was held in *Huang v. Secretary of State for the Home Department* [2005] EWCA Civ 105 that it was legally defective for the Immigration Appeal Tribunal to have deferred to the Secretary of State's view of proportionality when deciding whether it would be disproportionate to remove persons who had been refused leave to enter the United Kingdom in pursuit of the legitimate aim of the maintenance of immigration control where they had family members in the United Kingdom. However, it was considered that only one of the three cases in the appeal was likely to have been found to be truly exceptional so as to give rise to a claim under Article 8 ECHR notwithstanding that the person concerned did not meet the Immigration Rules.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In dismissing an appeal against the inclusion, pursuant to the Criminal Justice Act 1988, s 74, in a confiscation order following a conviction for certain money laundering offences of the offender's share in the matrimonial home, which could only be met if the home were sold, it was held in *R v. Ahmed* [2004] EWCA Crim 2599, [2005] 1 All ER 128 that a court, having concluded that offenders had benefited from criminal activity and having made findings as to the extent of that benefit, had no discretion in relation to the assessment of the value of realisable property but had simply to apply the provisions of section 74 in computing what was, in effect, a statutory debt. The process did not involve any assessment of the way in which that debt might ultimately be paid and therefore no questions arose at that stage under Article 8 ECHR. Different considerations might arise if the debt were not met and the prosecution took enforcement action; if the court were asked to make an order for the sale of the matrimonial home, rights under Article 8 would be engaged and it was at that stage that the court would have to consider whether an order for sale would be proportionate.

The refusal of a local authority to treat the claimant, a British citizen, as having a priority need for accommodation because the Housing Act 1996, s 185(4) required that no account be taken of her dependent daughter for this purpose solely because she was subject to immigration control was held in *R (on the application of Morris) v. Westminster City Council* [2004] EWHC 2191 (Admin), [2005] 1 All ER 351 to have infringed her right under Article 14 ECHR to enjoy without discrimination her right to respect for her family life under art 8 since the difference in treatment was on grounds of national origin and was unlikely to achieve the legitimate aim in section 185 of discouraging persons from coming to the United Kingdom to claim benefits and services.

In dismissing an appeal against a court's ruling on a preliminary issue in an action for possession against defendants who were gypsies that, where a public authority demonstrated that it had an absolute right to possession of land, the decision of the House of Lords in *Harrow London Borough Council v. Qazi* [2003] UKHL 43, [2003] 4 All ER 461 prevented a defendant from raising by way of defence to an action for an order for possession of that land a plea that the obtaining of possession would infringe his rights under Article 8 ECHR, notwithstanding that that decision was incompatible with the subsequent decision of the European Court of Human Rights in Eur.Ct.H.R. (1st sect.) *Connors v. United Kingdom* (Appl. N° 66746/01) judgment of 27 May 2004 it was held in *Leeds City Council v. Price* [2005] EWCA Civ 289, [2005] 3 All ER 573 that the European Court's decision could not be treated as identifying a discrete exception to the general rule propounded by the majority in the House of Lords and, in the absence of any change in circumstances, the principle of legal certainty required, where there was a conflict between a decision of the European Court and a previous decision of the House of Lords, that the court follow the decision of the House of Lords.

Article 8. Article 8. Protection of personal data

Protection of personal data (in general, right of access to data, right to have them rectified and the right to a remedy)

Legislative initiatives, national case law and practices of national authorities

Guidance issued by the Information Commissioner indicated that students were entitled under the Data Protection Act 1998 to information about their exam performance, including examiners' comments, which should normally be provided within 40 days; 2 August 2005

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In overturning a successful challenge by a social worker to the disclosure (which was made after a request by a social work agency for an enhanced criminal record certificate for him from the Criminal Records Bureau) under the Police Act 1997, s 115 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, it was held in *R (on the application of X) v. Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 All ER 610 that, having regard to the language of section 115, the chief constable had been under a duty to disclose if the information might be relevant, unless there were some good reason for not making a disclosure. The policy of the legislation, in order to serve the pressing social need to protect children and vulnerable adults, was that the information should be disclosed even if it only might be true. If it might be true, the employer should be entitled to take into account before the decision was made as to whether or not to employ the person and such disclosure was not contrary to Article 2 ECHR. It would impose too heavy an obligation on a chief constable to require him to give an opportunity for a person to make representations prior to his performing his statutory duty of disclosure. It was considered that in the instant case the social worker had had ample opportunity during the police interview to set out his account and had not taken advantage of his statutory opportunity to correct the certificate.

The decision to disclose documents seized by the Serious Fraud Office (SFO) during a search as part of an investigation of allegations that drug companies at artificially sustained prices to the Secretary of State for Health in connection with civil proceedings, pursuant to the authorisation in the Criminal Justice Act 1987, s 3(5)(a) for information obtained by any person in his capacity as a member of the SFO to be disclosed to any government department by any member of the SFO designated by its Director, was held in *R (on the application of Kent Pharmaceuticals Ltd) v. Director of Serious Fraud Office* [2004] EWCA Civ 1494, [2005] 1 All ER 449 not to be liable to be impugned on the basis that it was not made in accordance with the law for the purposes of Article 8(2) ECHR since the nominated representative of the SFO was granted a discretion to be exercised having regard to the purpose for which disclosure was sought, the policy and objects of the 1987 Act and the way in which access to the documents had been obtained and any attempt to give further guidance in section 3(5)(a) as to the circumstances in which the discretion to make disclosure might be exercised would introduce undesirable rigidity. It was further held that the power had to be exercised reasonably and in good faith and that disclosure could be challenged by judicial review or in the context of proceedings brought against person concerned so that he would not normally be without redress. In the present case the disclosure was appropriate as section 3(5)(a), however restrictively worded, would clearly allow the SFO's nominated representative to disclose to a government department to assist that department to prosecute a civil action seeking to recover losses allegedly caused by the fraud under investigation.

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

Marriage and control of marriages suspect of being simulated

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

In Eur.Ct.H.R. (4th sect.) *B and L v. United Kingdom* (Appl. n° 36536/02) judgment of 13 September 2005 the bar on marriage between parents-in-law and children-in-law was found to be a violation of Article 12 ECHR. Although pursuing a legitimate aim in protecting the integrity of the family, the bar did not prevent such relationships occurring and, since no incest, or other criminal law provisions prevented extra-marital relationships between parents-in-law and children-in-law, it could not be said that the ban on the applicants' marriage prevented the second applicant's son from being exposed to any alleged confusion or emotional insecurity. The fact that, hypothetically, the marriage could take place if both their former spouses died, did not remove the inability of the applicants to obtain legal and social recognition of their relationship. The same applied to the

possibility of applying to Parliament as that was an exceptional and costly procedure, totally at the discretion of the legislative body and not subject to discernable rules or precedent. The Court considered that the inconsistency between the stated aims of the incapacity and the waiver applied in some cases undermined the rationality and logic of the law in question.

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

In determining an application for a declaration which would have effect in the event of irreconcilable disagreement between the parents of a child (who had gross, irreversible brain damage and the gravest chronic lung diseases) and her medical treatment team concerning a treatment decision, it was held in *Re Wyatt (a child)(medical treatment: continuation of order)* [2005] EWHC 2293 (Fam) that a doctor cannot be required to act contrary to his conscience. In circumstances where a clinician concludes that a requested treatment is inimical to the best interests of the patient and his profesional conscience confirms that view, he may refuse to act and cannot be compelled to do so but he should not prevent another from so acting should that clinician feel able to do so.

The dismissal of an employee who refused to work on Sundays on religious grounds following the adoption by his employer of a seven-day was considered in *Copsey v. WWB Devon Clays Ltd* [2005] EWCA Civ 932 either not to involve a material interference with the employee's rights under Article 9 ECHR or, having regard to the reasonableness of the employer in offering alternative positions, to be an interference with those rights that was justified.

Positive aspects

The conclusion in *Re Wyatt* that a clinician may refuse treatment for reasons of professional conscience but should not another from so acting should that clinician feel able to do so.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In allowing an appeal against the refusal of an application for judicial review of the school's decision to refuse to allow a pupil to attend unless she complied with the uniform code, which permitted girls to wear headscarves and which required the wearing of a shalwar kameeeze (a sleeveless, smock-like dress of no more calf-length worn over a school shirt and loose trousers tapering at the ankle), notwithstanding that she did not consider the shalwar kameeeze an appropriate form of dress for herself as a Muslim girl who had reached puberty, it was held in *R (on the application of SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 2 All ER 396 that the school had failed to address the question of whether it was necessary in a democratic society to place a particular restriction at that school (which permitted girls to wear a headscarf which was likely to identify them as Muslim) on those Muslim girls who sincerely believed that when they arrived at the age of puberty they should cover themselves more comprehensively than was permitted by the school uniform policy and had instead started from the premise that its uniform policy was there to be obeyed and that if the claimant did not like it she could go to a different school.

Positive aspects

The ruling in the *Denbigh High School* case that a school uniform policy cannot be insisted upon without first considering whether the requirements in it are necessary in a democratic society.

Article 11. Freedom of expression and of information

Freedom of expression and of information (in general)

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

The Committee of Ministers has adopted an interim resolution (ResDH(2005)49, 5 July 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (GC) *Hashman and Harrup v. United Kingdom* (Appl. n$^{o)}$ judgment of 25 November 1999, in whch it had been held that there had been a violation of Article 10 ECHR due to the fact that the order by which the applicants, who had not breached the peace, were bound over to keep the peace and not to behave *contra bonos mores* did not comply with the requirement that it should be "prescribed by law". The Committee noted that the judgment has been published in several law reports and also noted with interest the publication of the *Crown Prosecution Service Casework Bulletin No. 6 of 2000*, giving guidance to prosecutors, first, that they should not ask courts to consider binding-over orders unless there is evidence of past conduct which, if repeated, is likely to cause a breach of the peace in future, and second, suggesting that courts could be encouraged to ensure that the behaviour to be avoided was made quite clear in the order. It also noted that a consultation document entitled "Bind Overs: A Power for the 21st Century" was issued in March 2003, including a recommendation that courts issuing binding-over orders should not specify "to keep the peace" or "to be of good behaviour" but rather that the individual concerned is bound over to do or refrain from doing specific activities, as well as a recommendation that the details of the conduct specified by the court should be included in an order served by the court on all relevant parties but regretted that to date no Practice Direction has been issued and no other measure taken in accordance with these recommendations. Furthermore emphasising that it is now more than five years since the judgment was delivered and noting that according to the information provided by the Government, around 20 000 persons are bound over each year, of whom a proportion have, like the applicants in the present case, not been found to have committed a breach of the peace, the Committee urged the United Kingdom authorities to take the remaining measures necessary to meet its obligations under the Convention without further delay.

Reasons for concern

The delay in fully implementing the ruling in the *Hashman and Harrup* case.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

A juror who had written to the defendant's mother informing her of discussions that had taken place in the jury room was held in *A G v. Scotcher* [2005] UKHL 36, [2005] 3 All ER 1 to have been in contempt of court contrary to the Contempt of Court Act 1981, s 8(1). The ruling recognised that such a disclosure to the court, whether directly or indirectly, with the intention of prompting an investigation would not be contrary to this provision but liability arose in this case because the disclosure had been to someone who had no authority to receive disclosures on behalf of the court and who might or might not pass on the contents of the letter to the court, something over which the juror had no control. It was considered that the juror had by his action created all

the risks to the confidentiality of the jurors' deliberations which s 8(1) was designed to prevent. The objective of securing the confidentiality of those deliberations was found to be sufficiently important to justify limiting the juror's freedom of expression through the offence created by s 8(1) so that it was unaffected by the Human Rights Act 1998.

The award of costs increased by a success fee (of 95% and 100% for solicitors and counsel respectively) in an action against the media for defamation and wrongful publication of personal information, pursuant to a conditional fee agreement permitted by the Access to Justice Act 1999, was held in Campbell v. MGN Ltd (No 2) [2005] UKHL 61, [2005] 4 All ER 793 to be a proportionate measure to provide litigants with access to justice. Furthermore funding litigation in this way was considered not to become disproportionate when a litigant did not need a conditional fee agreement. The use of success fees were thus not an interference with the right to freedom of expression.

The provision in the Human Rights Act 1998, s 12(3) that a court was precluded from granting such relief as to restrain publication before trial unless it was satisfied that the applicant was likely to establish that publication should not be allowed was held in *Greene v. Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] 1 All ER 30 not to have changed the rule that, in an action for defamation, a court would not impose a prior restraint on publication unless it was clear that no defence would succeed at trial. It was considered that, in a section which was expressly concerned with the protection of freedom of expression and not with undermining it, Parliament could not be interpreted as having abrogated the rule by a sidewind and there was nothing in the ECHR that required the elimination of the established rule. Furthermore the effect of Article10 would be seriously weakened if a claimant were able to stop a defendant from exercising its Article 10 right merely by arguing, on paper-based evidence, that it was more likely than not that the defendant could not show that what it wished to say about the claimant was true. It would mean that people with an undeserved fair reputation could stifle public criticism by obtaining injunctions simply because, on necessarily incomplete information, a court thought it more likely than not that they would defeat a defence of justification at trial.

It was held in *Culnane v. Morris* [2005] EWHC 2438 (QB) that, in the light of the Human Rights Act 1998, the Defamation Act 1952, s 10 was to be interpreted as meaning that a candidate at a Parliamentary or local election cannot claim a special privilege by virtue only of publishing words that were material to a question in issue in the election. However, a candidate, like any other citizen, might be able to establish a defence of qualified privilege if the ingredients recognised at common law are present on the facts of the case.

Further clarification was given in *Jameel v. Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, [2005] 4 All ER 356 as to the defence (recognised in *Reynolds v. Times Newspapers Ltd* [1999] 4 All ER 609) of qualified privilege to a libel action that was based on the publisher of an article having exercised 'responsible journalism'. The Court of Appeal suggested that the phrase 'responsible journalism' denoted the degree of care that a journalist should exercise before publishing a defamatory statement. Its requirements would vary according to the particular circumstances and, in particular, the gravity of the defamation. Furthermore, while responsible journmalism had to be demonstrated before the *Reynolds* privilege could be established, it was also necessary to demonstrate that the subject matter of the publication was of such a nature that it was in the public interest that it should be published. That was a more stringent test than that the public should be interested in receiving the information and in the present case it was found that an article suggesting that the respondent's bank account was being monitored for possible terrorist connections was not one which it was in the public interest to publish without adequate attempts at verification and without belief in the truth of its defamatory implications. The Court of Appeal also rejected the submission that a requirement for a corporation to prove special damage in order to establish a cause of action in libel would be required in order to produce an appropriate balance between the freedom of the press and protection of individual reputation. In the court's view, if a foreign corporation which traded outside the jurisdiction succeeded in establishing that it had a

trading reputation within the jurisdiction, the interests of justice required that the same principles of law should apply to its claim for defamation as applied to a British corporation within the British corporation.

It was made clear in *W v. Westminster City Council* [2005] EWHC 102 (QB), [2005] 4 All ER 96 that where a claim in libel is defeated by the defence of qualified privilege it did not follow that claim under the Human Rights Act 1998, art 8 must also fail.

It was not accepted by the Court of Appeal in *Douglas v. Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2005] 4 All ER 128 - which concerned a claim for damages by one magazine against another (Hello!) for publishing unauthorised pictures of a wedding where the first magazine had a contract giving it the exclusive right to publish photographs of the event - that it had not been reasonably foreseeable to Hello! when they decided to proceed with publication that the developing English law might result in it being held to have infringed rights of privacy or confidence. Hello!'s appeal against a finding of liability in damages based on privacy and commercial confidence was dismissed as the photographs of the wedding had portrayed aspects of the couple's private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information. However, the first magazine could not invoke against Hello! any right to commercial confidence in relation to the details of the wedding or the photographic images portraying as it only had an exclusive right to exploit the authorised photographs commercially; Hello! had published other images which invaded the area of privacy that the couple had chosen to retain and it was they who had the right to protect that area of privacy or confidentiality.

Article 12. Freedom of assembly and of association

Freedom of peaceful assembly

Legislative initiatives, national case law and practices of national authorities

In dismissing appeals against convictions arising from protest action at military bases against the Iraq war by persons considering it to be illegal, it was held in *Ayliffe v. DPP* [2005] EWHC 684 (Admin), [2005] 3 All ER 330 that conduct which might amount to crimes against peace or to crimes of aggression was not unlawful activity so that the persons concerned could not be regarded as having committed the offence of aggravated trespass under the Criminal Justice and Public Order Act 1994, s 68 by trespassing on land and in relation did anything intended to have the effect of obstructing or disrupting any 'lawful activity' which persons were engaging in there. As a consequence the issue of the legality of the war was non-justiciable. It was further held that, in so far as the defendants had sought to raise the issue of war crimes contrary to the International Criminal Court Act 2001, the general allegations made by them had not raised any issue requiring consideration in connection with the lawfulnes of the activities at the bases. It was ruled, however, that if a defendant raised an issue that his or her intention had been to disrupt an unlawful activity, it would not assist the prosecution to limit the description in the charge to some lawful aspect of what was occurring on the land. Furthermore it was held that the provision in the Criminal Damage Act 1967, s 3 allowing the use of such force as was reasonable in the prevention of crime afforded no defence to the offence of criminal damage where no issue had been raised that any war crime had been committed. In addition it was held that, even if activities on the bases might have eventuated in some war crime, there had been no nexus between the damage and the preventing of such activity.

It was held in *R (on the application of Brehony) v. Chief Constable of Greater Manchester*, *The Times*, 15 April 2005 that the exercise of the power under the Public Order Act 1986, s 14(1)(a) to impose conditions on the holding of a public assembly where the police have reasonable belief that it may result in serious public disorder, serious damage to property or serious disruption to the life

of the community required reasons to be given. However, no such obligation was considered to apply where conditions were imposed on the scene of an assembly

The Serious Organised Crime and Police Act 2005 creates the offence of organising or taking part in a demonstration, or carrying out a demonstration alone, without an authorisation in the designated area, with exemptions for lawful industrial disputes and public processions. "The designated area" is to be defined in an order made by the Secretary of State but no point in the designated area may be more than one kilometre from Parliament Square. A person seeking authorisation for a demonstration must give written notice to the Commissioner of Police of the Metropolis. If it is reasonably practicable, notice is to be given not less than 6 clear days before the demonstration is to start but if not reasonably practicable, notice is to be given as soon as it is. In all cases at least 24 hours' notice must be given. If a written notice complying with the requirements of the provisionis received the Commissioner must give authorisation for the demonstration but he can impose conditions on those taking part in or organising a demonstration, if, in his reasonable opinion they are necessary for the purpose of preventing any of the following: (a) hindrance to any person wishing to enter or leave the Palace of Westminster, (b) hindrance to the proper operation of Parliament, (c) serious public disorder, (d) serious damage to property, (e) disruption to the life of the community, (f) a security risk in any part of the designated area, (g) risk to the safety of members of the public (including any taking part in the demonstration).There is a defence where a person can prove that failure arose from causes beyond his control or from something done with the agreement or by the direction of a police officer. A loudspeaker shall not be operated, at any time for any purpose in a street within the designated area.

The Serious Organised Crime and Police Act 2005 creates a criminal offence in England, Wales and Northern Ireland, of trespassing on sites designated by order by the Secretary of State, who may do so if *(a)* it is Crown land, *(b)* it is privately owned by either the Monarch or the immediate heir to the Throne, or *(c)* it appears to the Secretary of State. A corresponding offence is created of entering, or being on, a designated site in Scotland without lawful authority but the Secretary of State may only designate sites in Scotland in the interests of national security.
The House of Commons Northern Ireland Affairs Committee considered that the Government's delay in responding to the report by Sir George Quigley on his review of the Parades Commission and the Public Processions (Northern Ireland) Act 1998, issued for public consultation in November 2002, had been particularly unfortunate because its own inquiry had shown that steady progress has been made by the Parades Commission in difficult and highly contentious circumstances. It considered that replacing it with new organisational arrangements, as suggested by Sir George Quigley, could entail considerable disruption and place at risk the progress towards a peaceful marching season. The Committee regarded wholly local and peaceful resolutions to local disputes to be the ultimate goal but believed that, while third party intervention in such disputes continued to be needed, retaining the Parades Commission offers the best hope for developing peaceful resolutions. However, in order to move forward, it considered that the Commission needed to improve its procedures in important respects, in particular to: make the objections to parades clearer and more accessible to organisers; take forward its proposal to develop a "compliance and post mortem" procedure to provide parade organisers in good time with detailed feedback on the key issues brought to the Commission's attention during the marching season; include in its determinations fuller explanations and greater detail about the potential impact of a parade on community relations and on human rights and public order; and review its involvement in mediation as a matter of urgency and strengthen its cadre of Authorised Officers. The Committee also considered that the recommendation in Sir George Quigley's report that responsibility for restrictions on parades imposed on public order grounds should revert to the police risked placing the police in an impossible position. It believed that it is essential to further progress in the resolution of disputes for the police to be seen unambiguously as occupying neutral ground and to remain completely apart from *decisions* about parades. It stated that the confusion which emerged during the 2004 marching season about the status of parade followers resulted in serious disorder in the Ardoyne area of North Belfast and recommended that the government's

review of existing legislation ensures that there was sufficient clarity about followers in advance of next year's marching season; *The Parades Commission and Public Processions (Northern Ireland) Act 1998*, HC 172, 11 January 2005.

Reasons for concern

The absolute requirement for 24 hours' notice before a demonstration can be held in a designated area within a kilometre from Parliament Square.

Freedom of association

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

In Case No. 2383, Report No. 336, *Complaint against the Government of United Kingdom presented by the Prison Officers' Association (POA)*, which concerned the prohibition in the Criminal Justice and Public Order Act 1994, s 127 of industrial action by prison officers employed by the State and prisoner custody officers employed by private sector companies to which certain of the functions of the prison service have been contracted out, the ILO's Committee on Freedom of Association considered that the prison service constitutes an essential service in the strict sense of the term and that prison officers, as well as prisoner custody officers to the extent that they perform the same functions, exercise authority in the name of the State so that it is in conformity with freedom of association principles to restrict or prohibit the right to take industrial action in the prison service. However, it found that, even if it were held that abridgement of the right to take industrial action was justified, the necessary condition for such abridgement, namely, the provision of adequate compensatory guarantees, did not exist. Thus, the Committee invited the Governing Body to approve the following recommendations: (a) the Committee requests the Government to take the necessary measures so as to establish appropriate mechanisms in respect of prisoner custody officers in private sector companies to which certain of the functions of the prison have been contracted out so as to compensate them for the limitation of their right to strike. (b) The Committee requests the Government to initiate consultations with the complainant and the prison service with a view to improving the current mechanism for the determination of prison officers' pay in England, Wales and Northern Ireland. In particular, the Committee requests the Government to continue to ensure that: (i) the awards of the Prison Service Pay Review Body are binding on the parties and may be departed from only in exceptional circumstances; and (ii) the members of the Prison Service Pay Review Body are independent and impartial, are appointed on the basis of specific guidance or criteria and have the confidence of all parties concerned. (c) The Committee requests to be kept informed of developments in respect of the above.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

An appeal against a finding that someone could be convicted of belonging to a proscribed organisation contrary to the Terrorism Act 2000, s 11(1) where someone belonged to the Real IRA, which provided that an organisation was proscribed if it was listed in Schedule 2 or operated under the same name as a listed organisation, was dismissed in *R v. Z* [2005] UKHL 35, [2005] 3 All ER 95 primarily on the basis that the Real IRA, although not listed, was to be regarded as part of the 'Irish Republican Army', which was a listed organisation and was an umbrella term capable of describing all manifestations or splinter groups.

The power in section 3 of the the Terrorism Act 2000 for the Secretary of State to proscribe any organisation which he believes is concerned in terrorism (ie, one that commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise

concerned in terrorism) has been used in the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2005, SI 2892 to proscribe the following organisations with a supposed link to violent radicalisation: Al Ittihad Al Islamia; Ansar Al Islam; Ansar Al Sunna; Groupe Islamique Combattant Marocain; Harakat-ul-Jihad-ul-Islami; Harakat-ul-Jihad-ul-Islami (Bangladesh); Harakut-ul-Mujahideen/Alami; Hezb-e Islami Gulbuddin; Islamic Jihad Union; Jasmaat ul-Furquan; Jundallah; Khuddam ul-Islam; Lashkar-e Jhanvi; Libyan Islamic; Fighting Group; and Sipah-e Sahaba Pakistan. This brings the total of 40 international terrorist groups proscribed under the Act to 40. It is an offence to belong or profess to belong to a proscribed organisation, to invite support for a proscribed organisation, to arrange, manage or assist in arranging or managing a meeting which one knows is to support a proscribed organization, to further its activities or is to be addressed by a person who belongs or professes to belong to a proscribed organisation. It is also an offence to addresses a meeting where the purpose of this address is to encourage support for a proscribed organisation or to further its activities.

Article 13. Freedom of the arts and sciences

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 14. Right to education

Access to education

Legislative initiatives, national case law and practices of national authorities

A national of another member state, whatever his actual degree of integration into the society of the host member state, was considered in Case C-209/03 *R (on the application of Bidar) v. Ealing London Borough Council* [2005] All ER (EC) 687 to be incapable of fulfilling the requirements for eligibility for a student loan in the Education (Student Support) Regulations 2001, namely, of being ordinarily resident in England and Wales throughout the preceding three-year period when his residence then not have been wholly or mainly for the purpose of receiving full-time education, and the rules could not, therefore, be regarded as justified by the legitimate objective of requiring a degree of integration which those rules sought to achieve. A member state could not require students to establish a link with its employment market, as a student's situation was not comparable to that of an applicant for, inter alia, a jobseeker's allowance.

The Education Act 2005, s 115 brings the power of governing bodies to direct excluded children to attend alternative provision in line with those for other children (previously pupils who were excluded from school for a fixed period or were appealing against a permanent exclusion could not attend a school from which they have been excluded and so schools could not direct such excluded pupils to attend alternative educational provision). Section 116 of the Act extends the fixed penalty notice system (in which a parent or a carer can be issued with a penalty notice or be prosecuted for failing to ensure that a child for whom he is responsible attends the alternative provision that has been made for the child) to the parents of excluded children who have been directed to attend alternative provision.

Positive aspects

The adoption of a power to direct excluded pupils to attend alternative educational provision.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The provision in the Education Act 1996, s 548(1) that corporal punishment given by or on the authority of a member of staff to a child for whom education was provided at any school could not be justified in any proceedings on the ground that it was given in pursuance of a right exercisable by the member of staff by virtue of his position as such and extending an existing statutory ban on corporal punishment from state schools to independent schools was held in *R (on the application of Williamson) v. Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 All ER 1 not to violate the rights of the claimant parents or the claimant teachers under Article 9 ECHR nor the rights of the claimant parents under Protocol 1, Article 2 ECHR. The House of Lords ruled that the ban on corporal punishment had been prescribed by primary legislation in clear terms, it pursued a legitimate aim in that children were vulnerable and the aim of the legislation was to protect them and promote their wellbeing. Furthermore the means chosen to achieve that aim - a universal ban - were considered to be appropriate and not disproportionate in their adverse impact on parents who believed that carefully controlled administration of corporal punishment could be beneficial.

The House of Commons Education and Skills Committee considered that the current provision of prison education is unacceptable. Whilst the Government has provided a substantial increase in resources it is failing to fully meet its manifesto commitment to 'dramatically increase the quality and quantity of education provision'. In 2004, still less than a third of prisoners had access to prison education at any one time. It considered that needed to be a fundamental shift in approach to prison education and a step change in the level of high quality provision that is suited to meet the needs of individual prisoners to provide them with a real alternative to crime on release. The Committee saw prison education as part of a wider approach to reduce recidivism through the rehabilitation of prisoners and considered that such education must consider the full range of needs of the prisoner and continue to support the prisoner on release. It found that the transfer of responsibility to the Department for Education and Skills in 2001 had not yet achieved a significant increase in the priority given to prison education, with progress in the provision of prison education and training is being hampered by a lack of an effective over-arching strategy. It recommended that the Learning and Skills Council is given the appropriate resources necessary to apply its standard funding methodology so that prisons have access to all of the funding streams available to mainstream Colleges. In particular, it wished to see the Additional Learning Support funding approach applied to prison education. Furthermore existing budget constraints, based on historical levels of provision, should not continue; a clear strategy for prison education should be costed and appropriately funded. The Committee considered that there needed to be a much better integration of education, vocational training, and work regimes in prisons and a significant step change in the level of provision of high quality vocational and work-based education. Schemes such as the Young Offender Programme, led by National Grid Transco, that now involves over 50 employers and trains prisoners for real jobs to meet a genuine skills gap must be the way forward for vocational training in prisons. The Committee would like to see more identification of skills shortages within local areas to the prison, and partnerships developed with businesses to meet these skill shortages. Real pay for real work should be given further consideration and, at the very least, the pay that prisoners receive for education should be equal to any other activity undertaken. It would also like to see the Government encouraging a great deal more entrepreneurial activity within prisons, with more business enterprises within prisons providing real work for prisoners, and much closer links with local Further Education Colleges, Universities and employers.It found that the delivery of prisoners' Individual Learning Plans as part of their sentence plans needs urgent improvement and that implementation so far had been shambolic. Individual Learning Plans needed a thorough and robust assessment of needs (including special educational needs), linked to entitlement, and a much greater focus on the continuation of provision on release through mainstream services. It also found that there were a number of barriers across the wider prison regime that were adding to the difficulty of successfully delivering prison education, including

overcrowding and the constant movement of prisoners between prisons, described colloquially as 'churn'. Without changes to the wider prison regime, and without a strong commitment to reduce overcrowding and 'churn', it would be very difficult to achieve improvements in prison education. A much greater level of investment in staff education and development was required in order to encourage a more positive attitude amongst Prison Officers towards the role that education has to play in prisons.; *Prison Education*, HC 114, 21 March 2005.

Reasons for concern

The continuing inadequacy of the arrangements for education in prison.

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

The right to engage in work and the right for nationals from other member States to seek an employement, to establish themselves or to provide services

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

In an Individual Direct Request concerning ILO Convention No. 122, Employment Policy published in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted that the Government's report has not been received. The Committee hoped that a report will be supplied for examination at its next session and that it will contain full information on the matters raised in its 2002 direct request, which read as follows: “The Committee notes with interest the detailed information contained in the Government's report for 1 June 2000-31 May 2002, the Employment Action Plan 2000 and other documentation forwarded, as well as the detailed reply to the 2001 direct request, in particular, concerning projects for the homeless and former drug users. 1. Articles 1 and 2 of the Convention. The Government states that the employment rate was 74.7 per cent in March-May 2002, up from 74.6 per cent in 2000. Employment has continued to shift from the production sector to the services sector. Unemployment decreased from 5.7 per cent in March-May 2000 to 5.2 per cent in 2002. The unemployment rate was 5.7 per cent for men and 4.6 per cent for women. Long-term unemployment as a percentage of total unemployment has continued to decline. And youth unemployment is at its lowest level since the mid-1970s, with almost no long-term youth unemployment. 2. The Committee notes that many of the pilot programmes described in detail in the last report have now been launched nationally, based on lessons learned in the pilot phase. It also notes with interest the extension of some programmes, such as the New Deal for Partners in isolated communities, New Deal for 50 Plus, etc. The Committee would appreciate continuing to receive information on the impact of these various programmes on employment promotion for the target groups. The Committee also would appreciate continuing to receive information on macro-level policies (fiscal, monetary, trade, etc.) that directly affect job growth. 3. Furthermore, the Committee notes the comments on some positive aspects of government skills and union training policy made by the TUC on the application of the Convention received in the Office in November 2002 and forwarded to the Government in December 2002.”

Article 16. Freedom to conduct a business

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 17. Right to property

The right to property and the restrictions to this right

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

In Eur.Ct.H.R. (4th sect.) *J A Pye (Oxford) Ltd v. United Kingdom* (Appl. no 44302/02) judgment of 15 November 2005 the Court concluded (4-3) that the application of the provisions of the Limitation Act 1980 (which provides that a person cannot bring an action to recover any land after the expiration of 12 years of adverse possession by another) and the Land Registration Act 1925 (which provided that, after the expiry of the 12-year period, the registered owner held the land in trust for a squatter) to deprive the applicant companies of their title to certain registered land without any obligation to provide compensation imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and the applicants' right to the peaceful enjoyment of their possessions on the other. There had therefore been a violation of Protocol 1, Article 1 ECHR.

In Eur.Ct.H.R.(4th sect.) *P M v. the United Kingdom* (Appl. no 6638/03) judgment of 19 July 2005 the inability of an unmarried father to deduct for tax purposes maintenance payments made in respect of his daughter was found to be a violation of Article 14 ECHR in conjunction with Protocol 1, Article 1 since, although the purpose of the tax deductions was purportedly to render it easier for married fathers to support a new family, it was not readily apparent why unmarried fathers, who undertook similar new relationships, would not have similar financial commitments equally requiring relief. However, as the discrimination in the applicant's case derived from the Income and Corporation Taxes Act 1988 and Article 13 did not go so far as to guarantee a remedy allowing the primary legislation of a State which had ratified the European Convention on Human Rights to be challenged before a national authority on the grounds that it was contrary to the Convention, the Court held that the facts of his case disclosed no violation of Article 13 ECHR.

The Committee of Ministers has adopted a resolution (ResDH(2005)101, 26 October 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (4th sect) *Stretch v. United Kingdom* (Appl. no 44277/98) judgment of 24 June 2003 in which a violation of Protocol 1, Article 1 ECHR had been found in respect of a complaint concerning the denial in 1991 of his option for a further term of twenty-one years under a lease concluded with a local authority, the government having indicated that the Court's judgment had been sent out to the authorities directly concerned.

Legislative initiatives, national case law and practices of national authorities

The effect of the Land Registration Act 1925, s 75 together with the relevant provisions of the Limitation Act 1980, which allowed for a person to obtain registration of title by adverse possession of land belonging to another but over which he or she had enjoyed exclusive possession and control for a period of 12 years was held in *Beaulane Properties Ltd v. Palmer* [2005] EWHC 1071 (Ch), [2005] 4 All ER 461 to engage Protocol 1, Article 1 ECHR, notwithstanding that they had no public purpose and merely regulated private transactions, since they affected property rights as a matter of substance and amounted to a deprivation rather than a control over the use of property. It was considered that expropriation of registered land without compensation in circumstances such as existed in the instant case did not advance any of the legitimate aims of the statutory provisions and was disproportionate. As a result of a reinterpretation of those provisions in accordance with the Human Rights Act 1998, s 3, it was ruled that the defendant's claim to have acquired the disputed land failed and that the claimant remained the owner of it.

Article 18. Right to asylum

Asylum proceedings

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should: extend the five day time-limit for the filing of appeals against negative Asylum and Immigration Tribunal decisions before the High Court, so as to permit their effective presentation; improve the quality of first instance asylum decisions by immigration officers, through increased training for front-line immigration officers and improved internal review of the reasons for high success rates of appeals by applicants from certain countries; provide for the possibility of open regimes in asylum processing centres for applicants in fast-track proceedings; reinstate the suspensive effect of appeals against negative asylum decisions on the deportation of applicants in fast-track proceedings; ensure that assistance from the National Asylum Support Service is not withheld from applicants who would otherwise be rendered destitute (see further below); and place the burden of proof on the prosecution to show that the accused has deliberately destroyed his or her identity documents for the purpose of entering the country or frustrating deportation.

Legislative initiatives, national case law and practices of national authorities

The provision in the Nationality, Immigration and Asylum Act 2002, s 101 that unsuccessful appellants against a refusal of asylum could apply to the court for review of the Immigration Appeal Tribunal's decision on the ground that the tribunal had made an error of law (statutory review) was held in *R (on the application of G) v. Immigration Appeal Tribunal* [2004] EWCA Civ 1731, [2005] 2 All ER 165 to justify the exercise of the court's discretion to decline to entertain an application for judicial review of issues which had been, or could have been, the subject of statutory review, notwithstanding that the latter procedure involved no right to an oral hearing and carried no right of appeal to the Court of Appeal. It was considered that the statutory procedure carried a satisfactory assurance that the rights of those entitled to asylum would be upheld and that the procedural restriction inherent in the statutory review on paper applied at only one stage of the procedure, with the likelihood of an arguable point of law being overlooked in the absence of an oral hearing not being great. It was also considered that the discretionary denial of judicial was objectively justified and did not fall within Article 14 ECHR since non-nationals seeking entry or asylum stood in a fundamentally different legal situation from those who could enter or remain by right and s 101, although differing from other forms of recourse to the courts, was not deficient or unjust.

The obligation of the Secretary of State for the Home Department under the Nationality, Immigration and Asylum Act 2002, s 55(5)(a) to arrange for support for an asylum applicant where the claim was not made as soon as reasonably practicable after the applicant's arrival in the United Kingdom, to the extent that this was necessary for the purpose of avoiding a breach of the applicant's ECHR rights, was held in *R v. Secretary of State for the Home Department, ex p Adam* [2005] UKHL 66 to arise when it appeared on a fair and objective assessment of all the relevant facts and circumstances that an individual applicant faced an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. It was concluded that there had been a breach of Article 3 ECHR in the present case as a result of the withdrawal of support from the appellant as a result of his late asylum application and of his then being forced to live rough for two nights, having no access to washing facilities and having had to beg for food.

Reasons for concern

The five day time-limit for the filing of appeals against negative Asylum and Immigration Tribunal decisions.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

An applicant for asylum, whose original claim had been rejected on the basis that he could safely relocate within Iraq to the Kurdish Autonomous Zone at a time when unknown to him the Secretary of State had a policy of not refusing asylum claims on the basis of such potential relocation but which policy had since lapsed, was held in *R (on the application of Rashid) v. Secretary of State for the Home Department* [2005] EWCA Civ 744 to have a legitimate expectation that the Secretary of State would apply the appropriate policy, whatever that might be, to his claim and whether that policy was known to him was immaterial. It was considered that the persistent failure of the Secretary of State to apply his own policy or to communicate it to those handling the claimant's case was startling and inexplicable, as was the delay in considering the case once the correct policy came to light. That persistence and the lack of explanation for it contributed to the seriousness of the abuse. Others in an identical position had eventually benefited from the policy and fairness demanded that the claimant be treated in the same way. The appropriate remedy for the detriment he had suffered would be that he should be given indefinite leave to remain.

In dismissing an appeal against the dismissal of an application for judicial review of a refusal of asylum in which it had been claimed that, notwithstanding the reasonable level of protection provided by Lithuania, Article 3 ECHR established an absolute bar on expulsion where violence in the receiving country was threatened by non-state actors, it was held in *R (on the application of Bagdanavicius) v. Secretary of State for the Home Department* [2005] UKHL 38, [2005] 4 All ER 263 that there was a distinction in non-state agent cases between the risk of serious harm and the risk of treatment contrary to art 3. Where the risk emanated from intentionally inflicted acts of the public authorities in the receiving countries, those terms could be used interchangeably; the intentionally inflicted acts would, without more, constitute a proscribed treatment. However, where the risk emanated from non-state bodies, that was not so; any harm inflicted by non-state agents would not constitute art 3 ill-treatment unless in addition the state failed to provide reasonable protection.

In dismissing appeals by ethnic Albanians from Kosovo against the refusal of their claims for refugee status because they no longer had a current well-founded fear of persecution and could safely return home, an international peace-keeping force had replaced the Serb army in Kosovo, it was held in *R (on the application of Hoxha) v. Special Adjudicator* [2005] UKHL 19, [2005] 4 All ER 580 that they could not claim to have been 'recognised' as refugees within the meaning of Article 1C(5) of the Geneva Convention Relating to the Status of Refugees 1951, by virtue of having at some time fulfilled the criteria for refugee status under Article 1A(2) as the former provision had no application unless and until it was invoked by the state against a refugee in order to deprive him of the refugee status previously accorded to him. Moreover the proviso to Article 1C(5) with regard to the ability to invoke compelling circumstances arising out of previous persecution for refusing to avail himself of the persecution of the country of nationality was not capable of availing the applicants since, having regard to the clarity of its ordinary meaning, only the most compelling case founded under Article 31 of the Vienna Convention on the Law of Treaties on 'subsequent practice' could properly give rise to a different and apparently contradictory interpretation from that obviously first intended (ie that it applied to Article 1A(1) and not Article 1A(2) refugees), and there was no such current international practice.

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

Subsidiary protection and 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 other cruel, inhuman and degrading treatments

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should ensure the judicial supervision of expulsions carried out on the basis of diplomatic assurances.

Legislative initiatives, national case law and practices of national authorities

With a view to facilitating the deportation of persons who would otherwise be considered at risk of being subjected to torture or inhuman and degrading treatment in the receiving State, the United Kingdom has concluded memorandums of understanding with Jordan, Lebanon and Libya whereby a commitment is made that deportees to those countries would be treated in a "humane manner in accordance with internationally accepted standards" and would not face the death penalty. Efforts are currently understood to being made to conclude similar agreements with Algeria, Morocco and Tunisia.

Reasons for concern

The use of unenforceable diplomatic assurances that individuals will not be ill-treated in an effort to facilitate their deportation to countries that do not currently fulfil their existing legal obligations not to use torture and inhuman and degrading treatment (see also "Article 6").

Foreigners under a life-saving medical treatment

Legislative initiatives, national case law and practices of national authorities

The expulsion of the appellant, who came from Uganda and had been refused leave to enter the United Kingdom but had pending the decision received anti-retroviral treatment for the advanced HIV/AIDS from which was suffering, was held in *N v. Secretary of State for the Home Department* [2005] UKHL 31, [2005] 4 All ER 1017 not to be inhuman treatment for the purposes of Article 3 ECHR where she was not critical, was fit to travel and would remain fit if and so long as she could obtain treatment in Uganda. It was considered difficult to see why a person who had his hopes raised by receiving treatment pending a decision should subject the country to a greater obligation than it would owe to someone who was turned away at the port of entry and never received treatment. In reaching this conclusion reliance was placed on Strasbourg jurisprudence and it was stated that, if an extension to the scope of the ECHR was needed to keep pace with medical developments that had to be left to the Strasbourg court.

Legal remedies and procedural guarantees regarding the removal of foreigners

Legislative initiatives, national case law and practices of national authorities

In dismissing an appeal against a finding that the respondent to an extradition application by Albania had not deliberately absented himself from the trial at which he had been convicted of premeditated murder and illegal possession of military weapons, so that his discharge was required

under the Extradition Act 2003, s 85(3), it was held in *Government of the Republic of Albania v. Bleta* [2005] EWHC 475 (admin), [2005] 3 All ER 351 that the term 'his trial' contemplated a specific event and not the entire legal process, with particular regard having been paid to the use in Article 6 ECHR of the word 'hearing' and the reference in this provision to a right to a hearing and a right to be informed of the nature and cause of the accusation. It was found that in the instant case the respondent had deliberately absented himself from Albania but that it had not been established that he had left that jurisdiction or had remained in the United Kingdom with the intention expressed in section 85(3). The court considered that the words of section 85(3) could not be construed as covering those circumstances and, as there was no sufficient assurance that the respondent would receive the retrial or review required, the appeal had to be dismissed.

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should ensure that the proposed Commission for Equality and Human Rights enjoys the necessary resources and independence to carry out its functions effectively.

Legislative initiatives, national case law and practices of national authorities

The Joint Select Committee on Human Rights has concluded that the Government's caution in deciding not to ratify Protocol 12 ECHR, which guarantees a free-standing right to equality, is unwarranted; *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.

In upholding the dismissal of appeals against judicial review applications of (a) the payment of annual cost of living increases to persons receiving the state retirement pension living in the United Kingdom or in countries which had recepirocal treaty arrangements with it but not in other countries, notwithstanding that the latter had paid all the necessary national insurance contributions for the pension and (b) the payment of a lesser jobseekers' allowance to persons under 25 than to those who were 25 or older, notwithstanding the contributions basis for the allowance, it was held (Lord Carswell dissenting) in *R (on the application of Carson) v. Secretary of State for Work and Pensions* [2005] UKHL 37, [2005] 4 All ER 545 that it was necessary to distinguish between those grounds of discrimination which appeared to offend against notions of the respect due to the individual and those which merely required some rational justification as in the present two cases. The payment of national insurance contributions could not be a sufficient condition for the similar treatment of all pensioners as the interlocking arrangements for taxation and social security made it impossible to extract one element for special treatment and the position of a non-resident pensioner was materially and relevantly different from that of a United Kingdom resident, as it was to that of a pensioner living in a country that had been willing to enter into suitable reciprocal social security arrangements. Furthermore, as the the necessary expenses of young people as a class were lower, they coulf be treated differently for the purpose of social security payments and the objective justification for the differential treatment between those one day under the age of 25 and those aged 25 was the need for legal certainty and a workable rule.

The payment of a non-means tested pension to widows but not widowers was held in *R (on the application of Hooper) v. Secretary of State for Work and Pensions* [2005] UKHL 29 to be justified as older widows were economically disadvantaged class which merited special treatment and, while they were becoming less disadvantaged the question of the precise moment at which such special treatment was no longer justified was a social and political question within the competence of Parliament.

Reasons for concern

The failure to accept the free-standing right to equality in Protocol 12 ECHR.

Article 21. Non-discrimination

Protection against discrimination

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

The European Commission against Racism and Intolerance (ECRI) has found progress in a number of areas since its second report. The legal framework against racism and racial discrimination had been strengthened. An important element of this framework, the statutory duty on public authorities to promote equality has been in force and implemented for over three years. Emphasis has increasingly been put on the achievement of concrete outcomes for ethnic minorities and specific equality targets for these groups of persons have been set across the public sector. Monitoring of the situation of different ethnic groups across a wide range of areas has facilitated the identification of priority areas for action and the elaboration of targeted policies. A strategy has been launched to promote community cohesion and race equality throughout Great Britain. Citizenship education has been introduced in secondary schools in order to better reflect the needs of a multicultural school population. Work is underway to establish a support mechanism to raise the awareness of the general public of their rights under the Human Rights Act and to advise and assist individuals. However, it found that a number of recommendations made in the second report had not been implemented or had only been partially implemented. Moreover, in spite of initiatives taken, members of ethnic and religious minority groups continue to experience racism and discrimination, with asylum seekers and refugees being particularly vulnerable to these phenomena, partly as a result of changes in asylum policies and of the tone of the debate around the adoption of such changes. It also found that members of the Muslim communities experienced prejudice and discrimination, especially in connection with the implementation of legislation and policies against terrorism. Continuing high levels of hostility, discrimination and disadvantage of Roma/Gypsies and Travellers were also a cause for concern; the media had continued to play an important role in determining the current climate of hostility towards asylum seekers, refugees, Muslims, Roma/Gypsies and Travellers. Although it was in part the result of better reporting and recording techniques, the number of racist incidents was high. The disproportionate impact of criminal justice functions on ethnic minorities had continued to increase. ECRI recommended: that the authorities of the United Kingdom take further action in a number of areas: the ratification of Protocol 12 ECHR, the European Convention on Nationality, the European Social Charter (Revised), the Convention on the Participation of Foreigners in Public Life at Local Level, the Additional Protocol to the Convention on Cybercrime, the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Additional Protocol to the Convention on Cybercrime, the European Convention on the Legal Status of Migrant Workers and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the First Optional Protocol to the ICCPR, as well as accepting Article 14 of the ICERD; the adoption of a consolidated equality act that would eliminate current discrepancies in the levels of protection of individuals against discrimination; improvements in the methods by which racist incidents are reported and recorded and to monitor the implementation of the provisions against racially and religiously aggravated offences; raising the awareness of the courts of the need to ensure that all racially or religiously aggravated offences are duly punished and that the sentences handed down adequately reflect the gravity of the offences; the swift enactment of legislation prohibiting incitement to hatred against religious groups; reform the blasphemy law, in order to ensure that it does not discriminate between religions; the monitoring of the situation as concerns racism and racial discrimination in prisons; repeal Section 19D of the Race Relations Act 1976, which provides for an exception to the principle of non-discrimination, by making it lawful for immigration officers to "discriminate against another person on grounds of nationality or ethnic or national origins in carrying out immigration functions" when this is authorised by a Minister; the pursuit and intensification of efforts to improve specialised teaching of English as an additional language and to reduce the disproportionate numbers of ethnic minority pupils excluded

from schools and to raise the latter's education achievement; the continuation and intensification of the drive to recruit ethnic minority teachers and to retain them in the teaching profession once they are recruited; the taking of measures to counter *de facto* ethnic and religious segregation in schools in the United Kingdom; the devotion of particular attention to tackling the disproportionate representation of certain ethnic minority groups among the users of mental health services and to addressing the issue of racism and the need for more cultural awareness and sensitivity in these institutions; a lead being taken by the authorities in promoting a debate on asylum issues that is balanced and that reflects the human rights dimension of these issues; no asylum seeker be left destitute pending the examination of her or his claim; any measures taken to provide asylum seekers with accommodation and support should not separate asylum seekers from the rest of society and should instead facilitate the early integration of those who will be allowed to stay, in particular children who seek asylum should not be educated separately from other children, but be integrated and, if necessary, supported in mainstream schools, and that these children not be separated from their families, even when the families have failed to comply with removal orders; the elaboration of an overall strategy against Islamophobia which cuts across different areas of life; a review of the operation of the Malicious Communication Act 1988 to ensure that it constitutes an effective tool to counter hate-mail, including antisemitic hate-mail, and that they introduce any necessary changes to this end; an extension of the legal protection against religious discrimination to all areas in respect of which legal protection against racial discrimination is currently provided; a review of legislation against terrorism in order to eliminate discrimination in its provisions and in its implementation and an assessment of the impact of legislation and policies against terrorism on race relations; a series of measures to address the situation of disadvantage and discrimination faced by the Roma/Gypsy and Traveller communities, notably their inclusion in national and local ethnic monitoring systems, their mainstreaming in all housing policies both at central and at local levels, the provision of adequate public permanent and transit sites, the use in practice of existing opportunities for schools for integrating the teaching of the history or culture of Roma/Gypsies and Travellers in the school curriculum and countering the appearance of "No Travellers" or "No Caravan Dwellers" signs on public establishments; *Third report on the United Kingdom*, CRI (2005) 27.

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should: give greater priority to the elimination of potential discrimination in the criminal justice system; include the prohibition of discrimination on the grounds of age and sexual orientation in the provision of goods and service in future legislation in this area; consider the introduction of single equality legislation standardising protection across all areas; reintroduce the obligation on local authorities to provide caravan sites for Roma/Gypsies and Travellers; provide financial assistance for their construction to local authorities.

Legislative initiatives, national case law and practices of national authorities

It was held in *Wong v. Igen Ltd* [2005] EWCA Civ 142, [2005] 3 All ER 812 that the effect of amendements in to the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1975, introduced by s 63A, s 54A and s 17A(1C) of those Acts, was to shift the evidential burden of proof to the respondent if the complainant proves what he was required to prove at the first stage, namely, facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed the unlawful act of discrimination against the complainant. The tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation the complainant would succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage, although it is possible that facts found relevant to the first stage may also relate to the explanation of the respondent. However, it was made clear that tribunals are not required to divide the hearings into two parts to correspond with the two stages, generally they will wish to hear all the evidence, including the respondent's explanation, before

deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus shifted to him. There may be cases where the complainant will have difficulty in proving that it was the employer who committed the unlawful act or may have no less difficulty in establishing other of the essential facts but that does not mean that it is sufficient for the complainant to prove only the possibility rather than the probability of those other facts at the first stage. The legislative intention is that the respondent should explain why he has done what he has been proved by the complainant to have done, rather than the respondent having to prove the fact that it was not he who did it at all.

The Commission for Racial Equality has recommended a review by all chief officers of police in England ands Wales of their positive action steps with regard to the recruitment and retention of under-represented minority groups, the adoption of annual intake targets, the development and publication by individual forces of race and diversity training strategies, reviews of disciplinary and grievances procedures with regard to their impact on racial equality, the implementation of safeguards for police officers against racial victimisation. A formal investigation by the Commission found that the police service had made significant progress in the area of race equality in recent years but that there was still a long way to go before there was a service where every officer treats the public and their colleagues with fairness and respect, regardless of their ethnic origin. It found that willingness to change at the top was not translating into action lower down, particularly in middle-management where you find the ice in the heart of the Police Service. It instanced the lack of proper support or full training for managers on how to handle race grievances, so relatively minor issues are often unnecessarily escalated. The Commission considered that the delicate balance in the governance of, and accountability for, policing runs the risk that 'too many cooks will spoil the broth' and it recommended that the Home Office, as the central co-ordinating body of all the various organisations involved in governing the police service, assumed overall responsibility for dealing with race equality issues. The Commission also found that none of the organisations complied fully with the race equality duty. Thus forces were either not recording the data as required by the ethnic monitoring duty or were not properly monitoring them. It also found that few forces appeared to be carrying out full race impact assessments of their new policies; risking difficulties arising which could have been ironed out earlier; *A formal investigation of the police service of England and Wales*, 3 February 2005.

Reasons for concern

The inadequacy of the measures being taken to protect Roma/Gypsies and Travellers from discriminatory treatment.

Fight against incitement to racial, ethnic, national or religious discrimination

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should continue to carefully monitor the impact of the application of anti-terror powers on disproportionately affected communities.

Legislative initiatives, national case law and practices of national authorities

The House of Commons Northern Ireland Affairs Committee has identified a lack of firm and effective leadership by the Government, the Police Service of Northern Ireland (PSNI), and the criminal justice agencies in Northern Ireland to tackle 'hate crimes', ie, offences committed against people and property on the grounds of ethnicity, sexual orientation, religion, political opinion or disability. It noted that in recent years there has been an increase in the number of racist,

homophobic and sectarian incidents in Northern Ireland and that hate crime against people with disabilities, although the least well documented, are likely to be on a scale at least comparable to homophobic incidents. The Committee considered that improvements must be made in a number of areas: the Office of the First Minister and Deputy First Minister and the Northern Ireland Office must improve their co-ordination of policies to counteract hate crime, publish their hate crime strategies more quickly, and ensure that policy work is carried through into clear improvements in the position of minority groups 'on the ground'; the PSNI must improve its clear-up rates for homophobic and racial attacks, translate its revised hate crime policy into practice quickly, and take all the necessary measures to build increasingly effective relationships with the minority communities. The police need to improve general confidence in the reporting system, address reasons for under-reporting, and encourage victims to come forward and report crimes. Police training to deal with racism, homophobia, sectarianism and disability must be improved, and all the necessary steps to secure higher levels of recruitment from minority ethnic communities must be advanced; the Department of Education must ensure that its *Local and Global Citizenship* initiative is followed through vigorously, and is monitored regularly to assess its contribution to the attitudes and behaviour of young people to hate crime; local district councils must expand their focus on sectarianism to encompass racism, homophobia and crimes against the disabled; enforcement authorities, particularly the PSNI and the DPP, must use the Criminal Justice (Northern Ireland) Order 2004 vigorously. There should be an early review by the PSNI and the criminal justice agencies of the success of the new measure; the racial, homophobic and disabled support and community organisations, churches, and trade unions must continue their existing efforts to provide support and advice within the communities to the victims of hate crime; the minority communities must report each incident to the police as without such co-operation this criminal activity will go unchecked, inter-community relations will continue to deteriorate, and the unfortunate impression will be given that the problem is less severe than it is; and the press should keep these dreadful attacks firmly in the public eye. The Committee was impressed by the way the Northern Ireland Housing Executive and the Department for Social Development are adapting their substantial experience of dealing with sectarian hate crime in housing to other forms of hate crime. These measures must be accelerated and extended, particularly their pilot projects for integrated estates. It also urged the Government to examine integrated education with renewed urgency, and to ensure that adequate funding is made available for integrated schools; *The Challenge of Diversity: Hate Crime in Northern Ireland*, HC 548-I, 14 April 2005.

Reasons for concern

The climate of hostility towards asylum seekers, refugees, Muslims, Roma/Gypsies and Travellers. See also “Article 22”.

Protection of Gypsies / Roms

See above and below.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Joint Committee on Human Rights has considered the United Kingdom's implementation of the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) in light of the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination. Its view was that the failure to accept rights of individual petition under Article 14 of CERD, and under the Optional Protocol to the ICCPR, had severely hampered the ability of people from vulnerable ethnic groups to secure some aspects of their right to equality. It recommended that: training programmes should be further developed to ensure that training in cultural awareness was provided to all those who might be involved in the use of restraint against people in detention; the

establishment of an inter-departmental task force to address deaths in all forms of State custody; greater community involvement should be pursued and facilitated in the context of the Race Equality and Community Cohesion Strategy; at local level, Gypsy and Traveller groups and local authorities should co-operate to facilitate greater community response to consultations; the difficulties faced by Travellers in accessing essential healthcare and education services are likely to raise issues under Article 5(e) of CERD, by which the State undertakes to guarantee equal protection of rights including rights to public health, medical care, social security and social service (Article 5(e)(iv))] and rights to education and training (Article 5(e)(v)); in light of the inequalities in the provision of accommodation for Travellers as compared to accommodation for the settled community, the creation of a statutory duty on local authorities to provide or facilitate the provision of accommodation, in order to fulfil the State's obligations under CERD, in particular under Article 2.2 (positive measures to ensure equality for ethnic groups) and Article 5(e)(iii) (equality in housing). It was also concerned that the differential treatment of the homes of Travellers permitted by the regulations made under the Planning and Compulsory Purchase Act 2004 risks breach both of obligations under CERD (in particular Article 2.1(a) and Article 5(e)(iii)) and of Article 14 ECHR read with Article 1 of Protocol 1 ECHR. It reiterated its concern that the power under the Anti-Social Behaviour Act 2004 for the police to direct those trespassing on land, residing there and having more than one vehicle on the land to move to an alternative vacant site, gave rise to a significant risk of incompatibility with ECHR rights, in particular the right to respect for private life and the right to peaceful enjoyment of possessions. It also considered that, given the disproportionate impact of the measures on the Gypsy and Traveller community, there is a significant risk that they could be implemented in a way that is indirectly discriminatory in breach of CERD. These considerations should be central to implementation of these powers, the application of which should be monitored to ensure against discrimination; *The Convention on the Elimination of Racial Discrimination*, HL 88/HC 471, 31 March 2005.

Reasons for concern

The failure to accept rights of individual petition under Article 14 of CERD, and under the Optional Protocol to the ICCPR

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Legislative initiatives, national case law and practices of national authorities

The House of Commons Home Affairs Select Committee has reported that Muslims in Britain are more likely than other groups to feel that they are suffering as a result of the response to international terrorism. It concluded that community relations had deteriorated since 9/11, although not universally and that there are positive elements. It called for much greater recognition for the problems of Islamophobia and anti-Semitism and for all communities to tackle them. The Committee considered that the Home Office should review the links between its work on community cohesion and anti-terrorism. It was impressed by the energy and imagination shown by some local councils and stressed the importance of central Government reinforcing their work through a strategy to explain national policy and encourage local discussion. It called upon community leaders, including faith leaders, to build bridges to other communities, including by dropping defensive and reactive stances to create a climate of tolerance and mutual respect. Diversity in police forces, local government and the media was considered to be important for its own sake, because it shows minorities are valued and because it provides role models. It noted that public policy affecting British Muslims must recognise both their common identity and their diverse backgrounds. It did not believe that the Asian community was being unreasonably targeted by stops and searches but it accepted that Muslims perceived that they were being stigmatised by the legislation. The Committee considered that the police and Government should make special

efforts to reassure Muslims and the Muslim community should be involved in independent scrutiny of police intelligence. It called for detailed and accurate statistics and information on terrorism-related detentions, arrests, charges and trials. The Committee also considered that a broader anti-terrorism strategy should include measures to support British Muslim leaders to resist extremists. It rejected any suggestion that that Muslims are in some way more likely to turn to terrorism and concluded that suggestions that there had been a Government strategy to manipulate media coverage of terrorism were unfounded; *Terrorism and Community Relations*, HC 151-I, 6 April 2005.

Article 23. Equality between man and women

Gender discrimination in work and employment

Legislative initiatives, national case law and practices of national authorities

The House of Commons Trade and Industry Committee has found that the tendency of men and women to work in different occupations, and the associated tendency of predominantly female occupations to be lower paid and lower valued than men's, has had a major effect on the gender pay gap in the United Kingdom; but such occupational segregation also deprived employers of potential recruits—a factor of particular importance in areas of skills shortages. It focussed on four elements that contribute to occupational segregation: the lack of knowledge about career options that prevents young people from choosing non-traditional occupations; difficulties in accessing training in atypical areas; difficulties with alien or sometimes even hostile business cultures; and the unavailability of part-time or flexible working in the higher-paid occupations and at senior levels in all occupations. It found that some employers had adopted imaginative and innovative policies to break down occupational segregation but that employers in general seemed unaware of the desirability of, or at least were slow to take action on, attracting non-traditional recruits and retaining experienced staff. It commended the work of the Sector Skills Councils in spreading awareness of the potential benefits to employers of tackling occupational segregation, and in disseminating good practice. It believed that other organisations, such as trade associations and Regional Development Agencies, should be more active in this area. The Committee called for a greater amount of co-ordination among public bodies, with a particular effort needed to ensure that those providing education and training and those charged with the task of getting people back into work take the issue of occupational segregation fully into account in the advice and support they provide to the public. It also supported the use of procurement policy to encourage the breakdown of occupational segregation and encouraged the Government to consider a review of equal pay legislation to try to make the principle of "equal pay for work of equal value" more effective; *Jobs for the girls: The effect of occupational segregation on the gender pay gap*, HC 300-I, 7 April 2005.

A report by the Equal Opportunities Commission has found a ‘disturbing’ pay gap between men and women in the legal profession, ranging from £5,000 to £42,000 depending on post and career stage, and which exists even when those working part-time are excluded. There was also a continuing under-representation of women at equity partner level in private practice, with 60% of men enjoying this status but only 20% of women (*Women in the legal profession in Scotland*).

Reasons for concern

The continuing gender pay gap.

Remedies available to the victim of gender discrimination (burden of proof, level of penalties, standing of organisations to file suits)

Legislative initiatives, national case law and practices of national authorities

The Employment Appeal Tribunal held in *Allan v. Newcastle-upon-Tyne City Council*, 14 April 2005 that it was not possible to make an award for injury to feelings or an award of aggravated or exemplary damages (non-economic loss) in equal pay claims under the Equal Pay Act 1970 as the expressly contractual claim under the 1970 Act was a financial one only and the damages referred to, as compared with arrears of remuneration, being a claim in debt, were intended to relate to a claim for damages in respect of the quantification of the loss of value of benefits not provided.

Article 24. The rights of the child

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

It was held in *R (on the application of W) v. Metropolitan Police Commissioner* [2005] EWHC 1586 (Admin), [2003] 3 All ER 749 that no power to use force had been conferred by the authorisation under the Anti-social Behaviour Act 2003, s 30(6) for a police constable in uniform who finds between the hours of 9.00 pm and 6.00 am a person in any public place in the relevant locality whom he has reasonable grounds for believing (a) is under the age of 16 and (b) is not under the effective control of a parent or a responsible person aged 18 or over to remove that person to the person's place of residence unless he has reasonable grounds for believing that the person would, if removed to that place, be likely to suffer significant harm. In the court's view the power was permissive and not coercive and so the subsection merely conferred an express power to use public resources to take such a young person home if he is willing to be taken home.

The Joint Select Committee on Human Rights has expressed concern that the interpretative declaration entered by the UK to the Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict – in which it states its understanding that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where: (a) there is a genuine military need to deploy their unit or ship to an area in which hostilities are taking place; and (b) by reason of the nature and urgency of the situation: (i) it is not practicable to withdraw such persons before deployment; or (ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel - is overly broad, and undermines the United Kingdom's commitments under the Protocol; *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.

Article 25. The rights of the elderly

Participation of the elderly to the public, social and cultural life

Legislative initiatives, national case law and practices of national authorities

Age Concern has published **a N**OP survey of 1,000 people which found that one in five people over 65 spend more than 12 hours of every day on their own. These people are more at risk of depression and ill-health caused by isolation and loneliness. Furthermore more than a quarter of people over 65 do not have a best friend, which is higher than any other age group. A third of people over 65 see their local supermarket as somewhere to socialise and get out of the house and one in five people eat their meals there rather than at home; January 2005.

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

The Disability Discrimination Act 2005 has made substantial amendments to the Disability Discrimination Act 1995 ("the DDA") – which contained provisions making it unlawful to discriminate against a disabled person in relation to employment, the provision of goods, facilities and services, and the disposal and management of premises, as well as some provisions relating to education and a power to make regulations with a view to facilitating the accessibility of taxis, public service vehicles and rail vehicles for disabled people - and builds on amendments already made to that Act by other legislation since 1999. Thus it brings councillors within the scope of the DDA; ensures that, with some exceptions, functions of public authorities not already covered by the DDA are brought within its scope (so that it would be unlawful for a public authority, without justification, to discriminate against a disabled person when exercising its functions); introduces a new duty on public authorities requiring them, when exercising their functions, to have due regard to the need to eliminate harassment of and unlawful discrimination against disabled persons, to promote positive attitudes towards disabled persons, to encourage participation by disabled persons in public life, and to promote equality of opportunity between disabled persons and other persons; provides that the current exemption from section 19 to 21 of the DDA (which deal with the provision of goods, facilities and services to the public) for transport services extends only to transport vehicles themselves, and create a power to enable that exemption to be lifted for different vehicles at different times and to differing extents; amends the definition of 'rail vehicle' in Part 5 of the DDA to enable rail vehicle accessibility regulations to be applied to all rail vehicles, enable the regulations to be applied to the refurbishment of rail vehicles, clarify and extend the current power to grant exemptions from the requirements, change the exemption process and include a requirement for the Secretary of State to produce an annual report on the making of exemptions; introduces new provisions requiring rail vehicle accessibility compliance certificates to be obtained for prescribed rail vehicles; amends the Chronically Sick and Disabled Persons Act 1970 so as to provide for the recognition in England and Wales of disabled persons' parking badges issued outside Great Britain; amends the DDA's provision on discriminatory advertisements so as to impose liability on a third party who publishes a discriminatory advertisement as well as the person placing the advertisement; amends the DDA in respect of group insurance arrangements; makes it generally unlawful for associations with 25 or more members to discriminate against disabled members, applicants for membership, associates and guests; imposes a duty to provide reasonable adjustments on landlords and others who manage rented premises; confers a power to modify or end the current small dwellings exemption; makes it unlawful for general qualifications bodies to discriminate against disabled persons in relation to the award of prescribed qualifications; makes provision for cases where a tenant seeks consent to make an improvement to a let dwelling house to facilitate the enjoyment of the premises by a disabled occupier (which could include himself), including provision for the Disability Rights Commission to make available a conciliation service, to provide assistance in legal proceedings in any dispute arising on the landlord's withholding of his consent and to issue codes of practice on consent to such improvements; amends the definition of disability in respect of people with mental illnesses; deem people with HIV infection, multiple sclerosis, or cancer to be disabled for the purposes of the DDA; and clarifies that there is no implied limitation to the scope of the regulation-making power which enables people to be deemed to be disabled.

Positive aspects

The extended scope of the protection against discrimination on grounds of disability.

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

Legislative initiatives, national case law and practices of national authorities

In an analysis from the Autumn 2004 Labour Force Survey, the Disability Rights Commission found that there were 6.8 million disabled people of working age in Britain, one fifth of the total working age population; fifty two per cent (3.5 million) are men and forty eight per cent (3.3 million) are women. The analysis showed that across Britain there were regional variations in the prevalence of disability; the North East of England and Wales had the highest proportions of disabled people, with about one quarter of the working age population in these regions disabled – 26 per cent and 24 per cent respectively, while London and the South East had lower than average proportions of disabled people at 17 per cent. It also found that disability rates increased with age; whilst 9 per cent of adults aged 16-24 are disabled, this increases to over 40 per cent for the 50 to retirement age group. In Autumn 2004, the overall employment rate for disabled people in Britain was 51 per cent, compared with 81 per cent for non disabled people. Employment rates varied greatly according to the type of impairment a person has; disabled people with mental health problems had the lowest employment rates of all impairment categories, at only 21 per cent, while for people with learning difficulties, the employment rate is 26 per cent. The analysis found that the unemployment rate for disabled people is near twice that for non disabled people, 7 per cent compared with 4 per cent and that disabled people are three times more likely to be economically inactive as non disabled people, 45 per cent compared with 15 per cent but over one third of inactive disabled people said they would like to work. It also found that disabled people in employment are more likely to work in manual and lower occupations, and less likely to work in managerial, professional and high-skilled occupations. At £9.52 per hour, the average gross hourly pay of disabled employees was about 10 per cent less than that of non disabled employees (£10.43 per hour) and disabled people were still only half as likely as non disabled people to be qualified to degree level and are twice as likely as non disabled people to have no qualification at all; *Disability Briefing*, June 2005

Reasons for concern

The high level of unemployment amongst the disabled.

Reasonable accommodations

Legislative initiatives, national case law and practices of national authorities

Having regard to the fact that it was unreasonably difficult for a disabled person to make use of the service involved in access to and use of an aiport's 'airside', the airport and the airline with which he was travelling were found in *Ross v Ryanair Ltd* [2004] EWCA Civ 1751 to have discriminated against him, contrary to the obligation in the Disability Discrimination Act 1995, s 21, by failing to provide him with a wheelchair free of charge for use from the check-in desk to the aircraft where it was reasonably practicable for them to do so, given their financial resources. It was considered irrelevant whether a particular passenger might have the financial means to pay for the necessary auxiliary aid.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Mental Capacity Act 2005 reforms and updates the current law where decisions need to be made on behalf of others. The Act will govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as a result of dementia or brain injury, and where the incapacitating condition has been present since birth. It covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed "deputies", and clarifies the position where no such formal process has been adopted. It contains a set of key principles (with a presumption of capacity and a duty always to consider the "least restrictive option"), sets out a checklist to be used in ascertaining a

person's best interests and sets out rules about advance decisions to refuse medical treatment. The Act includes new rules to govern research involving people who lack capacity (the research must be connected with an impairing condition that affects the person participating in the research or with the treatment of the condition and there must be reasonable grounds for believing that there is no alternative to the involvement of the person in the research, that is, it cannot be carried out as effectively if it only involves people who have capacity) and provides for new independent mental capacity advocates to represent and provide support to such people in relation to certain decisions. The Act provides recourse, where necessary, and at the appropriate level, to a court with power to deal with all personal welfare (including health care) and financial decisions on behalf of adults lacking capacity. A new Court of Protection with more comprehensive powers will replace the current Court of Protection, which is an office of the Supreme Court.

CHAPTER IV. SOLIDARITY

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

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 28. Right of collective bargaining and action

Social dialogue

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

In an Individual Observation concerning Convention No. 144, Tripartite Consultation (International Labour Standards), 1976, published in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted the Government's detailed report for the period ending May 2004 including its reply to the 2002 observation. The Government had indicated that in light of comments received from the Trades Union Congress a number of changes to the format of their meetings have been introduced. The meetings are now firmly focused on the main agenda items to be addressed by the Conference or the Governing Body, and allow for a full exchange of views as well as the early identification of areas of common interest or areas of concern. The Government has also held separate ad hoc meetings with the social partners. The Committee welcomed this approach and expressed the hope that in its next report the Government will continue to report on the operation of effective tripartite consultation on the matters covered by the Convention.

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

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

In an Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948, published in 2005, the Committee of Experts on the Application of Conventions and Recommendations refered to its previous request that the Government keep it informed of developments in respect of sections 64-67 of the Trade Union and Labour Relations (Consolidation) Act 1992, which prevent trade unions from disciplining members who refuse to participate in lawful strikes and other industrial action or who seek to persuade members to refuse to participate in such action. The Committee noted the information provided by the Government that the review of the Employment Relations Act, 1999 resulted in the Employment Relations Act, 2004, that amends section 67 by transferring responsibility from the Employment Appeal Tribunal to an employment tribunal for making certain compensatory awards and that in the current reporting period 17 tribunal complaints have been brought under section 66. It also noted with interest that, by virtue of section 33 of the Employment Relations Act, 2004, section 174 of the TULRA has been amended to allow unions lawfully to exclude and expel individuals wholly or partly on the basis of conduct which consists of activities undertaken by an individual as a member of a political party. Recalling once again that unions should have the right to draw up their rules without interference from public authorities and should be able to determine whether or not it should be possible to discipline members who refuse to comply with democratic decisions to take industrial action, the Committee requested the Government to continue to keep it informed in its future reports of any further developments concerning sections

64-67 of the TULRA so as to more fully ensure the rights of unions to draw up their rules and formulate their programmes without government interference. In addition the Committee noted that the Government had reported that there were no developments in respect of the treatment of sympathy strikes under United Kingdom law and that principles of fairness and partnership at work had resulted in more harmonious relationships and the avoidance of conflict. Furthermore the Committee noted the Government's indication that it believed that the restrictions on secondary and solidarity strikes reflected the United Kingdom's experiences and needs and that its strike law gave sufficient scope for unions to protect the interests of their members. However, the Committee once again recalled that workers should be able to participate in sympathy strikes, provided the initial strike they are supporting is lawful, and to take industrial action in relation to matters which affect them even though the direct employer may not be a party to the dispute, and it requested the Government to continue to keep it informed in its future reports of developments in this respect.

In another Individual Observation concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949, published in 2005, the Committee of Experts on the Application of Conventions and Recommendations referred to concerns previously raised with respect to insufficient protection for workers against anti-union discrimination, with such lack of protection having harmful implications for the promotion of collective bargaining, and to its request for the Government to indicate any steps taken to review and amend the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA), s 146 which did not include protection for making use of the essential services of the union (eg, collective bargaining), and the Trade Union Reform and Employment Rights Act 1993, s 13 (which had amended section 148 of the TULRA), which allowed an employer to wilfully discriminate on anti-union grounds, so long as another purpose was to further a change in the relationship with all or any class of employees. The Committee noted with satisfaction the amendment by the Employment Relations Act 2004, s 31 of section 146 of the TULRA, so that it is unlawful to subject a worker to detriment short of dismissal for making use of trade union services at an appropriate time and that the phrase "trade union services" is defined to mean services made available to an employee by an independent trade union by virtue of his membership of the union, including an employee consenting to the raising of a matter on his behalf by an independent trade union of which he or she is a member. It also noted the Government's indication that section 31(5) of the Employment Relations Act repealed subsections (3)-(5) of section 148 of the TULRA so that detriment to employees by employers is prohibited even if the employer's purpose was to further a change in the relationship with all or any class of his or her employees.

In a Individual Direct Request concerning Convention No. 87, Freedom of Association and Protection of the Right to Organise, 1948 United Kingdom, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations referred to its request that the Government keep it informed of measures taken or intended to remedy the situation whereby due to the restrictive definition of trade disputes, workers in practice lose the common law protection against breach of employment contract and, therefore, are prevented from using an essential means of defending their interests. The Committee noted the Government's indication that there were no developments to report in this area and that it had studied the comments of unions on this matter as part of the review of the Employment Relations Act 1999, which concluded that the law is working adequately. The Committee recalled once again that the right to strike is an essential means by which trade unions may defend their interests, and requested the Government to keep it informed in its future reports of any developments in this regard. In addition the Committee referred to its The Committee also referred to its request that the Government keep it informed of the progress and results of the review of the Employment Relations Act 1992, including on issues that were raised in its previous comments on the basis of observations made by workers' organizations such as UNISON in respect of pre-ballot and pre-strike notices, and in particular the interpretation of the amendments brought to section 226A(2)(c) of the TULRA, and on issues raised in its previous observations. The Committee observed that the review in question resulted in the Employment Relations Act 2004, and noted with interest the following developments: (a) the extension, pursuant to sections 26-28 of the Employment Relations Act 2004, of the protected

period for employees taking lawful industrial action by ensuring that the equivalent number of days during which employees are locked out by the employer are added to the basic 12-week period of protection, and by defining more clearly procedural requirements on the employer; (b) the introduction by section 29 of the Employment Relations Act 2004 of a new section 145A into the TULRA giving workers the right not to have an offer made where its sole purpose is to induce the worker not to be, or seek to become, a member of a union, not to take part in union activities, or not to use union services ; and (c) the increase by Sections 52-54 of the Employment Relations Act 2004 of the methods by which unions may conduct ballots and elections.

In another Individual Direct Request concerning Convention No. 98, Right to Organise and Collective Bargaining, 1949, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations referred to its previous request to be kept informed of progress made in adopting draft regulations pursuant to the Employment Relations Act, 1999, s 3 prohibiting blacklisting on the basis of union membership or activities. The Committee noted the information provided by the Government that draft regulations for consultation had been published in February 2003 to ban the compilation, use or dissemination of blacklists of trade unionists and that the Government intended to finalize the draft regulations, ready for their prompt introduction, should evidence emerge of such lists being drawn up or there being a demand for them. The Committee noted that the Government had indicated that its consultations did not reveal any evidence that blacklisting was reappearing, and that it considered it would be inappropriate to regulate against a practice when there is no evidence to suggest that the problem has existed for over a decade. Nevertheless, the Government had stressed that it is not complacent in this matter and, by finalizing the regulations and holding them in reserve, will be able to act swiftly should the need arise. The Committee recalled its view that practices involving the “blacklisting” of trade union officials constitute a serious threat to the free exercise of trade union rights and that governments should take stringent measures to combat such practices and expressed the hope that the Government will take the necessary steps to ensure that blacklisting of trade unionists may not become a problem in the United Kingdom in the future by ensuring that the practice is prohibited. The Committee requested to be kept informed of developments in this regard in the Government's future reports.

In a third Individual Direct Request concerning Convention No. 135, Workers' Representatives, 1971 United Kingdom, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted with interest the Employment Act 2002, s 43 which provides, in a new section 168A of the Trade Union and Labour Relations (Consolidation) Act, 1992, that employers shall permit union learning representatives to take time off during work hours for certain purposes.

Article 29. Right of access to placement services

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 30. Protection in the event of unjustified dismissal

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 31. Fair and just working conditions

Health and safety at work

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

In an Individual Direct Request concerning Convention No. 68, Food and Catering (Ships' Crews), 1946, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted with interest the reports from the inspection services for the period 1998-2002 regarding the application of the Convention. In particular it noted that according to the annual report ending 31 March 1999, "marine surveyors inspected over 4,000 vessels which cover the arrangement and cleanliness of food stores, galleys, pantries, mess-rooms and sanitary facilities including measures taken to minimize the risk of food and water contamination and procedures for the disposal of waste" while in the report ending 31 May 2002 the Government refers to 2,500 inspections per year. The Committee requested clarification as to the difference in inspection statistics. Furthermore it appeared from the terms of the report that there is only one maritime Food and Hygiene Inspector (FHI) and that this person visits other inspectors to train them with regard to including the provisions of this Convention in their inspections but the qualitative and statistical information provided appeared to be limited to the inspections carried out by the FHI, approximately 200 per year, and not the 4,000 carried out by marine surveyors. Moreover, it noted that there was no clear indication of the criteria and the circumstances under which ships that are considered “detainable” or are in fact detained. Of further interest to the Committee were the number and the flags of ships detained for food and accommodation infractions. As it was often the case that once the decision to detain a ship has been taken for other reasons, in particular related to potential marine pollution, then maritime labour standards infractions are added to the list or are cited as recommendations, the Committee indicated that it would appreciate further information on these points. In addition, with regard to the obligation to enforce regulations by the competent authority (Article 2 of the Convention) and, in particular, the complaint- generated special inspections (Article 8 of the Convention), the Committee requested details of the complaints received, sanctions applied, and cases of illness attributable to food and water contamination and waste disposal procedures. The information in the Government's report concerning the Legionella scare on a cruise ship provided a practical example of present danger and preventive action taken. The Committee stated that it would appreciate other examples of preventive or remedial action taken by the competent authority with regard to its enforcement obligation.

In another Individual Direct Request concerning Convention No. 120, Hygiene (Commerce and Offices), 1964, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted the comprehensive report of the Government and the information supplied in response to its comments. It noted in particular the Government's indications on the extensive review of existing legislation which, as a result, had led to the adoption of a number of new regulations for the United Kingdom and Northern Ireland to implement the requirements set forth in the respective Directives of the European Community, which also give effect to the general principles set forth in Articles 7 to 19 of the Convention. Referring to its previous comments, the Committee stated that it understoods from the information contained in the Government's report that workers employed in domestic and offshore premises are still excluded from the scope of application of the legislation. It therefore invited the Government to consider the possibility to include these groups of workers into the scope of application of the legislation at the occasion of the next revision of the legislation. The Committee also noted the Government's indication as to the public consultations held between November 2001 and February 2002 in the framework of the revision of the respective safety and health regulations. It further noted the Government's indication that the European Commission required Member States to review this legislation every five years. The Committee, while taking due note of this information, requested the Government to supply information on any legislative changes which might occur and which might have an impact on the application of this Convention.

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

Protection of minors at work and monitoring of the protection

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

In an Individual Direct Request concerning Convention No. 138, Minimum Age, 1973 United Kingdom, submitted in 2005 the Committee of Experts on the Application of Conventions and Recommendations took note of the Government's first and second detailed reports. The Committee also took note of the comments made by the Trades Union Congress (TUC) on the application of the Convention in the United Kingdom. It also noted with interest that the Government ratified Convention No. 182 on the worst forms of child labour on 22 March 2000. The Committee asked the Government to provide further information on the Children and Young People's Unit and on the national policies designed to ensure the effective abolition of child labour. The Committee observed that the law does not make it clear whether the general minimum age for admission to employment is 14 or if paragraphs (a) and (aa) of section 18(1) of the Children and Young Persons Act, 1933 shall be read together as to mean that the minimum age for admission to light work is 14 years. The Committee further observes that pursuant to section 18(2) in fine, by-laws taken by the local authority authorizing: (i) the employment of children aged 13 by their parents or guardians in light agricultural or horticultural work; (ii) the employment of children for not more than one hour before the commencement of school hours on any day on which they are required to attend school may derogate from subsection (1) of section 18. Consequently, the Committee observed that a child irrespective of his/her age may perform work other than light work for not more than one hour before the commencement of school hours on any day. The Committee took note of the statement of the TUC that, with regard to the employment of young people, 15 European directives and international conventions, 16 domestic acts of Parliament and statutory instruments are in force as well as 172 local by-laws. It also noted the TUC's comments regarding the complexity of many relevant legislative provisions on work permitted for school-age children and the need for simplification. The Committee reminded the Government that, according to Article 2, paragraph 2, of the Convention, the general minimum age for admission to employment or work shall be 16 since it is the minimum age specified by the Government at the time of ratification. The Committee requested the Government to indicate whether there is any existing or envisaged legislative provision that explicitly prohibits the employment of children before leaving compulsory schooling, which is approximately around 16 years of age, and to supply specific reference and copy of such provision. Unless such explicit legislative provision is confirmed, the Committee asked the Government to indicate any measures taken or envisaged to clarify the rules and raise awareness on the contents of its national legislation on the minimum age for admission to employment or work. The Committee noted the Government's indication, in its report, of other types of work which are currently prohibited or restricted in the United Kingdom for children below the age of 18 years either in legislation, approved codes of practices or health and safety executives (HSE) agreements with industry. The Committee noted that the activities prohibited are dispatched in several pieces of legislation which makes it very difficult to identify the types of work prohibited for children under 18 years of age. The Committee also noted that the TUC welcomes the progress made since the first draft produced by the Government in extending the list of types of work, which by their nature or the circumstances in which they are carried out, should be defined as likely to jeopardize the health, safety or morals of children under 18. The TUC also pointed out that the draft list could be more helpful to the social partners if it were to list the relevant sections of legislation and regulations. It also highlighted the need to consolidate and strengthen child labour legislation in the United Kingdom. The TUC further expressed its concerns about the lack of comprehensive, consolidated and nationally applied legislation, evidenced by this extensive draft list. The Committee encouraged the Government to lay down in a single comprehensive text the types of employment or work which by their nature or the circumstances in which they are carried out are likely to jeopardize the health, safety or morals of young persons. It also asked the Government to provide information on any progress made in this regard. The

Committee asked the Government to indicate whether the exceptional authorization to undertake hazardous work for those aged between 16 and 18 under Regulation 19(3) of the Management of Health and Safety at Work Regulations and under section 124 of the Mines and Quarries Act, 1954 is allowed only for work carried out in conformity with Article 6 of the Convention, which requires such work to be an integral part of: (a) a course of education or training for which a school or training institution is primarily responsible; (b) a programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or (c) a programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training. If so, the Committee would request the Government to provide a copy of relevant rules or documents showing the practice. If not, the Committee requests the Government to provide further information to ascertain that the conditions of exception under Regulation 19(3) of the Management of Health and Safety at Work Regulations fulfil the requirements contained in Article 3(3) of the Convention, namely that: (i) the health, safety and morals of the young persons concerned are fully protected; and (ii) that the young persons concerned have received adequate specific instruction or vocational training in the relevant branch of activity. The Committee noted the TUC's communication indicating that the law governing how much and what kind of work school-age children in England and Wales carry out is too complicated and confused. It also notes the TUC's concern about certain occupations that can be undertaken by children by virtue of by-laws listing the types of employment children may undertake. The TUC referred for instance to the model by-laws issued by the National Assembly of Wales. It pointed out that agricultural or horticultural work may be performed by children aged 13 or more, and indicates that it is unclear whether these types of work fall within the definition of light work: not harmful to the health, safety and development of the child. The Committee reminded the Government that by virtue of Article 7(3) of the Convention, the competent authority shall determine the activities in which employment or work may be permitted and shall prescribe the number of hours during which, and the conditions in which, such employment or work may be undertaken. The Committee asked the Government to provide information on the different by-laws listing light work, the types of activities usually found to be light work and whether all parts of England, Scotland and Wales have by-laws providing for a list of light work activities. The Committee also encouraged the Government to ensure that these activities fall under the definition of light work laid down in section 18(2)(A) of the Children (Protection at Work) Regulations 1998. The Committee noted that the activities listed under the Schedule to the Employment of Children Regulations (Northern Ireland), 1996 appeared to be light work but it also observed that section 135 of the Children (Northern Ireland) Order, 1995 authorized children under 16 to perform light work without providing a minimum threshold age of 13. The Committee accordingly requested the Government to confirm that only children aged 13 and above may undertake light work. If not, the Committee asked the Government to take the necessary measures to ensure that national legislation clearly states that children aged 13 shall only perform light work. The Committee noted the TUC's comments on the possibility for children aged 12 to be trained to take part in performances of a dangerous character, such as acrobatics and contortionism if they are granted a licence from the local authority. The licence shall specify the place or places at which the person is to be trained and shall embody such conditions as are, in the opinion of the authority, necessary for his protection, but a licence shall not be refused if the authority is satisfied that the person is fit and willing to be trained and that proper provision has been made to secure his/her health and that kind treatment is assured. The Committee reminded the Government that by virtue of Article 8 of the Convention, the competent authority may authorize children to participate in artistic performances. However, by virtue of Article 3 of the Convention, this authorization shall not lead to children being engaged in hazardous work, except for children aged 16 and above who may take part in them under the two conditions laid down in Article 3(3) of the Convention; namely (i) that their health, safety or morals are fully protected, and (ii) that they have received adequate specific instruction or vocational training before taking part in performances of a dangerous nature. The Committee requested the Government to indicate the measures taken or envisaged to ensure that children under 18 do not take part in dangerous artistic performances, or alternatively that they take part in them from 16 years of age upon fulfilling the requirements of Article 3(3) of the Convention. The Committee also asked the Government to provide information on the types and

duration of dangerous performances for which licences have been granted. The Committee noted the Government's indication, in its report, that eight improvements notices were issued and three prosecutions taken under the Management of Health and Safety at Work Regulations relating to offences connected to the employment of young persons. It also observed that one prohibition notice was issued under the Employment of Women, Young Persons and Children Act, 1920. The Committee further observed that, according to a TUC survey on school age employment in England and Wales of 2001, approximately 75 per cent of children aged between 10 and 16 years work either Saturdays or Sundays, and 30 per cent work on both days. It also noted that 65 per cent of children aged from 10 to 16 years work at least one weekday. However, 77 per cent of working children declared not to have missed school to do paid work. According to the survey, term-time jobs include paper rounds (39 per cent), baby-sitting (38 per cent), shop work (15 per cent), and cleaning (14 per cent). The Committee indicated that it would be grateful if the Government would supply information on the types of violations noticed and the penalties imposed. The Committee also requested the Government to continue supplying information on the manner in which the Convention is applied in practice, including, for example, statistical data on the employment of minors, extracts from the reports of inspection services, and information on the number and nature of contraventions reported.

In another Individual Direct Request concerning Convention No. 140, Paid Educational Leave, 1974, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted that, for the financial year ending 31 March 2003, the Learning and Skills Council was responsible for an education and training budget of £7.6 million (£3.946 million for young people and £2.638 million for adults). According to the report, this represented a real term increase of 5.9 per cent on the previous year and was used to finance some 6 million learners. The Committee requested that information continue to be provided on how the granting of paid educational leave contributes to the promotion of appropriate continuing education and training (Articles 2 and 3 of the Convention). The Committee also noted that, as from 27 April 2003, in virtue of section 43 of the Employment Act 2002, union learning representatives and members of an independent trade union recognized by the employer have the right to be granted leave for purposes of trade union education and it sought information on the effect given in practice to section 43, in relation to workers who are not trade union representatives (Article 2(c) of the Convention). In relation to the Committee's question on the effective application of programmes giving effect to the principles of lifelong learning, including the establishment of a learning network distributed through new information technologies (Learndirect), it takes note of a research report sent by the Government, published in June 2003 by the Institute for Employment Studies, entitled “New learners, new learning: A strategic evaluation of UfI” (University for Industry) which thoroughly assesses the practice and perspectives of these learning techniques. Some of the conclusions of the report were that Learndirect has so far had more of an impact on individuals than on organizations; it contributes to lifelong learning by engaging new learners; it leads to further learning progression; it helps some learners to enhance their employability and finally Learndirect is contributing to the expansion and diversification of the learning market. Finally the Committee took note of other useful information sent by the Government related to, inter alia, employer training pilots, which were launched in September 2002 (and due to finish in August 2004) in six local learning and skills council areas to test the effect of offering financial incentives to improve access to training and enable employees to attain basic and level-2 skills. The Committee requested information on the results of these measures and continue providing information on the practical application of the Convention.

In a third Individual Direct Request concerning Convention No. 182, Worst Forms of Child Labour, 1999, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted that Regulation 19 of the Management of Health and Safety at Work Regulations, 1999 places a duty on the employer to protect young persons (ie, a person under 18 years of age) from risks to their health and safety and provides for a detailed list of occupations that young workers shall not perform. However, according to the TUC, the provisional list of hazardous work prohibited for children under 18 was not satisfactory; it argued that underwater

and underground work, manual handling of heavy loads, work in confined spaces, work at dangerous heights, and deep-sea fishing are not included therein. The Committee encouraged the Government to adopt, for the sake of clarity, a single comprehensive document compiling the types of work, likely to harm the health, safety or morals of children under 18. It also trusted that, when reviewing the types of hazardous work, the Government wouldl take due consideration of the types of work enumerated in Paragraph 3 of the Worst Forms of Child Labour Recommendation, 1999 (No. 190). The Committee noted with interest that the Health and Safety Executive ("HSE"), which is a governmental body responsible for ensuring that risks to people's health and safety from work activities are properly controlled, is engaged in qualitative researches into the most effective means of communicating health and safety messages to young people. It also observed that the HSE influences vocational courses and qualifications particularly where risks are identified in particular sectors such as woodworking. It also noted that the Government has introduced health and safety and risk awareness into the national curriculum, which will be supplemented by guidance for teachers which will help them to prepare young people for work experience and the world of work. The Committee further observed that, according to the health and safety statistics at work, provided by the Government, the lowest rate of injury is found in the age group 16-19. Generally speaking, non-fatal injuries increases with age. The Committee accordingly observes that the Government's measures have a positive impact on keeping children out of hazardous occupations. The Committee encouraged the Government to carry on its efforts to raise young persons' awareness on health and safety measures so as to keep them out of hazardous work. The Committee took due note of the Government's indication that there are specific regulations in identified areas of significant risks, eg, relating to lead or ionizing radiation and agriculture. It also noted that the HSE identified key activities where attention is needed over and above the protection afforded by general regulation, including agriculture, woodworking, construction, ceramics and metalworking. The Committee however noted the lack of information on the identification of hazardous work. The Committee accordingly requested the Government to indicate the measures taken or envisaged to identify where the types of hazardous work exist, and to provide information on the findings. The Committee also noted the Government's indication, in its report, that since 1997 there have been 14 prosecutions relating to offences connected with the employment of young persons below the age of 18. Nine notices have been issued and eight prosecutions have been taken under the Prevention of Accidents to Children in Agriculture Regulations, 1998 since they came into force in 1999. It also observed that the Health and Safety Executive in the United Kingdom took forward 102 cases of illegal child employment and secured 81 convictions between 1986-87 and 2001. The Committee asked the Government to provide information on the types of sanctions imposed by courts for the violation of the legal provisions related to the worst forms of child labour.

The European Committee of Social Rights has noted that there had been no change in the insufficiency of the mandatory rest period during the summer holidays for children still subject to compulsory education because it did not equal half the holiday period and it concluded that the situation in the United Kingdom was not in conformity with Article 7(3) ESC on the ground that it did not ensure that children might fully benefit from such education; Conclusions XVII-2.

The European Committee of Social Rights has also concluded that the situation in the United Kingdom was not in conformity with Article 7(5) ESC on the ground that there was no evidence that, during the reference period, young workers' lowest wages were fair compared to adult workers' minimum wages, which were themselves unreasonably low compared to the average wage in industry and services (the minimum wage of 1,076€ was 34.4% of the average wage). As from 1 October 2004 a minimum hourly wage of 4.36€ (62% of the adult minimum wage) had been introduced for 16-17 year old workers; Conclusions XVII-2.

Reasons for concern

The inadequacy of the lowest wages payable to young workers.

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

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

The European Committee of Social Rights has concluded that, in the absence of a compulsory period of six weeks post natal leave (of the twenty-six weeks maternity leave only two weeks post natal was compulsory except in the case of factory workers for whom the compulsory period is four weeks), the situation in the United Kingdom was not in conformity with Article 8(1) ESC. The Government had maintained that in practice nearly all women availed themselves of six weeks post natal leave. The Committee also concluded that the situation was not in conformity with Article 8(1) in that the standard rates of Statutory Maternity Pay and Maternity Allowance were inadequate during the reference period; *Conclusions XVII-2*.

Article 34. Social security and social assistance

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In *Secretary of State for Work and Pensions v. Bobezes* [2005] EWCA Civ 111, [2005] 3 All ER 497, it was held that the Income Support (General) Regulations 1987, reg 16(5) - which provided that a child was not to be treated as a member of the same household where the child was not living with the income support claimant and he or she had been continuously absent from Great Britain for a period of more than four weeks - indirectly discriminated on grounds of nationality. The Court of Appeal considered that the proper approach was to compare the children of migrant workers with British children whose families were normally resident in the United Kingdom and it concluded that it was intrinsically likely that significantly more of the latter would be prejudiced by regulation 16(5). Moreover in view of the greater proximity of the families of European migrant workers than those from the Caribbean or India, it was in any event probable that the former rather than the latter were more likely to be discriminated against by regulation 16(5).

The Child Benefit Act 2005 deals with a non-contributory, non-income related benefit payable weekly where a person is responsible for a child. It is not taxable. The Act contains measures regarding the conditions of entitlement to child benefit provided for in Part 9 of the Social Security Contributions and Benefits Act 1992 and in Part 9 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The Act amends the definition of a child by replacing it with a definition of a child and a definition of a qualifying young person. Under the new provisions a child is defined as a person who has not attained the age of 16. A qualifying young person is defined as a person, other than a child, who has not attained the age (greater than 16) that is prescribed in regulations, and who satisfies prescribed conditions. It is the intention that in the first instance regulations under the powers introduced by the Act should extend child benefit entitlement to include young people who are on specified unwaged vocational training arranged by the Government as well as those in full-time, non-advanced education. The Government also intends to extend support to 19 year olds completing a course of learning begun before they reached that age. Future changes to the scope of entitlement will respond to developments in curriculum policy and further consultation.

Positive aspects

The plans to extend the payment of child benefit to include young people on unwaged vocational training or in full-time advanced education.

Article 35. Health care

Drugs (regulation, decriminalisation, substitutive treatments)

Legislative initiatives, national case law and practices of national authorities

The Drugs Act 2005 gives the police a new discretionary power for the police to require persons who have reached the age of 18 and who have tested positive for a specified Class A drug to attend an initial assessment of their drug misuse. The Drugs Act 2005 has also amended the Crime and Disorder Act 1998 in relation to Anti-social Behaviour Orders (ASBOs), providing for a new order which can be made alongside an ASBO when drug misuse has been a cause of the behaviour that led to the ASBO being made. The requirements of the order should avoid, as far as reasonably practicable, interfering with the defendant's religious belief and any work or educational commitments. See also "Article 4".

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Smoking, Health and Social Care (Scotland) Act 2005 makes provision for a ban on smoking in certain wholly or substantially enclosed places. This effected by creating an offence of permitting others to smoke in and on no-smoking premises; creating an offence of smoking in no-smoking premises; creating an offence of failing to display warning notices in no-smoking premises; setting out the powers of enforcement officers to enter no-smoking premises; creating an offence of failing without reasonable excuse to give one's name and address on request by an authorised officer. The Act also enables Scottish Ministers to raise by order the ages specified (currently age 16) in section 18 of the Children and Young Persons (Scotland) Act 1937, which includes the legal age for tobacco purchase.

Article 36. Access to services of general economic interest

No developments have been reported for the period under scrutiny under this provision of the Charter.

Article 37. Environmental protection

Right to a healthy environment

Legislative initiatives, national case law and practices of national authorities

The Clean Neighbourhoods and Environment Act 2005 develops the powers and duties in England and Wales for dealing with problems associated with local environmental quality. In particular it amends the law relating to crime and disorder reduction partnerships to require them to take into account anti-social and other behaviour adversely affecting the local environment; makes provision for the gating (ie, erecting a physical barrier to restrict public access) of minor highways that attract anti-social behaviour; introduces two new offences relating to nuisance parking and amends the law relating to abandoned and illegally parked vehicles; extends the statutory offence

of dropping litter to all open places; amends the powers and duties of local authorities in relation to litter; amends the law relating to graffiti, fly-posting and the illegal display of advertisements; makes provision about the illegal deposit of waste ("fly-tipping") and about the powers and duties of local authorities to collect and dispose of waste; makes provision to deal with waste generated at construction sites; allows local authorities and parish and community councils to create offences relating to the control of dogs; gives local authorities new powers to deal with noise from intruder alarms; extends the powers for dealing with night time noise nuisance from domestic premises to cover also licensed premises; allows local authorities to employ alternative means to resolve complaints about noise qualifying as a statutory nuisance prior to issuing an abatement notice; establishes a statutory body to take the place of a non-departmental public body, the Commission for Architecture and the Built Environment.

The House of Commons Select Committee on Environmental Audit has reported that the environmental impacts of the proposed increase in house building deserve much greater consideration than they have yet received from Government. It believed that all new housing should be built to standards that minimise environmental impacts. Furthermore it considered that there was a serious risk that, as matters stand, the principal beneficiaries of housing growth will be property development companies, whilst the principal loser will be the environment. It concluded that large scale house building demands prudence, properly joined-up government, thorough environmental appraisals, a respect of environmental limits, local engagement, and improvements in skills, knowledge and awareness. While there was a need for sustainable communities and new sustainable housing, they would never be truly sustainable unless they were environmentally sustainable; *Housing: Building a Sustainable Future***,** HC 135-I 31 January 2005.

The right to access to information in environmental matters

See "Article 47".

Article 38. Consumer protection

No developments have been reported for the period under scrutiny under this provision of the Charter.

CHAPTER V. CITIZEN'S RIGHTS

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

No developments have been reported for the period under scrutiny under this provision of the Charter.

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

Right to vote and to stand as a candidate to municipal elections for third country nationals

A violation of the right to free elections under Protocol 1, Article 3 ECHR was confirmed (12-5) in Eur.Ct.H.R. (GC) *Hirst v. the United Kingdom (No. 2)* (Appl. n° 74025/01) judgment of 6 October 2005 on account of a blanket ban in the Representation of the People Act 1983, s 3 on convicted prisoners voting in parliamentary or local elections. It was accepted that restrictions on electoral rights might be imposed on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations but it was emphasised that the severe measure of disenfranchisement was not to be undertaken lightly and the principle of proportionality required a discernible and a sufficient link between the sanction and the conduct and circumstances of the individual concerned. Although the present measure might have the legitimate aim of preventing crime, a general, automatic and indiscriminate restriction on a vitally important right - which applied automatically to convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances - had to be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Prot 1, Art 3.

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

Other relevant developments

On a reference to the ECJ in the course of an appeal against a refusal to grant a long-term residence perrmit to the child of a mother (who was a national of China) where the child, as a result of being born in the territory of Northern Ireland was automatically entitled to, and had acquired, Irish nationality, it was ruled in Case C-200/02, *Chen v. Secretary of State for the Home Department* [2004] ECR I-9925 that art 18 EC and Council Directive (EEC) 90/354 conferred on both the young minor - who was a national of a member state, who was covered by appropriate sickness insurance, and whose primary carer was a third-country national having sufficient resources for the minor not to become a burden on the public finances of the host member state - and the minor's primary carer a right to reside for an indefinite period in that host state. This right was not subject to any condition that the resources required to avoid becoming such a burden had to be possessed personally by the minor. Furthermore it was irrelevant that the purpose of the mother's stay in the United Kingdom had been to create a situation in which the child she was expecting would acquire the nationality of another member state in order to secure for her child and for herself a long-term right to reside in the United Kingdom. Moreover it was not permissible for a member state to restrict the effect of the grant of the nationality of another member state by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. A refusal to allow a parent, whether a national of a member state or a national of a non-member country, who was the carer of a child to whom art 18 EC and the directive granted a right of residence, to reside with that child in the host member state would deprive the child's right of residence of any useful effect since enjoyment by a young child of a right of residence necessarily implied that that child was entitled to be accompanied by the person who was his or her primary carer.

Legislative initiatives, national case law and practices of national authorities

The use of an anti-social behaviour order under the Crime and Disorder Act 1998, s 1, whereby the person subject to it was prohibited for a period of two years against his being in any other placve other than a certain specified addresses, or moving between those addressed, between 11.30 pm and 6.00 am, was held in *R (on the application of Lonergan) v. Lewes Crown Court* [2005] EWHC 457 (Admin), [2005] 2 All ER 362 not to be legally objectionable if it were necessary for protection. Because the content and duration of such an order was conditioned solely by what was necessary for the purpose of protecting members of the public from further anti-social behaviour, the court was not required to consider what sentence would have been imposed, whether by way of curfew order or otherwise, if it had been sentencing the same person for one or more of the same acts which justified the making of an order. It was observed that, although an order has to run for a minimum of two years, it does not follow that each and every prohibition within a particular order must endure for the life of the order and, as a curfew for two years in the life of a teenager is a very considerable restriction of freedom, it is likely that in many cases either the period of the curfew can properly be set at less than the full life of the order or that, in the light of behavioural progress, an application to vary the curfew may well succeed.

Article 46. Diplomatic and consular protection

No developments have been reported for the period under scrutiny under this provision of the Charter.

CHAPTER VI. JUSTICE

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

Access to a court and, in particular, the right to legal aid / judicial assistance

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

The denial of legal aid to two unemployed defendants in defamation proceedings in respect of claims made in a leaflet against a large multinational company – where the trial at first instance had lasted 313 court days, preceded by 28 interlocutory applications, the appeal hearing had lasted 23 days, the factual case which they had had to prove had been highly complex, involving 40,000 pages of documentary evidence and 130 oral witnesses and extensive legal and procedural issues had to be resolved before the trial judge was in a position to decide the main issue - was found in Eur.Ct.H.R. (4th sect.) *Steel and Morris v. United Kingdom* (Appl. no 68416/01) judgment of 15 February 2005 to have deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with the company. It was considered that in an action of this complexity, neither the sporadic help given by the volunteer lawyers nor the extensive judicial assistance and latitude granted to the applicants as litigants in person, was any substitute for competent and sustained representation by an experienced lawyer familiar with the case and with the law of libel. Indeed the very length of the proceedings was, to a certain extent, a testament to the applicants' lack of skill and experience and there had, therefore, been a violation of Article 6(1) ECHR. Violations of Article 10 ECHR were also found to arise out of both this lack of procedural fairness and equality and the absence of a reasonable relationship of proportionality between the injury to reputation suffered and the award of damages of GBP 36,000 in the case of the first applicant and GBP 40,000 in the case of the second applicant.

The provision in the Crown Proceedings Act 1947, s 10 that no act or omission of a member of the armed forces of the Crown while on duty should subject either that person or the Crown to liability in tort for causing personal injury to another member of the armed forces while on duty was considered not to have removed a class of claim from the domestic courts' jurisdiction or to have conferred an immunity from liability which had been previously recognised since such a class of claim had never existed and was not created by the 1947 Act. As section 10 was found therefore to be a provision of substantive law which delimited the rights of servicemen as regards damages' claims against the Crown and which provided instead, as a matter of substantive law, a no-fault pension scheme for injuries sustained in the course of service, the applicant in Eur.Ct.H.R. (GC) *Roche v. the United Kingdom* (Appl. no 32555/96) judgment of 19 October 2005 was found (9-8) to have no (civil) "right" recognised under domestic law which would attract the application of Article 6(1) and so it was not necessary to examine submissions as to the proportionality of the restriction on his ability to bring a civil action in respect of health problems that he maintained were the result of his participation in mustard and nerve gas tests conducted under the auspices of the British Armed Forces at the Chemical and Biological Defence Establishment at Porton Down Barracks (England) in 1962 and 1963. However, it was considered that an individual, such as the applicant, who had consistently pursued disclosure of information relevant to his test participation independently of any litigation, should not have been required to litigate to obtain disclosure. Although a structured disclosure process was required, the various "medical" and "political" means available in the applicant's case had resulted only in partial disclosure. In addition, information services and health studies had only been started almost 10 years after the applicant had begun his search for records and after he had lodged his application with the Court. In such circumstances, the Court considered that the United Kingdom had not fulfilled its positive obligation to provide an effective and accessible procedure enabling the applicant to have access to all relevant and appropriate information which would allow him to assess any risk to which he had been exposed during his participation in the tests and there had therefore been a violation of his

right to respect for private and family life under Article 8 ECHR. However, while the freedom to receive information under Article 10 ECHR prohibited a Government from restricting a person from receiving information that others wished or might be willing to impart, that freedom could not be construed as imposing on a State, in circumstances such as those of the applicant's case, positive obligations to disseminate information and there had therefore been no interference with the applicant's right to receive nformation. No violation was also found in respect of Articles 13 and 14 or Protocol 1 Article 1.

The Committee of Ministers has adopted a resolution (ResDH(2005)111, 26 October 2005**)** with respect to the measures taken to ensure compliance with the judgments in Eur.Ct.H.R. (4th sect.) *Broadhurst v. United Kingdom* (Appl. no 69187/01) judgment of 22 June 2004 (Friendly Settlement), Eur.Ct.H.R. (4th sect.) *Edwards v. United Kingdom* (Appl. nos 38260/97, 46416/99, 47143/99, 46410/99, 58896/00 and 3859/02) judgment of 16 November 2004 (Friendly Settlement) and Eur.Ct.H.R. (4th sect.) *Townsend v. United Kingdom* (Appl. no 42039/98) judgment of 18 January 2005 (Friendly Settlement) (see below), which concerned complaints relating to the lack of legal representation in proceedings for non-payment of poll-tax and detention ordered by the Magistrates Court, namely, the payment to the applicants of certain sums for non-pecuniary damage. The Committee recalled that general measures had already been adopted in particular through the amendment by the Lord Chancellor of the Legal Advice and Assistance (Scope) Regulations 1989 by the Legal Advice and Assistance (Scope) (Amendment) Regulations 1997.

Violations of Article 6(1) & (3)(c) ECHR were found in Eur.Ct.H.R. *Beet and Others v. the United Kingdom* (Appl. nos 47676/99, 58923/00, 58927/00, 61373/00 and 61377/00), *Lloyd and Others v. the United Kingdom* (Appl. nos 29798/96, 30395/96, 34327/96, 34341/96, 35445/97 36267/97, 36367/97, 37551/97, 37706/97, 38261/97, 39378/98, 41590/98, 41593/98, 42040/98, 42097/98, 45420/99, 45844/99, 46326/99, 47144/99, 53062/99, 53111/99, 54969/00, 54973/00, 54997/00, 55046/00, 55068/00, 55071/00, 56109/00, 56231/00, 56232/00, 56233/00, 56429/00, 56441/00, 2460/03, 2482/03, 2483/03, 2484/03 and 2490/03) judgments of 1 March 2005 on account of the lack of legal representation in proceedings for non-payment of poll-tax and detention ordered by the Magistrates Court. Violations of Article 5(1) & (5) were also found in *Beet* and *LLoyd*. There were also friendly settlements in respect of similar complaints in Eur.Ct.H.R. *Townsend v. United Kingdom* (Appl. no 42039/98) and Eur.Ct.H.R. *Mark Wood v. United Kingdom* (Appl. no 47441/99) judgments of 1 March 2005.

The Committee of Ministers has adopted a resolution (ResDH(2005)29, 25 April 2005) with respect to the measures taken to ensure compliance with the judgment in Eur.Ct.H.R. (GC) *Hatton & others v. the United Kingdom* (Appl. no 36022/97) judgment of 8 July 2003 in which it was found that there was effective domestic remedy in respect of a complaint that government policy on night flights at Heathrow airport gave rise to a violation of their right to respect for their private and family lives and their home. Information provided by the United Kingdom Government about the measures taken preventing new violations of the same kind as that found in the judgment comprised the empowerment of the courts to conduct judicial review of administrative policies (including those dating from before the enactment of the Human Rights Act 1998) in accordance with the ECHR's requirements, the publication of the judgment in the *European Human Rights Reports* at (2003) 37 EHRR 28 and its wide circulation to relevant officials within the government.

Legislative initiatives, national case law and practices of national authorities

Provisions in the Child Support Act 1991, s 4 which precluded a person with care of children from playing any part in the enforcement of maintenance assessments, with the responsibility for enforcement being placed on the Secretary of State and through him on the child support agency, were held (Baronness Hale of Richmond dissenting) in *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905 not to engage the right of access to court under Article 6(1) ECHR as the claimant was not seeking to enforce a 'right'

according to the autonomous meaning given to that word. It was not considered enough to bring Article 6(1) into play to assert that, as the whole object of the scheme of the 1991 Act was that the persopn with care was the person who would ultimately benefit from the enforcement process, a person in the position of the claimant should be allowed a say in how that process was conducted.

The House of Commons Constitutional Affairs Committee has found that the small claims system, which operates in the county court, generally works well in providing a low cost, good quality procedure for large numbers of litigants. The procedure is informal and quicker than ordinary proceedings, assisting litigants to appear in person by providing greater judicial intervention and supporting and enabling people to avoid incurring substantial legal costs in order to pursue small monetary claims. However, it also identified a number of deficiencies and some potential for improvements: the county courts are still lacking proper IT facilities and they rely on a paper-intensive system, which makes proceedings slower and leads to unnecessary waste; it was time to implement much sought-after improvements to the system of enforcing judgments as litigants often find that the judgment that they have obtained is in a practical sense unenforceable; and the claims limits for cases involving personal injury and housing disrepair - currently substantially lower than those for other claims which go through the small claims procedure - are in need of review. It also concluded that current proposals for a European Small Claims Procedure should prove a welcome improvement for those conducting cross border cases, but considered that this system should not extend to wholly domestic cases; *The courts: small claims*, HC 519, December 2005.

Independence and impartiality

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

A challenge by four prisoners to the independence and impartiality of the adjudicating body (the prison governor or the controller) in disciplinary proceedings has ben upheld in Eur.Ct.H.R. (4th sect.) *Whitfield and Others v. the United Kingdom* (Appl. nos 46387/99, 48906/99, 57410/00 and 57419/00) judgment of 12 April 2005 on the basis that persons answerable to the Home Office (whether as prison officer, governor or controller in the applicants' prisons) drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants' guilt or innocence together with their sentences. In addition to this finding of a violation of Article 6(1) ECHR, a violation of Article 6(3)(c) ECHR was found as a result of the decision of the adjudicating body that legal representation for each applicant's adjudication hearing was unnecessary and, moreover, that one of them did not even need to consult his lawyer before his hearing.

Legislative initiatives, national case law and practices of national authorities

The Constitutional Reform Act 2005 makes provision for modifying the office of Lord Chancellor (a member of the executive) so that the office-holder is no longer a judge nor exercises any judicial functions; provides a guarantee of continued judicial independence; makes provisions for a Supreme Court to replace the existing system of Law Lords operating as a committee of the House of Lords and provides for the appointment of judges to the new Court (selection commissions comprised of judicial and non-judicial members, with the Lord Chancellor able to reject the selection commission's recommendation or to ask it to reconsider its recommendation; consistently with the position of all senior judicial office holders, removal from office of any judge of the Supreme Court may only be effected following resolutions passed by both the House of Commons and the House of Lords.); creates an independent Judicial Appointments Commission to select people for all other judicial appointments in England and Wales (it will be comprised of a lay Chairman and five other lay members, five judicial members, two legal professionals, a tribunal

member and a lay magistrate; the Lord Chancellor will either appoint or recommend for appointment the selected candidate, or will have the ability to reject a candidate, once, and to ask the Commission to reconsider, once), and provides for judicial discipline in England and Wales; makes provision about the supply of information to the existing Northern Ireland Judicial Appointments Commission, creates a Northern Ireland Judicial Appointments Ombudsman, and provides a mechanism for the removal of judicial office holders in Northern Ireland

In quashing the convictions in a case in which the judge, after having received a letter from one of the jurors while the jury were considering their verdict stating that a certain group of jurors had been badgering, coercing and intimidating other jurors into changing their verdicts, had given a further direction to the jury including an exhortation not to be bullied or cajoled into a verdict with which they did not agree and referring to the burden of proof and adjuring them to decide the case on the evidence without speculatingit was held in *R v. Smith* [2005] UKHL 12, [2005] 2 All ER 29 that in the instant case there had been no obligation in law on the judge to question the jurors about the contents of the letter and it would not have been appropriate for him to have done so as, had he gone into the allegations, he would inevitably have had to question the jury about the subject of their deliberations. Moreover, where, as in the instant case, the letter alleged wilful misconduct on the part of certain jurors and deliberate disregard of the judge's directions on the law, the prospects of obtaining satisfactory answers to the questioning would have been limited and questioning jurors, even were that within legitimate bounds, would have been likely to have made the situation worse rather than better.While it was legitimate to decide to choose to give the jury a further direction rather than discharge it, the direction given in the instant case had not contained the required strong warning that the jury had to follow the judge's directions on the law, adhere to the evidence without speculation and decide on the verdicts without pressure or bargaining. It was thus difficult to be satisfied that the discussion in the jury room had henceforth been conducted in the proper manner.

The process of trying a soldier for an offence under Part II of the Army Act 1955 by way of summary dealing by his commanding officer was held in *Baines v. Army Prosecuting Authority* [2005] EWHC 1399 (Admin) to be compatible with Article 6 ECHR as a result of the introduction by s 76AA of the right to be tried *de novo* by a court-martial or by the Army Summary Appeal Court and the possibility of making a free and unrestrained choice to elect the former rather than the summary trial and the latter if a finding was made against the soldier on a summary dealing. These changes were considered to distinguish the case from the situation in Eur.Ct.H.R. (4th sect.) *Thompson v. United Kingdom* (Appl. n° 36256/97) judgment of 15 June 2004, in which the summary dealing procedure was found to be in breach of art 6.

Positive aspects

The arrangements for judicial appointments in the Constitutional Reform Act 2005, which have the potential to reinforce judicial independence and establish a clearer separation of powers between the executive and the judiciary.

Publicity of the hearings and of the pronouncement of the decision

Legislative initiatives, national case law and practices of national authorities

Although, pursuant to the Mental Health Review Tribunal Rules 1983, r 21(1), a mental health tribunal was to sit in private unless the patient requested a hearing in public and the tribunal was satisfied a hearing in public would not be contrary to the interests of the patient, it was held in *R (on the application of Mersey Care NHS Trust) v. Mental Health Tribunal* [2004] EWHC 1749 (Admin), [2005] 2 All ER 820 that a tribunal was not necessarily required to sit in public where the two prerequisities in r 21(1) were satisfied. In the present case the concerns raised before the tribunal as to (a) the nature and extent of the patient's understanding about the likely impact of his

request for a public hearing and (b) the patient's safety at a public hearing and the clinical impact on his condition of the security required were relevant to the determination of whether a public hearing would be contrary to his interests and were accordingly a factor that the tribunal should have considered in the exercise of its discretion. In addition it was noted that, although a tribunal could by virtue of r 21(5) control the extent to which any information was made public whether the hearing was in public or private, a tribunal's powers to limit press reporting and publicity if a hearing was held in public was significantly more limited than they were if it were held in private because the protection afforded by the strict liability rule would be only for a limited period and because of the difficulty of determining in advance what kind of public comment about proceedings would create a substantial risk that the course of injustice would be seriously impeded or prejudiced.

The Serious Organised Crime and Police Act 2005 disapplies automatic reporting restrictions for breaches, committed by children and young persons, of anti-social behaviour orders and orders made under sections 1B and 1C of the Crime and Disorder Act 1998 but the court will retain discretion to apply reporting restrictions.

Reasonable delay in judical proceedings

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

A violation of Article 6(1) ECHR was found in Eur.Ct.H.R. (3rd sect.) *Yetkinsekerci v. the United Kingdom* (Appl. n° 71841/01) judgment of 20 October 2005 as a result of the appeal stage of proceedings against the applicant, who had been convicted of knowingly being involved in the attempted import of a controlled drug (diamorphine), having lasted for just under three years.

Legislative initiatives, national case law and practices of national authorities

In dismissing an appeal against a tribunal ruling in favour of a complaint of race discrimination against an employer on account of the delay - seventeen months - in promulgating it, it was held in *Bangs v. Connex South Eastern Ltd* [2005] EWCA Civ 14, [2005] 2 All ER 316 that there might be exceptional cases in which unreasonable delay in a tribunal promulgating its decision could properly be treated as a serious procedural error or material irregularity giving rise to a question of law in the 'proceedings before the tribunal and would thus fall within the right of appeal under the Employment Tribunals Act 1996, s 21(1). However, in the instant case it was not possible to characterise the decision as perverse as a result of the unreasonable delay, and the delay in promulgating it had not created a real risk that the employer had been deprived of the benefit of a full and fair trial.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

In dismissing appeals against the making of confiscation orders following convictions for conspiracy to cheat the Revenue where the judge had (a) taken account, for the purpose of determining whether the defendants had withheld some of their realisable assets from view, of information disclosed by the prosecution other than anything revealed to him which had attracted public interest immunity and (b) had declined to apportion between the relevant conspirators the VAT which the relevant company had obtained but had found that the amount of benefit which a particular defendant was to be treated as having obtained from the offence was the value of the VAT of which the Revenue had been cheated by any corporate entity in respect of which the defendant had, at the material time, been in a controlling position, it was held in *R v. May* [2005] EWCA Crim 97, [2005] 3 All ER 523 that the test was fairness and a judge was neither obliged to

recuse himself nor to appoint special counsel where he was confident that he could put undisclosed material - which he had seen but which was covered by public interest immunity - out of his mind for the purposes of a later decision. Furthermore, while the requirements of Protocol 1, Article 1 ECHR might in some circumstances lead the court to adopt an apportionment approach, that was not so in the circumstances of the present case where the total value of the confiscation orders had been well below the amount of the VAT of which the Revenue had been cheated.

In *Polanski v. Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 All ER 945 it was held (Lords Slynn and Carswell dissenting) that the administration of justice would not be brought into disrepute by allowing a claimant to give his evidence from France by means of a video conference link when he did not wish to come to the United Kingdom to give oral evidence in person at the trial of his action as he was a fugitive from justice in the United States and did not wish to run the risk of being extradited. It was considered that a fugitive from justice,.despite his status, was entitled to invoke the assistance of the court and its procedures in protection of his civil rights and he should therefore be able to have recourse to a procedural facility flowing from a technological development readily available to all litigants.

Guidance on the approach to the award of damages in cases involving violations of Article 6 ECHR was given in *R (on the application of Greenfield) v. Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240, a case in which the Secretary of State accepted that he had acted unlawfully by failing to provide a prisoner with a hearing before an independent tribunal and by refusing to allow him to be legally represented in the determination of a drugs offence contrary to the prison rules, as a result of which he was ordered to serve additional days of imprisonment. It was emphasised that a finding of a violation, even where judged not to afford the applicant just satisfaction, would be an important part of his remedy and an important vindication of the right he had asserted. Secondly the purpose of incorporating the ECHR in domestic law through the Human Rights Act 1998 had not been to give victims better remedies than they could recover in the ECHR but to give them the same remedies without the concomitant delay and expense. Thirdly s 8(4) of the 1998 Act required a domestic court to take into account the principles applied by the European Court of Human Rights under Article 41 ECHR not only in determining whether to award damages but also in determining the amount of the award. Domestic judges should not aim to be significantly more generous than the European Court might have been expected to be in a case where it was willing to make an award at all. In the instant case it was held that the finding in the claimant's favour afforded just satisfaction and there was no special feature which warranted an award.

Following the ruling in Eur.Ct.H.R. (GC) *Ezeh and Connors v. United Kingdom* (Appl. n^{os} 39665/98, 40086/98) judgment of 9 October 2003 that certain disciplinary adjudications faced by prisoners constituted the determination of a criminal charge within Article 6 ECHR, the Secretary of State for the Home Department had generally remitted the award of additional days of imprisonment imposed by prison governors following such adjudications. However, it was held in *R (on the application of Napier v. Secretary of State* [2004] EWHC 936 (Admin), [2005] 3 All ER 78 that a prisoner whose award of additional days for an assault on a prison officer had been remitted was not entitled to have his finding of guilt also quashed as, stripped of its penal consequences, it fell properly to be analysed as an administrative finding of fact. The finding was considered not to involve the stigma of a conviction and to be something that could be legitimately used in the making of sensible and informed decisions regarding the prisoner's management in prison. It was also considered that the the Secretary of State had acknowledged the breach of the prisoner's rights under the ECHR and that sufficient redress had been afforded to him by the remission of the sentence.

The Public Services Ombudsman (Wales) Act 2005 establishes the office of the Public Services Ombudsman for Wales and makes provision for the Ombudsman to investigate those matters that until now were investigated by the Welsh Administration Ombudsman, the Health Service Commissioner for Wales and the Social Housing Ombudsman. The Ombudsman will have

responsibility for investigating maladministration and service failure by the Assembly, its sponsored public bodies and a number of other publicly funded bodies, Welsh health service bodies (primarily NHS Trusts and Local Health Boards in Wales), certain health service providers, local government bodies and social landlords, providing a unified ombudsman service in Wales.

Article 48. Presumption of innocence and right of defence

Presumption of innocence

Legislative initiatives, national case law and practices of national authorities

The Drugs Act 2005 amends section 5 of the Misuse of Drugs Act 1971 to create a presumption of intent to supply where the defendant is found to be in possession of a particular amount of controlled drugs; where the presumption applies a court or jury must assume that the defendant intended to supply the drugs. The presumption does not apply if evidence is adduced, by any person, that raises an issue that the defendant may not in fact have intended to supply those drugs. Where such evidence is raised it will be for the prosecution to prove beyond reasonable doubt that the defendant intended to supply the drugs in his possession. The particular amount of drugs that will give rise to the presumption will be prescribed by the Secretary of State in regulations. The levels will reflect and be proportionate to the seriousness of the offence of supply of a controlled drug.

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 special problems of investigating crime in Northern Ireland was held in Eur.Ct.H.R. (4th sect.) *Shannon v. the United Kingdom* (Appl. n° 6563/03) judgment of 14 October 2005 not to warrant the coercive measures imposed on the applicant, who had already been charged with false accounting and conspiracy to defraud, by the Proceeds of Crime (Northern Ireland) Order 1996, whereby he was fined for failing, without a reasonable excuse, to comply with the financial investigator's requirement to attend an interview and answer questions. In addition, it was held that the applicant's attendance at the interview might well have required him to give information on matters which could have arisen in the criminal proceedings for which he had been charged. It was therefore concluded that the requirement for the applicant to attend the interview and to be compelled to answer questions in connection with events in respect of which he had already been charged with offences was not compatible with his right not to incriminate himself and was thus a violation of Article 6(1) ECHR.

Legislative initiatives, national case law and practices of national authorities

The jury were held in *R v. Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 to have been misdirected where the judge, after refusing a defence application to exclude under the Police and Criminal Evidence Act 1984, s 76(2) evidence of an interview by the police, in which the defendant had made statements amounting to a confession, had stated that they could rely on it if they were ure that it was true, even if it was or may have been made as a result of oppression or other improper circumstances. The House of Lords considered that the logic of s 76(2) - which provided for a confession to be excluded where the prosecution had not established that it had not been obtained by oppression or in consequence of anything said or done that was likely to render it unreliable - was that the jury should have been directed to disregard the confession if they considered that it was or might have been obtained by oppression or in consequence of anthing

said or done likely to render it unreliable. The direction was also considered to an invitation to the jury to act in a way that was incompatible with the defendant's right against self-incrimination under Article 6(1) ECHR. However, as there was no evidence of oppression or any other improper means in obtaining the confession, the direction had been unnecessary and could not have affected the fairness of the defendant's trial or the safety of his conviction.

It was held in *R (on the application of the Crown Prosecution Service) v. Bolton Magistrates' Court* [2003] EWHC 2697 (Admin), [2005] 2 All ER 848 that, where a witness who had been summoned to give a deposition pursuant to para 4 of Schedule 3 to the Crime and Disorder Act 1998 refused to answer questions on the ground of privilege against self-incrimination, that claim should be the subject of proper investigation by the justices in respect of each and every question for which it was claimed. Furthermore, before acceding to a claim to privilege, the court should satisfy itself, from the circumstances of the case and the nature of the evidence which the witness was called to give, that there was a reasonable ground to apprehend real and appreciable danger to the witness with reference to the ordinary operation of the law in the ordinary course of things and not a danger of an imaginary or insubstantial character. The duty of the court was non-delegable so it could not simply adopt the conclusion of the solicitor advising the witness.

The provisions of the Youth Justice and Criminal Evidence Act 1999, s 21(5) - the effect of which was that the court had to give a 'special measures direction' in relation to a witness under 17 years of age 'in need of special protection' which provided for video recorded evidence-in-chief to be given by that witness and for any evidence not given by a video recording, whether in-chief or otherwise, to be given by a live television link - were held in *R (on the application of D) v. Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 All ER 999 to be compliant with Article 6 ECHR in so far as they prevented individualised consideration of the necessity for a special measures direction at the stage at which the direction was made. It was considered that nothing in the special measures provisions was inconsistent with the principles enunciated by the ECtHR as to the admissibility of evidence; all the evidence was produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused could see and hear all of it, as well as having every opportunity to challenge and question witnesses against him at the trial itself. Furthermore the court had the opportunity to scrutinise the video-recorded interview at the outset and exclude all or part of it and at trial it had the fallback of allowing the witness to give evidence in the courtroom or to expand upon the video recording if the interests of justice so required/ Moreover, with regard to the equality of arms the court had wide and flexible inherent powers to ensure that the accused received a fair trial, was not at a substantial disadvantage because the 1999 Act scheme did not apply to him and could give his best quality evidence.

In uholding the defendant's conviction for burglary, which relied upon a confidential statement made by a suspect in an entirely separate inquiry, in which he had said nothing adverse to the defendant's interest in respect of the burglary (being either entirely exculpatory or entirely neutral in effect) but in which he had stated that he had made threats against the defendant after the burglary and not before as claimed by defendant when advancing a defence of duress, it was held in *R v. Hasan* [2005] UKHL 22, [2005] 4 All ER 685 that a statement intended by the maker to be exclupatory or neutral and which appeared to be so on its face but which became damaging to him at trial because, for example, its contents could then be shown to be evasive or false or inconsistent with the maker's evidence on oath was not a 'confession' for the purposes of the Police and Criminal Evidence Act 1984, ss 76(1) and 82(1) and thus could be excluded. It was further held that there was nothing in the text of Article 6 ECHR or the case law of the European Court of Human Rights which supported the view that ss 76(1) and 82(1) created any incompatibility with art 6 and, given the unrestricted capability of s 78 of the 1984 Act to avoid injustice by excluding any evidence obtained by unfairness, including wholly exculpatory or neutral statements obtained by opporession, ss 76(1) and 82(1) were compatible with art 6.

Other relevant developments

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom accelerate the implementation of the reforms of the criminal justice system in Northern Ireland and provide for an obligation on disclosure judges there to regularly review court proceedings in juryless trials.

Legislative initiatives, national case law and practices of national authorities

In dismissing a challenge to the lawfulness of the warning under the final warning scheme established for children and young persons by the Crime and Disorder Act 1998 - whereby a police officer could give a warning to a young offender with no previous convictions if he had evidence that the young offender had committed an offence, the offender admitted that he had committed it and the officer was satisfied that it would not be in the public interest for the offender to be prosecuted, with the warnings being registered on the police national computer and, in the case of certain offences, the sex offenders register - it was held in *R (on the application of R) v. Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369 that neither a warning nor the decision to warn under the scheme in ss 65 and 66 involved the determination of a criminal charge within Article 6(1) ECHR since, even if there had been one at the beginning of the process, it could not be held to endure once a decision had been made that ruled out the possibility of any trial, or condemnation or punishment and it was not part of the duty of the police officer to decide, determine or adjudicate whether the offender was guilty or not. Furthermore the recording of the warning on the police national computer and the sex offenders register a public announcement or declaration of guilt as access to the computer and register was controlled and limited to a small number of authorised persons.

In dismissing applications for compensation under the Criminal Justice Act 1988, s 133 (which incorporated ICCPR, Art 14(6) by providing for compensation where a conviction had been reversed on the ground that a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice), it was held in *R (on the application of Murphy) v. Secretary of State for the Home Department* [2005] EWHC 140 (Admin), [2005] 2 All ER 763 that, where new evidence resulted in a finding of fact and the fact so found could properly be described as a new or newly discovered fact, then the relevant statutory condition could be met even if the evidence and resulting finding of fact related to a matter that was in issue at trial. However, the disclosure of a fact (in the instant case evidence previously undisclosed by the prosecution) between trial and the determination of an appeal brought within the normal time limit could not engage the operation of section 133 since that provision, read in the light of Article 14(6) was concerned only with facts that emerged after the ordinary appellate process had been exhausted. Furthermore it was not sufficient that the new or newly discovered fact made some contribution to the quashing of the conviction as it had to be the principal, if not the only, reason for the quashing of the conviction. Only then could it be said that the new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice. In the instant case the newly disclosed evidence was considered to be one of a number of factors rendering the convictions unsafe.

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

Legality of criminal offences and penalties

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

Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), recommended that the United Kingdom should: ensure that Anti-social behaviour order guidelines adequately delimit the nature of the behaviour targeted.; exclude the possibility of authoritising ASBOs on the basis of hearsay evidence alone; restrict the ability to apply to the courts for Anti-Social Behaviour Orders to the authorities currently invested with this right.

Legislative initiatives, national case law and practices of national authorities

The House of Commons Home Affairs Select Committee has carried out an inquiry into anti-social behaviour (behaviour that causes, or is likely to cause, harassment, alarm or distress) and the response to it from central and local government. It heard evidence that the current definitions of anti-social behaviour are too broad, leading to jurisprudential and other concerns but concluded that they should not be changed as they work well from a practical enforcement point of view, are helpful in focusing on the effect on victims and offer the flexibility that is essential to allow problems of ASB to be highlighted and tackled where they are felt—at a local level. At the same time, it concluded that local residents need to be more fully involved in the process of defining locally what is to be treated as anti-social behaviour and believed that there was a need for more effective communication as to the standards of behaviour that are to be expected—especially in relation to young people. The Committee rejected arguments that the Government's anti-social behaviour policies are overwhelmingly punitive towards children and that its strategy was skewed towards enforcement. It stated that it had seen much evidence that in many parts of the country, legal powers are used only relatively rarely. The Committee considered that, overall, the balance of the Government's strategy is about right. It also welcomed the introduction of a number of new powers to deal with anti-social behaviour, including housing injunctions and demotions, anti-social behaviour orders (ASBOs) and dispersal powers. It considered that these could provide much-needed relief for communities suffering from the impact of nuisance behaviour. However, it recommended that qualitative research be commissioned as a matter of urgency to determine the take-up of the main housing powers, their effectiveness in tackling anti-social behaviour and their impact on homelessness. It noted that ASBOs are commonly seen as the central element of the response to anti-social behaviour but emphasised that they are used only in response to a small fraction of incidents of such behaviour: it found that in most cases, local authorities, housing associations and other agencies will try informal approaches first. The Committee concluded that most of the criticisms of ASBOs were unfounded but did recommend that the minimum term of ASBOs (currently of two years) be removed in relation to young people and considered that research is necessary to establish the reasons for those few ASBOs which have been issued inappropriately or contain inappropriate conditions; *Anti-Social Behaviour*, HC 80-I, 5 April 2005.

The House of Commons Welsh Affairs Committee welcomed the legislation introduced by the Government to tackle anti-social behaviour, but recommends that time is now given for that legislation to bed in to the working practices of the police. It further recommended, that the Government establishes a clearer definition of what constitutes anti-social behaviour so that strategies can be better designed to combat that behaviour. The Committee identified some initial concerns about the low number of ASBOs issued in Wales compared to England but concluded that the low use of ASBOs is a result of a considered and appropriate response to tackling anti-social behaviour in Wales. The Committee welcomed the 'Welsh approach' which is based on a strategy for staged intervention which uses ASBOs as a measure of last resort. It recommended that the Government establishes a measurement for success which better reflect the Welsh approach. It also recommended that clear guidelines be given to magistrates so that ASBOs can be issued quickly, when considered necessary; *Police Service, Crime and Anti-Social Behaviour in Wales*, HC 46-I, 23 March 2005.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The Serious Organised Crime and Police Act 2005 inserts into the Crime and Disorder Act 1998 new sections 13A to 13E which provide power for magistrates' courts in England and Wales to make parental compensation orders ("PCOs") on application by a local authority up to a maximum of GBP 5,000. The magistrates' court will be able to make a PCO where it is satisfied to the civil standard of proof that a child under the age of 10 has taken or caused loss or damage to property in the course of behaving anti-socially or committing an act that would have been criminal if he were 10 or over and where making the order would be desirable in the interests of preventing a repetition of the behaviour in question. The order will require the child's parent(s) or guardian(s) (other than a local authority) to pay compensation to any person or persons affected by the taking of the property or by its loss or damage.

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

No developments have been reported for the period under scrutiny under this provision of the Charter.