**The Human Rights Act**

**and the Criminal Justice System:**

**the impact of the ECHR in criminal cases**

**Introduction**

Since coming into force in 2000, the Human Rights Act has widely shaped the development of the United Kingdom’s criminal justice system, not only in providing solutions for rights infringements, but also in shaping legislation. Upon enactment, the Act made it unlawful for any public body to act in a way that is incompatible with the European Convention on Human Rights, thereby reinforcing the fortitude of the Convention and its legal weight at a national level.

This paper will consider the impact of the rights contained in the European Convention on Human Rights on the UK criminal justice system through challenges raised in the UK courts. Although article 6 ECHR has a significant role in the development of case law enhancing rights protection, other rights set out in the ECHR have also had a broader impact.

It is important to also note that many changes to the criminal justice system have occurred without the need for challenges through the courts, through the interpretation of the requirement in article 6 ECHR for a fair and public hearing by an independent and impartial tribunal – the Parole Board, the Criminal Cases Review Commission, Criminal Injuries Compensation Board are examples of independent decision making bodies where decisions were previously made by the Secretary of State for Justice. Decisions continue to be made by the Minister concerning compensation for miscarriages of justice, which may be considered to be the exercise of power in violation of article 6 ECHR.

Other articles of the Convention that have played a role in developing the criminal justice system are:

* Article 3, freedom from torture;
* Article 4, freedom from slavery or servitude;
* Article 5, right to liberty and security;
* Article 7, no punishment without law; and,
* Article 8, the right to private and family life.

For example, article 3 has not only played a role in providing legal assurances to the victims of crimes, but also improving due process for those accused of crime. In *Police v. DSD*, the High Court found that a police failure to conduct an investigation into allegations of rape had breached Article 3. On the other hand, in *RB v. Secretary of State*, the House of Lords held that individuals accused of terrorism could not be deported when there were substantial grounds to believe there was a risk that their rights would be breached.

Article 4 has also played a significant role in protecting victims of slavery, and has introduced positive obligations on the UK to deter human trafficking. For example, in *OOO v. Metropolitan Police*, the High Court determined that the police had a duty to investigate alleged breaches of rights where there was any credible allegation of trafficking. Additionally, the Article was invoked in *R v. L*, where the Court of Appeal imposed new guidance to criminal courts in instances where those accused of committing crimes had themselves suffered forms of human trafficking.

Article 5 has been engaged in an array of challenges ranging from terrorism charges, hospitalisation and detention to the more obvious period of imprisonment. For example, Article 5 was invoked on the British military in the context of its detention of a UK national suspected of terrorism, in *A & Ors v. United Kingdom*.

Finally, the right to respect for private and family life, preserved in article 8, has been used extensively and to date has succeeded in assuring UK nationals that public bodies cannot exploit the personal lives of the public. Most recently, in *R v. Commissioner of Police of the Metropolis*, the Supreme Court found that the police’s systematic collection and retention of previous convictions must be weighed by a principle of proportionality so that the rights of those previously convicted are not violated.

Below is a list of example cases, separated by article that chart the range of cases which have impacted upon the criminal justice system over the period since the Human Rights Act came into force. These demonstrate the broad range of challenges brought to enhance victim and suspect rights during and after criminal proceedings. It will also be apparent that, despite the opportunity to raise human rights claims directly in UK courts

**Article 2 – right to life**

Cases which have improved victims’ rights:

* 2013: ***McCaughey v. United Kingdom (43098/09)*, (2014) 58 E.H.R.R. 13**; Where applicants brought a claim under art. 2 ECHR following the shooting of their relatives by the security forces, the Strasbourg Court found a violation due to the excessive delay in investigating the killings of the individuals. The UK Supreme Court had previously found no violation as it was deemed that reasonable force had been used.
* 1998: (Pre-HRA) ***Osman v. UK*, (2000) 29 E.H.R.R. 245**; where a victim was seriously injured and his father was killed after being shot by his former teacher, the victim brought a negligence claim against the police. The Court of Appeal ordered the action to be struck out as disclosing no reasonable cause of action on the ground that, following the House of lords’ ruling in *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53, for public policy reasons, no action in negligence could lie against the police in respect of the investigation and suppression of crime. After applying to the ECtHR, Strasbourg found that the police’s blanket immunity provided by *Hill* constituted a disproportionate restriction on the family’s right to life, as well as the applicant’s Art.6 right to a fair trial

**Article 3 – prohibition of torture**

Cases which have improved victims’ right:

* 2014: ***Police v. DSD*, [2014] EWHC 2493 (QB), [2015] 1 W.L. R. 1833;** Where the failure by police to conduct an effective investigation into allegations of rape amounted to a violation of art. 3 ECHR, the victims of rape by a serial rapist were entitled to a financial remedy for harm caused by the police failings on top of sums received in civil claims for the harm caused by the rapes.
* 2011: ***OOO and others v. the Metropolitan Police*, [2011] EWHC 1246 (QB)**; Where four girls had been trafficked from Nigeria to the UK and forced to work as domestic slaves, the Court found that the duty of the police to investigate alleged breaches of an individual’s right to freedom from inhuman or degrading treatment under Article 3 (as well as freedom from slavery or servitude under Article 4) would not be limited to situations where the complaint was received by the victim themselves, but wherever a credible allegation was received.
* 2009: ***R(B) v. DPP*, [2009] EWHC 106 (Admin)**; Where prosecution by the DPP of a serious assault was discontinued the day before trial on the basis of a victim’s mental condition (deeming he could not be put before a jury as a reliable witness), the Strasbourg court ruled that the discontinuation was an irrational exercise of the DPP’s discretion and violated the victim’s rights under Article 3 because he suffered humiliation, was made to feel like a second class citizen and increased his feeling of vulnerability.
* 2001: ***Price v. UK*, (2002) 34 E.H.R.R. 53**; A severely disabled person was detained in a prison cell that was not adapted to the needs of a disabled person, causing her to suffer degrading treatment.

Cases which have improved suspect’s rights:

* 2013: ***Vinter v. United Kingdom (66069/09)* and *Bamber v. United Kingdom (130/10)* 34 B.H.R.C. 605, [2014] Crim. L.R. 91**; For a sentence of life imprisonment to be compatible with Art.3, the Strasbourg court ruled there had to be a possibility of review and a possibility of release. In *Vinter*, the Court of Appeal had found ‘whole life terms’ appropriate for offenders convicted of a second murder, having the element of premeditation following the kidnapping of his victim. However in 2014: ***R. v. Newell (Lee William) [Attorney General’s Reference (No.69 of 2013))*, [2014] EWCA Crim 188**; The applicant appealed against the imposition of a whole-life term of imprisonment following conviction for murder. The Court of Appeal held that the scheme for release under Crime (Sentences) Act 1997 did not violate the Convention because the section 30 “exception circumstances” for release provision must be exercised compatibly with article 3 ECHR. Moreover, the terms of the Indeterminate Sentence Manual cannot restrict the duty to comply with the ECHR or fetter the Secretary of State’s discretion to release, who must consider all the circumstances and is subject to judicial review. In ***Hutchinson v. United Kingdom*** App No, 57592/08, 3 Feb 2015 the ECHR’s fourth section accepted this reasoning and was satisfied that it clarified how article 3 would be complied with in a whole life review case. *Hutchinson* was referred to the Grand Chamber and a decision is pending.
* 2009: ***RB (Algeria) v Secretary of State for the Home Department*, [2009] UKHL 10**; Where an individual had received an order for deportation and claimed that such action would violate his art. 3 and art. 6 rights because there was the risk that they would be tortured by authorities on their return, the Court found that before the deportation of a foreign national would be capable of violating the ECHR Art. 6, there must be substantial grounds for believing that there was a real risk that there would be a fundamental breach of his right to a fair trial, and that that breach would lead to a miscarriage of justice that itself constituted a flagrant violation of his fundamental rights.
* 2001: ***R v. H (Assault of Child: Reasonable Chastisement*), EWCA Crim 1024, [2002] 1 Cr. App. R. 7**; Where a father’s defence to a charge of assault occasioning bodily harm was one of reasonable chastisement of his son, the jury was directed in accordance with the common law in light of decisions of the ECtHR (precedent indicated that to contravene art. 3, considerations of severity and reasonableness were of relevance. *Tyrer v. United Kingdom (1979-80) 2 EHRR 1, Y v United Kingdom (14229/88) (1994) 17 EHRR 238)*; As a result, the Court of Appeal (Criminal division) found the object of the jury was to achieve a balance between maintaining rights of the boy under Art. 3, the father’s right to a fair trial under Art. 6, and the father’s right not to be punished for an act that did not constitute a criminal offence under Art.7.

**Article 4 – prohibition of slavery and forced labour**

Cases which have improved victims’ rights:

* 2012: ***C.N. v. UK*, (2012) 56 EHRR 869**; Where a Ugandan woman who immigrated to the UK to escape sexual and physical violence was held in domestic servitude upon arrival and was denied asylum and police investigation, the Strasbourg Court found a violation of Art.4 and held there is a procedural duty on the part of the States to investigate ‘where there is a credible suspicion that an individual’s rights under that Article have been violated.’
* 2011: See ***OOO and others v. the Metropolitan Police*, [2011] EWHC 1246 (QB)** in ‘Article 3’ section above

Cases which improved due process for accused individuals:

* 2013: ***R v L,* [2013] EWCA Crim 991 (CA (Crim Div))**; Where four unconnected individuals, who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced to commit their offences, some of which included cultivation of cannabis and prostitution, the Court of Appeal gave guidance to future courts to consider trafficking issues before conviction.

**Article 5 – right to liberty and security**

Cases which have improved suspects and detained people’s rights:

* 2012: ***James v. UK (25119/09), (2013) 56 EHRR 12, 33 BHRC 617***; The Strasbourg Court found that a prisoner’s continued detention beyond the expiry of his minimum term of sentence of indeterminate imprisonment on the basis of public protection (IPP) without access to any rehabilitative courses violated Article 5; The House of Lords had dismissed his appeal prior to his appeal to Strasbourg, finding no violations of Art.5(1) or Art.5(4).
* 2011: ***Al-Jedda v. the United Kingdom,* (27021/08)**; Where an individual who travelled from the UK and Iraq, and was subsequently imprisoned by British military forces without charge on the grounds of his suspected membership of a terrorist group, the ECtHR deemed his internment to be a violation of his rights under Art 5(1). The contention had previously been rejected by the UK courts (*R (Al-Jedda) v Secretary of State for Defence (JUSTICE Intervening) [2007 UKHL 58, [2008] 1 AC 332).*
* 2004: ***A v. Secretary of State for the Home Department*, [2004] UKHL 56**; Where foreign nationals were suspected of terrorist activity after 9/11 (who were at risk of torture if they were to be deported and thus protected by Art.3), the House of Lords held that the Anti-terrorism, Crime and Security Act 2001 was incompatible with the HRA insofar as it was disproportionate and permitted detention of suspected terrorists in ways that was discriminatory. The ECtHR had previously held (in ***A & Ors v United Kingdom*, (3455/05)**)that the severe and indefinite movement restrictions amounted to a detention which was not applied to nationals and was unlawfully discriminatory.
* 2013: ***Osborn v The Parole Board* [2013] UKSC 61**: The appellants had sought early release and had been denied an oral hearing by the Parole Board under the operation of the statutory regime. Their cases had instead been decided on paper by a single anonymous member of the Board. The Supreme Court held that by denying the appellants an oral hearing in the circumstances of their cases the Board had breached the requirements of procedural fairness it owed them at common law. As the common law duty of fairness satisfied the requirements of article 5(4) (decision on detention by a ‘court’), it followed that the Board had also acted incompatibly with the appellants’ Convention rights*. (The Court was critical of the appellants’ focus on article 5(4) and comparative lack of attention to domestic administrative law (at [54]). It stated that the Convention rights were expressed very generally, and should be fulfilled at a national level through more specific domestic law. The protection of human rights “is not a distinct area of law, based on the case law of the ECHR, but permeates our legal system” at [55]).*
* 2012: ***Cameron v Procurator Fiscal* [2012] ScotHC HCJAC\_19:** (Under the Scotland Act, any law passed by the Scottish government in Holyrood can be struck down by the Scottish courts if it is incompatible with the ECHR. The HRA power to make a declaration of incompatibility still applies in relation to Westminster Acts.) Mandatory provisions of the standard Scottish bail conditions required any bailed person whenever reasonably instructed to do so to participate in ID procedures and allow prints, etc, to be taken. Article 5 is engaged by pre-bail conditions, and the mandatory nature of the provisions, which removed any judicial discretion and supervision, was a violation of Article 5 (*cf.* the position in England and Wales).

**Article 6 – right to a fair trial**

* 2016: ***Guardian News and Media Ltd. v. Incedal*, [2016] EWCA Crim 11**; Various media organisations appealed against continuing restrictions on reporting parts of the trial of Erol Incedal, on terrorist charges, that had been held in private. The Court of Appeal dismissed the claim. The Court accepted that there was a strong public interest in the evidence that was heard in private being made public. However, in this case, a departure from the principles of open justice was necessary for justice to be done (the decision was based on the nature of the evidence, which the court was unable to make public). It did, however, request that a working party be formed to advise the Court of Appeal on how to ensure that the practice of following precedents in making decisions could be scrutinised, notwithstanding the use of a closed judgment.
* 2012: ***Othman (Abu Qatada) v. United Kingdom* App. No. 8139/09 [2012] ECHR 56**; the UK sought to deport Abu Qatada to Jordan due to suspicion of involvement in terrorist activities in the UK. He challenged this due to having been tried in his absence and sentenced to life imprisonment on terrorism charges there. He argued that evidence against him had been extracted through torture. The Strasbourg court held that deportation would violate the right to a fair trial due to the reliance that would be placed on unfair evidence at re-trial. In 2013 Abu Qatada was deported to Jordan following the signing of a bi-lateral treaty by Jordan that the evidence would not be used. He was then acquitted of the charges in 2014.
* 2010: ***Peter* *Cadder v HM Advocate*, [2010] UKSC 43; [2010] 1 W.L.R. 2601** (JUSTICE intervening); The Supreme Court ruled that a person detained under the Criminal Procedure (Scotland) Act 1995 s.14 had to have access to a lawyer from the time of his first interview unless there were compelling reasons in the particular circumstances of the case that made the presence of a lawyer impracticable; Relied on *Salduz v. Turkey* (2009) EHRR 19, where the applicant succeeded on his application to the ECtHR that refusal for the state to allow him access to a lawyer while in detention violated his right to a fair trial, which includes the right to legal advice in police custody pursuant to art. 6(3)(c).
* 2009: ***R v. Horncastle*, [2009] UKSC 14**; In response to the ECtHR ruling in *Al-Khawaja and Tahery v. United Kingdom* (2009) 49 EHRR 1 (JUSTICE intervening), where the ECtHR ruled against the state and found while it was justifiable to allow hearsay evidence in some circumstances, it was likely never permissible for a conviction to be based solely or decisively on such evidence, the Supreme Court unanimously affirmed the decision by the Court of Appeals and dismissed the appeals of several defendants who were convicted on the basis of statements of absent witnesses. The ECtHR later found ([2015] 60 EHRR 31) no breach of Article 6 rights in relation to the evidence admitted from absent victims.
* 2001: See ***R v. H (Assault of Child: Reasonable Chastisement*), EWCA Crim 1024**, above

**Article 7 – no punishment without law**

* 2001: See ***R v. H (Assault of Child: Reasonable Chastisement)*, [2001] EWCA Crim 1024**, above

**Article 8 - right to respect for private and family life**

* 2015: ***R (on the application of T) (AP) v. Commissioner of Police of the Metropolis*, [2015] UKSC 9;** Two individuals who had committed crimes years ago wanted to be removed from the national police database. The Supreme Court determined that the systematic collection and retention by the police of data about the respondents disproportionately interfered with their rights to privacy.

* 2013: ***L & Ors v The Children’s Commissioner v. England & Anor*, [2013] EWCA Crim 991**; See “R v. L; [2013] EWCA Crim 991” in Article 4 section above
* 2010: ***Gillan & Quinton v. UK* (4158/05)**, **[2010] ECHR 28;** Where two protestors were stopped and searched by the police without the requirement to show reasonable grounds for suspicion under the Terrorism Act 2000 the ECtHR held that there was a violation of art. 8. The House of Lords had dismissed the applicant’s appeal, believing that the “superficial search of the person and an opening of bags, of the kind to which passengers uncomplainingly submit at airports, for example, can scarcely be said to reach [the level of violating Art. 8].” However, the Strasbourg Court held that national law did not provide adequate safeguards against arbitrary interference: there was no requirement to assess the “necessity” of a stop and search, the test being whether the search was “expedient”; the lack of a requirement to demonstrate reasonable suspicion conferred an unacceptable breadth of discretion on the individual police officer; and the availability of judicial review or an action in damages was not an adequate safeguard, as it was likely to be difficult or impossible to prove the power was improperly exercised. The public nature of a search may in some cases compound the seriousness of the interference.
* 2008: ***Liberty and Ors v. the United Kingdom* (58243/00), [2008] ECHR 568;** Where the UK’s system of mass surveillance implemented to spy on telephone calls, faxes, and emails to and from Ireland was challenged by the Irish Council for Civil Liberties, Liberty, and British-Irish Rights Watch, the ECtHR found a breach of privacy rights under Art. 8, reasoning that “the Court does not consider that the domestic law at the relevant time indicated with sufficient clarity, so as to provide adequate protection against abuse of power, the scope or manner of exercise of the very wide discretion conferred on the State to intercept and examine external communications.”
* 2008: ***S and Marper v. the United Kingdom*, (30562/04, 30566/04), [2008] ECHR 1581, 25 BHRC 557;** Where fingerprints of individuals arrested were retained by authorities and requests for their destruction were denied, the individuals claimed that the retention was disproportionate because of its blanket nature. S and M applied unsuccessfully for judicial review and their appeals to the Court of Appeal and the House of Lords were dismissed. The ECtHR found a violation of Art. 8 since the blanket and indiscriminate nature of the powers of retention of fingerprint and DNA material of a suspected (but not convicted) person was a disproportionate interference with the right to private life, not necessary in a democratic society.
* 2000: ***ADT v. United Kingdom* (35765/97), (2001) 31 E.H.R.R. 33; [2000] 2 F.L.R. 697;** Where a homosexual man complained to the ECtHR that his conviction of ‘gross indecency’ under the Sexual Offences Act 1956 s.13 relating to consensual, non-violent sexual acts with four other men, which was depicted in a videotape seized from his home, infringed Art.8, the Court had found a violation since the law imposed an unnecessary restriction on private life in a democratic society (although state interferences could be justified in certain circumstances to protect morals or health).

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