CHAPTER 22

RIGHTS AND DUTIES GENERALLY

I. INTRODUCTION

22–001 In this Part we discuss the civil rights which have been traditionally recognised as the hall marks of a free society. We discuss also some areas of the criminal law which are designed to preserve a society in which these rights can be exercised and to protect individuals against undue invasion of their rights by the actions of others. Dicey was concerned in his discussion of basic civil rights to demonstrate that they had been deduced as principles from judicial decisions determining the rights of private persons in particular cases brought before the Courts "whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution."[1]

Rights of the individual under the United Kingdom Constitution[2]

22–002 As has been seen in Chapter 2, there are under the constitution of the United Kingdom no rights strictly fundamental, in the sense of entrenched (basic, inalienable), because of the supremacy of Parliament and the absence of a written constitution with entrenched provisions and judicial review of Acts of Parliament.[3] However, as was also mentioned, the Courts have increasingly in recent years adverted to the importance of generally recognised rights and suggested that they are so fundamental to the common law that statutes must be read in the light of their existence and they will be restricted only by the clearest words. The right of unimpeded access to a court, for example, must "even in our unwritten constitution . . . rank as a constitutional right".[4] Freedom of expression is "the primary right" in a democracy.[5]

At the same time, however, support was increasingly being expressed for the adoption by the United Kingdom of some form of written constitutional statement of basic rights not only by academic writers but also by senior members of the judiciary.[6] Various proposals were made. Some writers preferred the drafting

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[1] *The Law of the Constitution* (10th ed.), p. 195.

[2] D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., 2001); G. Robertson, *Freedom, The Individual and the Law* (6th ed., 1989); S. H. Bailey, D. J. Harris and B. L. Jones, *Civil Liberties, Cases and Materials* (3rd ed., 1991); C. Palley, *The United Kingdom and Human Rights* (1991).

[3] *ante*, para. 2–034.

[4] *R. v. Secretary of State for the Home Department ex p. Leech* [1994] Q.B. 198, 210, *per* Steyn L.J. (Prison Act 1952 not sufficiently unambiguous to justify making Prison Rule which interfered with right of access to legal advisers). *R. v. Secretary of State for the Home Department ex p. Ruddock* [1987] 1 W.L.R. 1482; *cf. R. v. Lord Chancellor ex p. Witham* [1998] Q.B. 575, DC; distinguished, *R. v. Lord Chancellor ex p. Lightfoot* [2000], 2 Q.B. 597, CA.

[5] *R. v. Secretary of State for the Home Department ex p. Simms* [2000] 2 A.C. 115, HL. See too *Derbyshire C.C. v. Times Newspapers Ltd* [1993] A.C. 534, HL.

[6] Lord Lloyd of Hampstead, "Do we Need a Bill of Rights?" (1976) 39 M.L.R. 121; C. Campbell, ed., *"Do We Need a Bill of Rights?"* (1980); J. Jaconelli, *Enacting a Bill of Rights: The Legal Problems* (1980, Oxford); M. Zander, *A Bill of Rights* (4th ed., 1997, Sweet & Maxwell); J. Wadham, "A British Bill of Rights" in *Constitutional Reform* (R. Blackburn and R. Plants, eds, 1999,

of a Bill of Rights, adapted to the needs of the nation at the time of drafting.[7] Others supported incorporation into domestic law of the European Convention on Human Rights on the grounds that, whatever its shortcomings, the United Kingdom had been a signatory to the Convention for many years and its adoption would not involve the same degree of controversy that would inevitably flow from attempting to draft a Bill of Rights from scratch.[8] Scepticism about the wisdom of conferring new and potentially controversial powers on the judiciary was voiced, however, forcefully by Professor J. A. G. Griffith.[9]

22–003 In its Manifesto at the 1997 Election the Labour Party included a pledge to introduce legislation incorporating the European Convention into United Kingdom law. Its election victory resulted in that pledge leading to the enactment of the Human Rights Act 1998 with which much of the rest of this chapter will be concerned.

In addition to the question, what rights should be protected, in the period before 1998 the issue of the possibility of entrenching any legislation on rights was discussed. Dicey's view of Parliamentary supremacy is inconsistent with the possibility of entrenching a statute of the United Kingdom Parliament. The government in introducing the proposed legislation simply—and probably wisely—ignored the issue.[10]

International Covenants[11]

22–004 Popularisation of the concept of human rights in the western world began in 1941[12] during the Second World War with the Atlantic Charter, a joint declaration by the United State President (Franklin Roosevelt) and the United Kingdom Prime Minister (Churchill), and Roosevelt's message to Congress proclaiming the Four Freedoms—freedom of speech and expression, freedom of religion, freedom from fear and freedom from want; followed by a declaration of United Nations war aims in 1942 that victory was essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice. These rights were elaborated in the Universal Declaration of Human Rights adopted and proclaimed in 1949 by the General Assembly of the United Nations, including the United Kingdom.[13] No attempt was made at the time to specify limitations on those rights; to distinguish political, economic and social rights; or

Longman). Judicial contributions include: Sir Leslie Scarman, *English Law—The New Dimension* (Hamlyn Lectures, 1974); Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] P.L. 397; Lord Bingham, "The European Convention on Human Rights: Time to Incorporate" (1993) 109 L.Q.R. 390; Laws L.J., "Is the High Court the Guardian of Fundamental Rights?" [1993] P.L. 59; "Law and Democracy" [1995] P.L. 72; Lord Woolf, "Droit Public—English Style" [1995] P.L. 57; Laws L.J., "The Constitution: Morals and Rights" [1996] P.L. 623; Lord Irvine, "Response to Lord Justice Laws" [1996] P.L. 636.

Although it might be thought that the concept of fundamental rights is undermined by the admission that they can arise or fade away within a period of 50 years.

[8] Bills were introduced in both Houses of Parliament from 1975 onwards by the Liberal Party. Lord Scarman introduced a Bill for incorporating the Convention in 1985. Sir Edward Garner, Q.C., a Conservative M.P. introduced a Bill in 1987 and Lord Lester of Herne Hill, Q.C., a Liberal Democrat peer, introduced bills in 1994 and 1996.

[9] *The Politics of the Judiciary* (5th ed., 1997).

[10] "It would not be necessary or desirable to attempt entrenchment": White Paper, (1997) Cm 3782, para. 2.16.

[11] Ian Brownlie (ed.), *Basic Documents on Human Rights* (3rd ed., 1992); P. R. Ghandhi, *International Human Rights Documents* (2nd ed., 1995).

[12] But *cf.* the work of the International Labour Organisation which was established after the First World War.

[13] *ante*, para. 1–020.

to provide machinery for enforcement. The United Nations drew up more elaborate formulations in 1966—in some respects improving on the European Convention—in the International Covenant on Economic, Social and Cultural Rights[14] and the International Covenant on Civil and Political Rights, which were ratified by the United Kingdom in 1976 with certain reservations in relation to education and dependent territories.[15] Subsequent developments have included the adoption of Conventions on the Elimination of All Forms of Discrimination against Women (1979), against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984), which was incorporated into the law of the United Kingdom by the Criminal Justice Act 1988, section 134,[16] and the Convention on the Rights of the Child, (1989).

The increasing international emphasis on the recognition of human rights had led to attempts to draft conventions on a regional basis, with emphasis on effective machinery for enforcement and the provision of remedies for infringement of guaranteed rights. In the United Kingdom the European Convention on Human Rights is the most important example of this development. Other significant important examples include the inter-American system of Human Rights.[17]

The European Convention[18]

22–005 The Member States of the Council of Europe,[19] being a number of democratic European countries including the United Kingdom, drew up the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1950 as a first step in the collective enforcement of certain of the rights stated in the Universal Declaration. The United Kingdom ratified the Convention in 1951.[20] Although it was not part of English or Scots law the Convention began to exert a strong influence on the way civil rights were regarded in this country.

An important feature of the European Convention from its inception was the provision of effective machinery to enforce the rights which it proclaimed. Provision was made for complaints to be laid by a State alleging breach of the provisions by another State[21] and, more remarkably, for a right of individual petition by a citizen of a signatory state.[22]

22–006 Until the reforms to the Convention which took effect in 1998, all applications alleging breaches of the Convention were made to the Commission on Human

[14] M. Craven, *The International covenant on Economic, Social and Cultural Rights* (1998).

[15] D. Harris and S. Joseph, *The International covenant on Civil and Political Rights and the United Kingdom* (1995).

[16] See *R. v. Bow Street Magistrate ex p. Pinochet (No. 3)* [2000] 1 A.C. 147, HL.

[17] D. J. Harris and S. Livingstone, *The Inter-American System of Human Rights* (1998).

[18] D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995); F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (2nd ed., 1996); A. H. Robertson and J. G. Merrills *Human Rights in Europe* (3rd ed., 1993); R. Beddard, *Human Rights and Europe* (3rd ed., 1993); A. Drzemczewski, *European Human Rights Convention in Dòmestic Law* (1983).

[19] The Council of Europe was established in 1949: the aim of the Council was declared by its founding Statute to be "to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."

[20] Lord Jowett, then Lord Chancellor, thought that accepting the Convention would "jeopardise our whole system of law, which we have laboriously built up over centuries, in favour of some half baked scheme to be administered by some unknown court": see Anthony Lester, "Fundamental Rights, The United Kingdom Isolated" [1984] P.L. 46, 51.

[21] *e.g. Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25.

[22] *e.g. Lawless v. Ireland* (1961) 1 E.H.R.R. 15.

Rights. The Commission decided whether a complaint was admissible, the Commission then established the facts and gave a legal opinion which was transmitted to the Committee of Ministers. The Commission was empowered to refer a case to the Court by Article 48, the normal way by which the Court became seized of a dispute.[23]

Under the revised Convention, following the coming into effect of the Eleventh Protocol, the Commission and the Court have been merged.[24] A new procedure had been required to cope with the continual increase in the number of applications each year arising from a greater awareness of the roles of the Commission and the Court and the expansion in the number of signatory states since the foundation of the Council of Europe in 1949.

The newly constituted Court consists of full-time judges, equal in number to the states which are parties to the Convention.[25] The work of the Court will be carried out by Committees, consisting of three judges, Chambers, consisting of seven judges, and a Grand Chamber of 17 judges. Although each judge sits in his individual capacity and not as a representative of the State which nominated him,[26] each State involved in litigation is entitled to have its national judge (or another of its choice) included as an *ex officio* member of the relevant Chamber or Grand Chamber (Article 27(2)).

A second important change to the previous law relates to the right of individual petition. Formerly, under Article 25 the right was subject to the lodging of a declaration by the relevant State which might be for a fixed period, subject to renewal, or indefinitely.[27] Under Article 34, however, the right is now independent of State agreement.

The European Convention before the Human Rights Act 1998

22–007 Increasingly as litigants obtained judgments at Strasbourg against the United Kingdom the Convention began to be cited in our domestic courts. This was despite the fundamental constitutional principle that treaties cannot affect rights and duties of persons in the United Kingdom unless their provisions have been incorporated into domestic law by legislation. That fundamental principle was illustrated in the *G.C.H.Q.* Case[28] when Lord Fraser in the part of his speech headed "Minor matters" declined to consider the interpretation of certain international labour conventions because they were "not part of the law in this country". In *British Airways Board v. Laker Airways Ltd*[29] Lord Diplock said, "The interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law". Nonetheless the Convention was frequently cited in the courts and judges on various occasions referred to its

[23] For details of the earlier procedure, see Harris, O'Boyle and Warbrick, *op. cit.*

[24] Decisions and Opinions of the Commission remain of importance in interpreting the terms of the Convention and are expressly mentioned in s.2(1)(b) and (c) of the Human Rights Act.

[25] A. R. Mowbray, "A new European Court of Human Rights" [1994] P.L. 540; "The composition and operation of the new European Court of Human Rights" [1999] P.L. 219.

[26] Each State nominates three names from which the final selection is made by the Parliamentary Assembly: Art. 22.

[27] Thus under Article 25 the United Kingdom withdrew the right of individual petition in relation to the Isle of Man after *Tyrer* (1978) 2 E.H.R.R. 1: *post* para. 22–032 and para. 35–001.

[28] *Council of Civil Service Unions v. Minister for the Civil Service* [1985] A.C. 374.

[29] [1985] A.C. 58.

provisions although no decision can be said to have been based on the Convention. In *Kynaston v. Secretary of State for the Home Department*[30] the Court of Appeal held that the clear words of the United Kingdom mental health legislation prevailed over the provisions of Article 5 (right to liberty of the person). Article 6 (right to a hearing) was involved in *Trawnik v. Lennox*.[31] Sir Robert Megarry V.-C., said "The [European] Convention [of Human Rights] is not, of course, law though it is legitimate to consider its provisions in interpreting the law; and naturally I give it full weight for this purpose."[32] Nonetheless, he (and subsequently the Court of Appeal) applied the letter of the Crown Proceedings Act 1947. Article 8 (respect for private and family life) was similarly invoked in vain in an attempt to challenge the legality of telephone tapping in *Malone v. Commissioner of Police of the Metropolis*.[33] Article 8 and Article 14 (enjoyment of rights without discrimination) have failed to aid immigrants in the light of the provisions of the Immigration Act 1971 and the Immigration Rules: "The Convention is not part of the law of this country. If it happens to be in accord with the law so much the better. But on the other hand if it does not accord with the law . . . then it is a matter of which we cannot take any account: *R. v. Immigration Appeal Tribunal ex p. Ali Ajmal*,[34] *per* Lord Lane C.J. In *R. v. Ministry of Defence ex p. Smith*[35] the Divisional Court and Court of Appeal felt bound to disregard Article 8 when considering the dismissal from the armed forces of the applicants because of their sexual orientation—although they had little doubt of the applicants' ultimate success at Strasbourg.

Article 9 (freedom of religious expression) was unsuccessfully relied on in **22–008**
Ahmed v. Inner London Education Authority.[36] The same Article was invoked by Lord Scarman in *R. v. Lemon*[37] to justify limitations on free speech. Article 10 (freedom of speech) was cited by Lord Simon and Lord Scarman in their dissenting speech in *Home Office v. Harman*[38] (as well as Milton and the Constitution of the United States). In *R. v. Wells Street Stipendiary Magistrate ex p. Deakin*[39] the House of Lords indicated the need for a reform of the law of criminal libel and Lord Diplock described the present English law as being contrary to Article 10. In *Schering Chemicals v. Falkman*[40] a majority in the Court of Appeal upheld the granting of injunction to prevent the showing of a television programme which had been sought on various grounds. Lord Denning M.R. (dissenting) referred to the importance of freedom of expression and quoted both Blackstone and Article 10. He said, "I take it that our law should conform as far as possible with the provisions of the European Convention of Human Rights". In *Derbyshire C.C. v. Times Newspapers Ltd*[41] the House of Lords in refusing a claim to sue in libel by the county council, considered that the common law on freedom of speech was in accordance with Article 10. In a

[30] [1981] 73 Cr.App.R. 281.
[31] [1985] 1 W.L.R. 532.
[32] At p. 541.
[33] [1979] Ch. 344; *post*, para. 22–012 and para. 26–014.
[34] [1982] Imm.A.R. 102, CA.
[35] [1996] Q.B. 517.
[36] [1978] Q.B. 36, CA; Scarman L.J. dissenting. See also *Panesar v. Nestlé Co.* [1980] I.C.R. 144, CA.
[37] [1979] A.C. 617.
[38] [1983] 1 A.C. 280.
[39] [1980] A.C. 477.
[40] [1982] Q.B. 1.
[41] [1993] A.C. 534.

number of cases relating to trades unions references have been made to Article 11 (right to join and form unions)[42] but judges have differed sharply about the correct significance to draw from the Article when applied to particular facts. In *Cheall v. APEX*,[43] for example, Donaldson L.J. agreed with Lord Denning M.R. that "in matters of legal policy regard should be had to this country's international obligations to observe the treaty as interpreted by the European Court of Human Rights." Nonetheless, he found the conclusion drawn by the Master of the Rolls from Article 11 a "somewhat surprising proposition".

At most, therefore, it could be said that the courts were entitled to look at the Convention, when faced, as Donaldson L.J. suggested in *Cheall v. APEX (supra)*,[44] with a question of legal policy (or public policy), or where the substantive law was unclear as Lord Fraser suggested in *Attorney-General v. BBC*.[45] "The House, and other courts in the United Kingdom should have regard to the provisions of the Convention [on Human Rights] and to the decisions of the Court of Human Rights in cases . . . where our domestic law is not firmly settled. But the Convention does not form part of our law and the decision on what that law is for our domestic courts and for this House."

The Construction of Statutes

22–009 A particular example of the use of the Convention to aid in resolving uncertainty in the law may be said to be found in having recourse to its provisions as an aid to statutory interpretation.

The justification for doing so was that Parliament must know that the United Kingdom has ratified the Convention and so must be taken to intend not to legislate contrary to it. Thus in *Waddington v. Miah*,[46] where the question was whether penal provisions of the Immigration Act 1971 were retrospective, Lord Reid referred to Article 11 of the Universal Declaration and Article 7 of the European Convention (no *ex post facto* criminal laws) and said: "It is hardly credible that any government department would promote or that any Parliament would pass retrospective criminal legislation." In *Birdi v. Secretary of State for Home Affairs*,[47] where a detained illegal immigrant applied unsuccessfully for habeas corpus alleging violations of Article 5 (liberty of person), Article 6 (fair trial) and Article 13 (effective remedies), Lord Denning M.R. stated *obiter* that the courts could and should take the Convention into account when construing statutes, since all concerned with framing legislation after the Convention came into force must be assumed to have borne the Convention in mind. His Lordship even went so far as to suggest that an Act which did not conform might be held invalid. Lord Denning in *ex p. Bhajan Singh*,[48] where an illegal immigrant applied unsuccessfully for mandamus against the Home Office to permit him to

[42] *e.g. R. v. G.L.C., ex p. Burgess* [1978] I.C.R. 991, DC. *U.K.A.P.E. v. A.C.A.S.* [1979] 1 W.L.R. 570; [1981] A.C. 424; *Taylor v. Co-operative Retail Services Ltd* [1982] I.C.R. 600, CA.

[43] [1982] I.C.R. 231. Article 11 was also referred to in the House of Lords which reversed the decision of the Court of Appeal: [1983] 2 A.C. 180.

[44] See similarly F. A. Mann, "Britain's Bill of Rights" (1978) 94 L.Q.R. 512. *cf. R. v. Secretary of State for the Home Dept, ex p. Fernandes, The Times*, November 21, 1980; [1981] Imm.A.R. 1; *R. v. Secretary of State for the Home Dept ex p. Kirkwood* [1984] 1 W.L.R. 913 (Secretary of State under no duty to consider Convention before deporting).

[45] [1981] A.C. 303.

[46] [1974] 1 W.L.R. 683, HL. On the first reference to the Convention in an English court, see note by Stephenson L.J., (1979) 85 L.Q.R. 35.

[47] February 11, 1975, CA, unreported. *cf. Minister of Home Affairs v. Fisher* [1980] A.C. 319, PC. (Interpretation of Constitution of Bermuda in light of United Nations Conventions).

[48] *R. v. Secretary of State for Home Department, ex p. Bhajan Singh* [1976] Q.B. 198, CA.

marry while in custody and relied on Article 12 (marriage and family), stated *obiter* that the courts should take account of the Convention when interpreting statutes affecting the rights and liberties of the citizen: and that it was hardly credible that Parliament or any government department would act contrary to the provisions of the Convention, and regard must be had to them by Ministers and government officials. But His Lordship admitted he went too far in *Birdi (supra)*: if an Act did not conform to the Convention the Act would prevail. And Scarman L.J. in *ex p. Phansopkar*,[49] where a Commonwealth immigrant wife of a patrial was refused entry under the Immigration Act 1971 on the ground that she had not obtained a certificate of patriality, referring to Article 8 (respect for family life) said it was the duty of the courts to have regard to the Convention and to construe statutes so as to promote those rights, so long as they do not disregard clear and unequivocal provisions of the statute.

In *ex p. Salamat Bibi*[50] where the wife and children of a Pakistani resident who sought to join him here after Pakistan had left the Commonwealth, were treated as foreign nationals and the wife cited Article 8 of the Convention (family life), Lord Denning, after stating that the courts can look to the Convention as an aid to clear up ambiguity in our statutes or uncertainty in our law,[51] added: "But I would dispute altogether that the Convention is part of our law. Treaties and declarations do not become part of our law until they are made law by Parliament. I desire, however, to amend one of the statements I made in the *Bhajan Singh* case [*ante*] . . . that the immigration officers ought to bear in mind the principles stated in the Convention . . . They must go simply by the immigration rules laid down by the Secretary of State, and not by the Convention." A Muslim teacher was held in *Ahmad v. I.L.E.A.*[52] not to be entitled, either by the Education Act 1944 or by the European Convention, to preferential treatment to enable him to attend a Mosque in school hours: Lord Denning saying that, although the Convention is not part of our law the courts do their best to see that their decisions are in conformity with it, but Article 9 (freedom of religion) was too vague to be relied on here. Scarman L.J. in his dissenting judgment, however, thought the Education Act 1944 had to be construed today in accordance with that Article.[53] **22–010**

Even this moderate approach was criticised in Scotland. Lord Ross in *Kaur v. Lord Advocate*[54] said "With all respect to the distinguished judges in England who have said that the courts should look to an international convention such as the European Convention of Human Rights for the purposes of interpreting a United Kingdom statute, I find such a concept extremely difficult to comprehend. If the Convention does not form part of the municipal law, I do not see why the court should have regard to it at all. It was His Majesty's government in 1950 which was High Contracting Party to the Convention. The Convention has been ratified by the United Kingdom but . . . its provisions cannot be regarded as

[49] *R. v. Secretary of State for Home Department, ex p. Phansopkar* [1976] Q.B. 606, C.A.

[50] *R. v. Chief Immigration Officer, Heathrow Airport, ex p. Salamat Bibi* [1976] 1 W.L.R. 979, C.A.

[51] If this means common law, the statement is questionable.

[52] *Ahmad v. Inner London Education Authority* [1978] Q.B. 36, C.A. A subsequent application to the Commission was ruled inadmissible: (1982) 4 E.H.R.R. 126.

[53] See also *Broome v. Cassell & Co* [1972] A.C. 1027, 1133, H.L. *per* Lord Kilbrandon (free speech); *Blathwayte v. Baron Cawley* (1976) A.C. 397, 426, *per* Lord Wilberforce (public policy); *R. v. Deevey* [1977] Crim.L.R. 550, *per* Sir Robert Lowry C.J.N.I. (Firearms Act); *R. v. Secretary of State for Home Department, ex p. Hosenball* [1977] 1 W.L.R. 766, C.A. (deportation on security grounds).

[54] [1980] 3 C.M.L.R. 79; 1981 S.L.T. 322.

having the force of law . . . Under our constitution it is the Queen in Parliament who legislates and not Her Majesty's government, and the court does not require to have regard to acts of Her Majesty's government when interpreting the law."

22–011 The House of Lords in *R. v. Home Secretary ex p. Brind*[55] while recognising that the courts could have recourse to the Convention when faced with an ambiguous statute refused to go a step further and hold that where wide powers of decision making were given to a minister by an unambiguous statutory provision, the minister in exercising those powers should conform to the provisions of the Convention. To do so, in the words of Lord Ackner, would be to incorporate the Convention into English law by the back door.[56]

No decision of the British courts before the coming into effect of the Human Rights Act was actually based on the European Convention. The dicta on the construction of statutes not purporting to implement a treaty do not follow from precedents concerned with construing statutes consistently with the general principles of international law[57] or statutes designed to implement particular treaties on such matters as diplomatic privilege. It is submitted, further, that their approach is potentially dangerous.[58] The judges wish to keep government officers to their international obligations, but in fact they are challenging the cardinal principle laid down in the *Case of Proclamations*[59] and our own Bill of Rights of 1688, that the Executive by itself cannot make law for this realm. Indeed, one might argue that the fact that Parliament had refrained from incorporating the European Convention into our law indicated an intention that its provisions should not be taken into account by the courts, so that the Convention ought not to be cited by counsel or looked at by judges.[60]

Cases against the United Kingdom in the European Court of Human Rights

22–012 Although unable to rely on the Convention in the domestic courts before the coming into effect of the Human Rights Act 1998, litigants were able, in reliance on the right of individual petition to argue before the European Court of Human Rights that United Kingdom law was in breach of the terms of the Convention. Cases in which they did so successfully will be cited in Part II in discussing the scope of Convention Rights. Here the emphasis is on the way the United Kingdom government reacted to these decisions, usually changing domestic law by legislation, or administrative action. After the decision in *Sunday Times v. United Kingdom*[61] that the English law of contempt of court was in breach of Article 10, Parliament enacted the Contempt of Court Act 1981. The law relating to corporal punishment in schools was changed by legislation following the decision in *Campbell and Cosans v. United Kingdom*[62] that the infliction of such

[55] [1991] 1 A.C. 696

[56] At p. 762.

[57] *ante*, para. 3–026. The dicta may claim support of a dictum of Diplock L.J. in *Salamon v. Commissioners of Customs and Excise* [1967] 2 Q.B. 116, for which, however, he cited no authority.

[58] This sentence was quoted with approval from the 6th ed. (p. 446) by Lord Ross in *Kaur v. Lord Advocate (supra)*.

[59] (1610) 12 Co.Rep. 74.

[60] The fact that the treaty was presumably laid before both Houses of Parliament before being ratified by the Crown *(ante*, para. 15–028) does not affect the argument.

[61] (1979) 2 E.H.R.R. 245.

[62] (1982) 4 E.H.R.R. 293; Education (No. 2) Act 1986; see now School Standards and Framework Act 1998.

punishment, contrary to parental wishes, was in breach of Protocol 1, Article 2 (right to respect for religious and philosophical principles in education). Telephone tapping was regulated by the Interception of Telecommunications Act 1985 following the decision in *Malone v. United Kingdom*.[63] In *Chahal v. United Kingdom*[64] the Court held that the decision to deport the applicant despite the risk of him being subjected to torture on return to India was in breach of Article 3 (torture, inhuman or degrading treatment) and of Articles 5 and 13 because the procedures for challenging the Home Secretary's decision did not constitute an effective remedy. The result was the passing of the Special Immigration Appeal Commission Act 1997. The law relating to courts martial and military discipline has been amended by the Armed Forces Act 1996 and the Armed Forces Discipline Act 2000 as a result of cases such as *Findlay v. United Kingdom*.[65]

22–013 In other cases it has been sufficient to amend delegated legislation, for example following *Golder v. United Kingdom*[66] where the Court held that prison rules relating to the rights of prisoners were in breach of the Convention or in *Dudgeon v. United Kingdom*[67] where the law in Northern Ireland prohibiting homosexual acts between consenting adults was held to be in breach of Article 8 (right to privacy).

Some victories at Strasbourg turned out, on the other hand, to be pyrrhic. The decision in *Tyrer v. United Kingdom*[68] that birching as a judicial punishment was a degrading punishment contrary to Article 3 led to the withdrawal of the right of individual petition from the Isle of Man, in which jurisdiction the case had originated. In *Abdulaziz v. United Kingdom*[69] a finding that immigration rules restricting the rights of women settled in the United Kingdom was met by extending the restriction to men. In *Brogan v. United Kingdom*[70] a decision that powers of detention in terrorist legislation violated Article 5 led to the United Kingdom entering a derogation on the grounds of a public emergency threatening the life of the nation under Article 15.

Community Law

22–014 We saw in Chapter 6 that the law of the European Communities does have legal effect inside the United Kingdom. Unlike the European Convention, the Treaties establishing the Communities were adopted by legislation of the United Kingdom Parliament. In some areas, particularly that of discrimination on the grounds of sex, British citizens have successfully claimed rights under EEC law and aliens, if citizens of Community states, have established rights in the field of immigration and deportation.

The European Court has recognised respect for fundamental human rights as one of the general principles of law which form part of Community law[71] and the Commission has accepted the desirability of the EEC becoming a signatory to the

[63] (1985) 7 E.H.R.R. 14. See now also the Regulation of Investigatory Powers Act, 2000, *post* para. 26–014 *et seq.*

[64] (1997) 23 E.H.R.R. 413.

[65] (1997) 24 E.H.R.R. 221; *Hood v. United Kingdom, The Times* March 11, 1999; *Moore and Gordon v. United Kingdom* (2000) 29 E.H.R.R. 728.

[66] (1975) 1 E.H.R.R. 524; a decision described as "almost grotesque": F. A. Mann, "Britain's Bill of Rights" (1978) 94 L.Q.R. 512, 524.

[67] (1981) 4 E.H.R.R. 149; Homosexual Offences (N.I.) Order 1982.

[68] (1978) 2 E.H.R.R. 1.

[69] (1985) 7 E.H.R.R. 471.

[70] (1988) 11 E.H.R.R. 117; *ante*, para. 14–054.

[71] For references, see *ante*, para. 6–011 and para. 6–038.

Convention on Human Rights.[72] The possible impact on domestic law of this approach is shown in *Johnston v. Chief Constable of the R.U.C.*[73] where the applicant was held entitled under Community law to challenge, on the ground of discrimination, the prohibition on women members of the R.U.C. carrying weapons.

An E.U. Charter of Human Rights was adopted at the Nice Summit but its impact on the work of the European Court and its legal status remain matters of conjecture.[74]

II. The Human Rights Act 1998[75]

The Scheme of the Act

22–015 A commitment to introduce legislation to incorporate the European Convention on Human Rights into United Kingdom Law had been included in the manifesto of the Labour Party before the election of 1997. The introduction of the necessary legislation was preceded by a White Paper (Rights Brought Home: The Human Rights Bill)[76] in which the Prime Minister referred to the Government's desire to modernise British politics and, as part of a comprehensive programme of constitutional reform, to enable people to enforce rights under the European Convention in British courts and to enhance the awareness of human rights.

The Human Rights Act 1998 does not directly incorporate the European Convention into the various legal systems in the United Kingdom. As the long title states, it is an Act to give further effect to rights and freedoms guaranteed under the Convention. Section 3 of the Act creates a rule of interpretation of legislation for the courts. Section 6 creates an obligation on public authorities not to act in a way incompatible with a Convention right. Whether the Act has any relevance to litigation between private litigants is, as will be seen, a controversial issue.

Section 1 of the Act defines Convention rights as the rights and fundamental freedoms contained in the Articles of the Convention and two Protocols to the Convention set out in Schedule 1 to the Act. Provision is made for subsequent amendments to the Act whenever the United Kingdom ratifies further protocols. Section 2 of the Act directs courts in determining any question which arises in connection with a Convention right *to take into account* judgments, decisions or advisory opinions of the European Court of Human Rights, opinions or decisions of the Commission and decisions of the Committee of Ministers.

22–016 Section 3 constitutes a general direction that *so far as it is possible to do so* primary and secondary legislation—whether enacted before or after the 1998 Act—must be read and given effect in a way which is compatible with Convention rights. The Act itself recognises that it will not always be possible to achieve

[72] See too the reference to the European Convention in the Preamble to the Single European Act (1986).

[73] [1986] E.C.R. 1651.

[74] *ante*, para. 6–039.

[75] S. Grosz, J. Beatson and P. Duffy, *Human Rights, The 1998 Act and the European Convention* (2000 Sweet & Maxwell); *Human Rights Act 1998: A Practitioner's Guide* (C. Baker ed.,) (Sweet & Maxwell, 1998); J. Wadham and H. Mountfield, *Human Rights Act 1998* (Blackstone, 1999); R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford, 2000).

[76] Cm 3782.

the desired compatibility because it goes on to provide in section 4 that the superior courts listed in section 4(2)[77] can make a declaration of incompatibility where satisfied that primary legislation or secondary legislation which is validly made within the terms of the empowering statute, is incompatible with a Convention right. This is in deliberate contrast to the position under the European Communities Act 1972,[78] a contrast specifically adverted to and defended in the White Paper. Section 5 makes provision for the right of the Crown to intervene in any proceedings where a court is considering whether to make a declaration of incompatibility.[79]

Since the Courts cannot strike down legislation for incompatibility, section 10 provides power for ministers to amend offending legislation by *remedial order* (see later at paragraph 29–034). This special procedure applies only where the minister considers there are compelling reasons for proceeding under section 10. In other cases amendment will require legislation in the normal way.

In an attempt to ensure that legislation enacted in the future does not inadvertently infringe Convention rights, section 19 requires the minister in charge of a Bill to make a statement of compatibility before the Second Reading or to draw the House's attention to the Government's wish to proceed with the Bill although a statement of compatibility with Convention rights cannot be made.

Section 6 makes it unlawful for a public authority to act in a way which is incompatible with a Convention right except where the public body could not have acted differently. Public authority is defined as including a court or tribunal and any person certain of whose functions are functions of a public nature.

Section 7 allows any person who claims that a public authority, other than a court, has acted or proposes to act in a way which is unlawful under section 6, to bring proceedings in the appropriate court or tribunal or rely on the relevant Convention right in any proceedings, but only if he is (or would be) a victim of the unlawful act. Section 7(7) specifically states that a person is a victim for the purpose of such proceedings if he would be a victim for the purposes of Article 34 of the Convention in relation to proceedings in the Court of Human Rights. **22–017**

In the case of a claim that a judicial act infringes a Convention right, section 9 requires that proceedings must be brought by way of appeal or judicial review or in such forum as may be prescribed by rules.[80]

Section 8 provides that a court which finds that a public body is acting unlawfully under the Act may grant such remedy within its power as it considers just and appropriate. This may, in the case of a court with power to order damages or the payment of compensation, include an order for damages. In awarding damages the court is specifically directed by section 8(4) to take into account the principles applied by the European Court of Human Rights in exercising its jurisdiction under Article 41 of the Convention.[81]

Article 13 of the Convention, which guarantees an effective remedy to any one whose rights have been infringed, is not included among the Convention rights

[77] The House of Lords, the Judicial Committee, the Courts-Martial Appeal Court, the High Court of Justiciary sitting otherwise than as a trial court of the Court of Session, the High Court or the Court of Appeal in England, Wales or Northern Ireland.

[78] *R. v. Secretary of State for Trade and Industry ex p. Factortame Ltd* [1990] 2 A.C. 85; *R. v. Secretary of State for Employment ex p. Equal Opportunities Commission* [1995] 1 A.C. 1, HL.

[79] *R. v. A. (Joinder of Appropriate Minister) The Times*, March 21, 2001.

[80] Grosz, Beatson and Duffy, *op. cit.* p. 142.

[81] L. Leigh and L. Lustgarten, "Making Human Rights Real. The Courts, Remedies and the Human Rights Act" (1999) 58 Camb. L.J. 509.

set out in Schedule 1 to the 1998 Act. While this omission may seem curious,[82] it is doubtful if it has any significance since section 8 is sufficiently widely worded to allow the courts to grant effective remedies and, in the case of damages, specific reference is, as has been seen above, made to the jurisprudence of the European Court. If, of course, a litigant feels that he has been deprived of an effective remedy he will be able, as before the Act, to appeal to Strasbourg.

22–018 Sections 12 and 13 of the Act are responses to misgivings expressed by the media and religious organisations during the passing of the Act. To the extent that they are consistent with the Convention they are otiose; to the extent that they are inconsistent they are storing up trouble for the future. Section 12(2) prevents the making of interim injunctions without the party affected being warned, unless there are compelling reasons why he should not be. Section 12(3) restricts the discretion of courts to make such orders unless the court is satisfied that the applicant is likely to establish at trial that publication should not be allowed. This provision applies to all cases involving freedom of expression.[83] Section 12(4) directs the court to have particular regard to the importance of the Convention right to freedom of expression and, in cases involving "journalistic, literary or artistic material", to have regard to the extent to which the material has, or is about to, become available to the public or it is or would be in the public interest for the material to be published; and any relevant privacy code. The latter remarkably vague phrase presumably includes, for example, the Press Complaints Commission Code to which newspapers are expected to adhere and similar voluntary codes which may be adopted by self regulatory bodies such as the Broadcasting Standards Commission.

Section 13 provides that a court, in determining any question arising under the Act which may affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, must have particular regard to the importance of that right.[84] As will be seen below, only the Church of England (or Church of Scotland) can be regarded as a public authority for the purposes of the Act. Thus this section can only have any significance in cases involving other religious organisations to the extent that the Act may be invoked against parties under section 6(3) or as discussed later, against private individuals.

22–019 Finally it should be noted that section 11 provides that nothing in the Act restricts any rights under the existing laws of any part of the United Kingdom or prevents the bringing of proceedings which can be brought apart from those provided for in section 7 to 9.

The wording of the Human Rights Act raises a number of problems, in the solving of which commentators have been quick to refer to the debates in both Houses, as reported in Hansard, in reliance on *Pepper v. Hart*.[85] Ministers, too, were well aware of that case which leads to one reason for doubting the wisdom of the rule laid down there: it may result in ministers deliberately tailoring

[82] Inspired, according to ministerial comments during debates on the Bill, by a fear that its inclusion might encourage the courts to be too adventurous in devising remedies and awarding damages.

[83] Equity had confined its extreme reluctance to grant interim injunctions to cases of libel: *Bonnard v. Perryman* [1891] 2 Ch. 269.

[84] P. Cumper, "The Protection of Religious Rights Under Section 13 of the Human Rights Act" [2000] P.L. 254.

[85] [1993] A.C. 593, HL. See *ante* for critical comment para. 4–037.

remarks in both Houses with a view to affecting the interpretation of legislation.[86]

The fundamental conundrum with which the courts will have to grapple is the meaning of the rule about the interpretation of legislation contained in section 3. In solving that, as in dealing with other issues, there will be invocations of the need for the courts to approach the legislation broadly and purposively, not in a narrow and legalistic way.[87] Whether this approach can or should be described as a generous approach is itself a matter of dispute.[88]

Where a statutory provision is genuinely ambiguous a court, following section 3, will have no difficulty in finding a meaning that is consistent with the Convention—which may mean a claim fails, of course. For example, a section which in ambiguous terms restricts the right of free speech may be consistent with the Convention because the ambiguous restrictions can be read as justifiable within the meaning of Article 10. Interpreting ambiguous provisions in a way which is consistent with the Convention[89] or principles of International law[90] or principles of the common law[91] is nothing new. But if a statute unambiguously, for example, requires an accused person, contrary to Article 6(2), to prove his innocence, what is the court to do? Mr Straw and Lord Irvine may believe that the courts can "read words" into the section.[92] but what words? It is assumed in the Act that in some cases the courts will not be able to twist a statute into consistency with the Convention: hence the need for the declaration of incompatibility provided by section 4. Examples taken from cases relating to Community law are not authoritative, precisely because the Human Rights Act is not based on the supremacy of Convention law. Moreover, in cases such as *Litster v. Forth Dry Dock and Forth Estuary Engineering*,[93] the House of Lords knew what Community law required and so could fairly precisely identify the words necessary to make the United Kingdom regulations consistent with that law. In a case involving alleged incompatibility with the Convention the issues may be far less clear. Should the Court imply words to deal with the facts of the case before them? Or try to redraft the relevant legislation to ensure compatibility in all future potential litigation involving that provision.[94]

22–020

The government has indicated that where a court does conclude that a statute is incompatible with the Convention and makes a declaration to that effect, amending legislation may not necessarily be introduced. In such cases litigants could, of course, pursue their claims at Strasbourg.[95]

[86] Anthologies of extracts from Hansard are available in Wadham and Mountfield, *op. cit.* Appendix 4; F. Klug, "The Human Rights Act 1998, *Pepper v. Hart* and All That" [1999] P.L. 246.

[87] *Att.-Gen. of Trinidad and Tobago v. Whiteman* [1991] 2 A.C. 240, 247, *per* Lord Keith who said this approach to interpreting written constitutions is particularly true of those provisions which are concerned with the protection of human rights.

[88] R. A. Edwards, "Generosity and the Human Rights Act: the right interpretation" [1999] P.L. 400. "It [s.3] drastically alters existing methods". F. Bennion, "What interpretation is possible under section 3(1) of the Human Rights Act 1998?" [2000] P.L. 77, 91.

[89] *e.g. Attorney-General v. BBC* [1981] A.C. 303, HL.

[90] *The Zamora* [1916] A.C. 77, PC.

[91] *Waddington v. Miah* [1974] 1 W.L.R. 683, HL; *R. v. West Yorkshire Coroner ex p. Smith* [1983] Q.B. 335.

[92] Klug, *op. cit.* 252–255. Are Acts of Parliament really to be interpreted by the words of Lord Chancellors taken from lectures, however "robust"?

[93] [1990] 1 A.C. 546, HL.

[94] See further, G. Marshall, "Two kinds of compatibility: more about section 3 of the Human Rights Act 1998" [1999] P.L. 377.

[95] Statement by the Lord Chancellor, September 20, 2000.

22–021 The next issue which arises has been described as that of the horizontal effect of the Act[96]—although it is suggested that that term is best avoided because of the risk of confusion with the position in Community law.[97] The object of the Act, effected in section 6, is to make it unlawful for public authorities to act in a way which is incompatible with a Convention right unless required to do so by primary legislation. Is it, however, possible that the Act may also impose duties on private parties relating to Convention rights? The argument for such effect mainly centres on section 6(3), a seemingly innocuous definition provision to the effect that for the purposes of the section "public authority" includes "a court or tribunal". But since section 6(1) forbids public authorities to act in ways which are incompatible with Convention rights, courts, it is argued, are similarly so forbidden—a prohibition which applies to all their activities including deciding the law in disputes between private parties. Thus, if the right to privacy guaranteed by Article 8 can be invoked in an action against public authorities it follows that since the Courts are public authorities they too must recognise and abide by the Convention rules on privacy if X sues a newspaper or his neighbour. Put in such terms the argument destroys what is clearly the basic concept of the Act and it is difficult to believe the Courts would accept it.

Full effect is given to section 6(3) in a way which is consistent with the concept underlying the Act if it is interpreted to mean that the courts as public authorities are bound by those Convention rights which affect them as *courts*. Thus courts are bound, in hearing cases, by Article 6 of the Convention to ensure a fair hearing and to respect the other procedural rights guaranteed by that Article.

The acts of private individuals may be relevant in actions under the Act because of the possibility recognised by the Strasbourg case law, that public authorities may be under positive duties to take steps to prevent breaches of the Convention[98]: that, however, is not giving the Act "horizontal effect".

22–022 The increased emphasis on human rights which is expected as a consequence of the Act may, independently of the legal effects of the statute, lead to a greater willingness on the part of the courts to develop common law rules in this area, as other factors had, as seen above,[99] encouraged judicial recognition of fundamental rights in the years before the Act's enactment. Conversely, the argument might prevail that implicitly at least the Act makes out the proper sphere for the protection of human rights and in implementing its possibly far-reaching effects the courts should not be over anxious to inaugurate controversial developments in other areas of the legal system.

22–023 In describing the scope of the Convention rights and their interpretation by the Strasbourg Court reference will be made to "the margin of appreciation"[1] allowed to national authorities in determining what limitations on rights are required by the realities of their own societies: thus in *Lawless* it was for the Irish Government to determine whether there existed a public emergency threatening

[96] M. Hunt, "The Horizontal Effect of the Human Rights Act", [1998] P.L. 423; Sir William Wade, Q.C., "Horizons of Horizontality" (2000) 116 L.Q.R. 217. See for a survey of various views, Clayton and Tomlinson, *op. cit.*, paras 5.74–5.99. See also J. Howell, "Horizontal Application: Its Possible Impact on Land Law", Chap. 9 in *Modern Studies in Property Law* (E. Cooke ed., Hart, 2001).
[97] Buxton L.J., "The Human Rights Act and Private Law" (2000) 116 L.Q.R. 48.
[98] *post*, para. 22–030.
[99] *post*, para. 22–002.
[1] *post*, para. 22–030.

the life of the nation, unless the Strasbourg Court concluded such determination could not be justified.[2] As a doctrine developed by Strasbourg to reflect "the subsidiary role of the Convention in protecting human rights" [as opposed to] the initial and primary responsibility for the protection of human rights [which] lies with the contracting parties"[3] the margin of appreciation logically cannot be applied as such by domestic courts.[4] That does not, however, mean that a court can substitute its decision on the need for legislation restricting freedom of expression for that of Parliament or substitute its decision for that of a minister refusing access to the media to prisoners. The roles of judge, administrator and legislature remain distinct.[5] The approach of the courts will be analogous to that with which they are familiar from judicial review. The role of the court is not to approve legislation or ministerial decisions but to decide that they are lawful because they fall within the limits of their powers. Traditionally this has often involved using the terminology of *Wednesbury* unreasonableness[6]: was this a decision no reasonable minister could reach. (Review of primary legislation could not, before the Human Rights Act, take place. Delegated legislation was examined for its legality by reference to *ultra vires*). In its new duties under the 1998 Act the Courts, taking account of the Strasbourg jurisdiction, will have to develop a more clearly articulated set of principles for setting acceptable legal limits to legislation and executive actions. These will largely be found in the terminology of the European Court as it developed its case law on justifiable grounds for restricting Convention rights, for example, is the restriction proportionate to the aim in view? Is the restriction necessary in a democratic society? Domestic courts, too, will presumably be justified in deferring more willingly to the views of the legislature and executive in such fields as national security than in an issue such as restriction of land use in peace time.[7]

The existence of an English (or Scottish) decision on a dispute relating to a Convention right may affect the application of the margin of appreciation doctrine by the Strasbourg Court if that dispute finally goes to that Court. For example, if an English court found a new statute extending the law of blasphemy to be incompatible with the freedom of religion guaranteed by Article 9 and freedom of speech guaranteed by Article 10, the Strasbourg Court in such circumstances might well feel less need to defer the views of the State authorities that such restrictions were needed by the "vital forces of their countries" when the courts of that country had reached a different conclusion.

Whatever the outcome of the debate on the misleadingly named "horizontal effect" of the Act, the meaning of public authority will be of central importance in future litigation. Section 6 offers no definition of a concept central to the legislation. It includes, by subsection 3, (a) a court or tribunal and (b) any person certain of whose functions are functions of a public nature. It excludes Parliament, except the House of Lords in its judicial capacity (subsections 3 and 4). It

[2] *post*, para. 22–026.
[3] Harris, O'Boyle, Warbrick, *op. cit.* p. 14
[4] Clayton and Tomlinson, paras 6.82–6.85. Hence the importance of s.2 of the Human Rights Act: the domestic courts are not bound by decisions of the European Court; they are to "take into account" any such decisions, so enabling them to disregard the margin of appreciation.
[5] See *R. v. D.P.P. ex p. Kebilene* [2000] 2 A.C. 326, 380 *per* Lord Hope.
[6] *Associated Provincial Pictures Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223, CA; *post* Chap. 31.
[7] *post*, Chap. 31.

also provides that any person within subsection 3(b) is not a public authority if the nature of the act is private. Public authority is not a term of art in English law and the courts will have to determine the applicability of section 6 on a case by case basis. No doubt, in so doing, they will be guided by case law on the availability of Judicial Review and the developing distinction between public and private law.[8] Bodies exercising legislative or common law powers, as opposed to those resting on a contractual basis, are *prima facie* public authorities and for the purposes of section 6, *all* their activities are subject to the Act.[9] Within this category will fall government departments, local authorities, the police, the armed forces.

22–024 The Church of England, it is arguable, unlike other religious bodies, is a public authority. It has law-making powers, exercised through the making of Measures, which, with Parliamentary sanction, become law and are for the purposes of the Human Rights Act, primary legislation[10] and are exempt from the ministerial amending provisions of section 10(6). The structure of its ecclesiastical courts has Parliamentary authority and appeal from them lies to the Privy Council.[11] Its episcopacy is appointed by the monarch, on the advice of the Prime Minister and the two Archbishops and twenty four other bishops sit in the House of Lords as Lords Spiritual. Against this legal background Mr Straw's belief that the Church of England is not a public authority is hardly conclusive of the question.[12] The basis of the authority of other churches in England, according to English law, is contractual and the reluctance of the courts to become involved in religious matters is illustrated in *R. v. Chief Rabbi of United Hebrew Congregations ex p. Wachmann*.[13] Nonetheless, arguably, religious organisations and authorities, other than those of the Church of England may fall within section 6(3)(b) in relation to any of their functions which are of a public nature, for example, running schools. Section 13, as mentioned above, directs courts to pay particular regard to the right to freedom of thought, conscience and religion in any litigation which might affect the exercise by a religious organisation of that right. Either that provision is superfluous or it is directing the Courts to give undue weight to the right in breach of the general principle that they decide cases under the Act by taking account of the decisions of the Court of Human Rights.

In judicial review proceedings the courts have identified as public bodies, in addition to those exercising statutory or common law powers, bodies created under the Royal Prerogative[14] and even bodies exercising *de facto* powers in areas where in the absence of such a body the State would have had to provide

[8] See further, Grosz, Beatson and Duffy, *op. cit.* 17–21 and 114–118.

[9] For the purposes of Judicial Review, the activities of a public body may be public (subject to review) or private (subject to the private law of tort and contract).

[10] s.21(1).

[11] Ecclesiastical Jurisdiction Measure 1963. Reports of cases decided on ecclesiastical law appear regularly in the Law Reports. Ecclesiastical courts, although not subject to certiorari, are subject to control by judicial review, for example by prohibition: *R. v. Chancellor of St Edmundsbury and Ipswich Diocese ex p. White* [1948] 1 K.B. 195, CA.

[12] 12 H.C. 1015 (May 20, 1998). On the legal status of the Church of Scotland, see *Stair Memorial Encyclopedia*, vol. 5 paras 679 *et seq.*

[13] [1992] 1 W.L.R. 1036. The courts may have to be drawn into religious controversies when warring groups lay claim to property: *Free Church of Scotland v. Lord Overtown* [1904] A.C. 515, HL. The property of the non-established Churches is held by trustees, subject to the normal laws of property. Exceptionally there are statutory provisions, *e.g.* Methodist Church Union Act 1929.

[14] *R. v. Criminal Injuries Compensation Board ex p. Lain* [1967] 2 Q.B. 864, CA.

a legal framework for regulation.[15] Thus there seems no difficulty in regarding the Press Complaints Commission as subject to judicial review and a public authority within section 6(1) or 6(3) as a body certain of whose functions are of a public nature.[16]

22–025 Section 7(1) provides that a claim that an act is unlawful under section 6 may only be brought by a victim of that act and section 7(7) provides that a person is a victim of an unlawful act only if he would be for the purposes of the Convention in the case of proceedings before the European Court of Human Rights. In judicial review proceedings the relevant requirement is that of "sufficient interest"[17] which encompasses almost any litigant other than the mere busybody.[18] Thus recent cases have allowed the lawfulness of government and to foreign governments to be challenged by environmental groups and organisations such as the Equal Opportunities Commission to challenge legislation on behalf of litigants unlikely to be in a position to do so themselves.[19] The Court of Human Rights interprets "victim" more narrowly, perhaps inevitably given its role in relation to municipal legal systems. It is not necessary that an individual *has* suffered interference with his rights: it suffices if he may be directly affected, for example, a complaint that the absence of a clear legal regime puts the complainant at risk of having his telephone tapped.[20] The Strasbourg jurisprudence also allows proceedings by the family or relatives of the person directly affected, for example to challenge an immigration decision,[21] or where the alleged wrong is a breach of Article 2.[22] Governmental organisations are excluded from bringing actions by the explicit wording of Article 34 of the Convention. Non-governmental organisations may bring proceedings if they are affected in their own right, for example, churches or trades unions.

The existence of the two tests, victim and sufficient interest, is almost certain to lead to confusion and difficulties. Organisations and individuals will be entitled to sue if they can bring their challenges within the limits of judicial review under Order 53 when they would be ineligible to litigate under the Human Rights Act.[23]

22–026 Section 1 of the Act subjected the effect of the Convention Rights to "any designated derogation or reservation". The reservation to Article 2 of the First Protocol (the right to education) has been considered earlier. The possibility of

[15] *R. v. Take-Over Panel ex p. Datafin* [1987] Q.B. 815. Contrast *R. v. Disciplinary Committee of the Jockey Club ex p. Aga Khan* [1993] 1 W.L.R. 909.

[16] *A fortiori* in the case of regulatory authorities established by statute such as the Broadcasting Standards Commission and the Independent Television Commission.

[17] *post*, para. 32–010.

[18] *R. v. Inland Revenue Commissioners ex p. National Federation of Self Employed and Small Businesses Ltd* [1982] A.C. 617.

[19] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. World Development Movement* [1995] 1 W.L.R. 386. *R. v. Secretary of State for Employment, ex p. Equal Opportunities Commission* [1995] 1 A.C. 1, HL. See similarly, *R. v. Secretary of State for Social Services ex p. Child Poverty Action Group* [1990] 2 Q.B. 540, CA; *R. v. Secretary of State for Social Security ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275, CA.

[20] *Klass v. Germany* (1978) 2 E.H.R.R. 214; *Open Door Counselling and Dublin Well Woman v. Ireland* (1993) 15 E.H.R.R. 244 (Women of child-bearing age, although not pregnant, entitled to challenge laws relating to abortion).

[21] *Abdulaziz, Cabales and Balkandali v. UK* (1985) 7 E.H.R.R. 471.

[22] *Wolfgram v. Germany* (1986) 46 D.R. 213.

[23] The requirement imposed by section 7 that a claimant under the Act must be a victim is identified as one of the weaknesses of the Act by Clayton and Tomlinson, paras 3.84–3.87.

derogations from the Convention raises wider and potentially more controversial issues.

The Convention on Human Rights, in addition to the specific restrictions in particular Articles referred to earlier, recognises in Article 15 the right of States "in time of war or other public emergency threatening the life of the nation" to derogate from its obligations under the Convention to the extent strictly required by the exigencies of the situation.[24] In 1988 the United Kingdom Government notified the Council of Europe of its decision to exercise this right in relation to Article 5(3) following the decision of the Court that the powers of detention granted by the Prevention of Terrorism (Temporary Provisions) Act 1984 were in breach of that provision.[25] The government referred to "campaigns of organised terrorism . . . repeated murder, maiming, intimidation and violent civil disturbance . . . bombing and fire-raising which have resulted in death, injury and widespread destruction of property". In the view of the government a public emergency existed within the meaning of Article 15(1). In the light of the provisions of the Terrorism Act 2000 which replaces earlier legislation the government has concluded that it no longer needs to maintain this derogation.[26] Section 14 of the Act defines as a *designated derogation*, the derogation at present in effect relating to Article 5(3) and any later derogation which is designated by the Secretary of State as a designated derogation. Section 16 provides for a system of five yearly reviews by Parliament of derogations: in the case of the existing derogation the five year period runs from the coming into effect of section 1(2), that is October 2, 2000, and in the case of later derogations from the date on which the designating order was made.

22–027 In litigation before the Strasbourg Court the question whether there is a public emergency and whether the measures derogating from the Convention are strictly required are issues for the Court which, not surprisingly, in this area leaves to State authorities a wide margin of appreciation.[27] Is it, however, open to domestic courts to consider the validity of the current or later derogations? At first sight it might seem that they can not. Section 1(2) provides that the Act takes effect subject to designated derogations; the only question for the domestic courts is whether a derogation is duly designated within section 14.[28] On the other hand, the courts are directed, in determining questions arising in connection with Convention rights, to take into account judgments of the European Court (S.2(1)). Can it be argued that this requires them to examine for themselves the validity of a derogation? The assertion of a government cannot, under the Convention, be conclusive. Section 3 also directs them to interpret legislation where is can be done in a way which is compatible with Convention rights. That can very easily be done with reference to sections 1(2) and 14 by interpreting them as referring to derogations which are *prima facie* effective but open to examination in the light of the prevailing facts. Once it is admitted that there is an ambiguity in the Act it can hardly be argued that it cannot be resolved in favour of the meaning which is compatible with the Convention.

[24] Derogations are not permitted in the cases of Article 2 (except in respect of deaths resulting from lawful acts of war), Articles 3, 4(1) and 7.

[25] *Brogan v. United Kingdom* (1989) 11 E.H.R.R. 11. An earlier derogation had been withdrawn in the belief that the Prevention of Terrorism (Temporary Provisions) Act 1984 complied with the Convention.

[26] *ante*, para. 19–054.

[27] *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 35.

[28] Grosz, Beatson and Duffy, *op. cit.* para. C15–03.

The Convention Rights **22–028**

It is impossible here to examine in detail the rights guaranteed by the Convention as these have been developed by the European Court of Human Rights.[29] Some important general issues and possible areas likely to be of particular concern in domestic litigation can, however, be identified.

The case law of the Court of which the United Kingdom courts must take account (Section 2)—has established a number of general principles. The Court has emphasised that the Convention must be interpreted in accordance with the general principles governing the interpretation of treaties. It must be interpreted in good faith, in the light of its object and purpose[30]—the purposive or teleological approach to interpretation. The protection given to Convention rights must be real and effective, for example the right to a fair trial (Article 6) may be illusory in the absence of a right to legal aid.[31] The Convention is a "living instrument" which is to be interpreted in the light of changing conditions.[32] This approach is particularly important in areas where the views of society are subject to variation from generation to generation for example in the field of sexual mores.[33]

The Court has also developed general guidelines in determining the extent to which rights guaranteed by the Convention may be restricted. Apart from Article 3, which prohibits absolutely torture or human or degrading treatment or punishment, Articles normally state a right in general terms and then go on to recognise the possibility of restrictions such as are prescribed by law and necessary in a democratic society for example in the interests of public security, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[34]

The court has held that where a State seeks to justify a restriction on a Convention right it must be able to point to a specific legal rule, whether of domestic, international or Community law. To justify a restriction a "law" must be accessible to citizens affected by it and it must be formulated with sufficient precision to enable citizens to regulate their conduct. Thus restrictions on prisoners' correspondence which were imposed on the basis of unpublished Prison Orders could not be said to be imposed by law.[35] A binding over order for conduct "*contra bonos mores*" imposed on hunt sabateurs was too imprecise to **22–029**

[29] For comprehensive accounts see D. J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (1995), F. G. Jacobs and R. C. A. White, *The European Convention on Human Rights* (2nd ed., 1996); R. Clayton and H. Tomlinson, *The Law of Human Rights* (Oxford, 2000).

[30] *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524.

[31] *Airey v. Ireland* (1979) 2 E.H.R.R. 305. In *Artico v. Italy* (1981) 3 E.H.R.R. 1 the Court said the Convention was intended to protect "not rights that are theoretical or illusory but rights that are practical and effective."

[32] *Tyrer v. UK* (1978) Series A, No. 26; 2 E.H.R.R. 1.

[33] "A belief which represented unquestioned orthodoxy in year X may become questionable by year Y and unsustainable by year Z": *per* Lord Bingham M.R. in *R. v. Ministry of Defence ex p. Smith* [1996] Q.B. 517, 554.

[34] The prevention of disorder or crime occurs in Art. 8 (right to respect for private and family life), Art. 10 (freedom of expression), Art. 11 (freedom of assembly and association). Other factors listed above are referred to, *e.g.* in Art. 6 (right to a fair trial), Art. 8, Art. 9 (freedom of thought, conscience and religion), Art. 10, Art. 11. Reference to restrictions prescribed by law are found in the Articles cited here and others, *e.g.* Art. 5 (right to liberty and security), Art. 1 of the First Protocol (protection of property). Other Articles require the establishment or protection of rights by law—*e.g.* Art. 6 (right to a fair trial before an independent and impartial tribunal established by law), Art. 12 (right to marry according to the national laws governing the exercise of this right).

[35] *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347.

be justifiable within the limits on free speech in Article 10.[36] French law which authorised the tapping of telephones was held to be insufficiently precise in the light of the gravity of the interference with the right to privacy posed by telephone tapping.[37]

The burden of showing that a restriction is necessary in a democratic society is on the State. "Necessary" does not mean indispensable, at one extreme, but neither does it equate with useful or desirable.[38] The Court requires, before a restriction can be justified as necessary, to be satisfied that there is a pressing social need for interference with the right and that the interference is no more than is required—that it is proportionate to the legitimate aim being pursued. Exceptions to rights are to be narrowly construed.[39]

22–030 On the other hand the Court is conscious of the fact that state authorities are better placed to evaluate the necessity of a particular restriction in a particular situation and hence allows to national authorities "a margin of appreciation".[40] This is likely to be particularly significant in areas of subjective judgment where cultural and religious traditions vary among the signatory states.

Although much of the Convention, and the case law of the Court, deals with interference with rights, the Court has recognised that positive obligations may have to be imposed on States if the protection given to Convention rights is to be real and effective.[41] The right to peaceful assembly may require, for example, positive steps on the part of State authority to protect citizens who wish to assemble against threats from others.[42] Again a group of citizens may be entitled to expect the authorities to take positive steps to protect their religious feelings from being offended by the publication of material which, to them, is blasphemous or, in similar ways, upsetting.[43]

Article 1 of the Convention, which is not reproduced in the Schedule to the Human Rights Act, imposes an obligation on the signatory states to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. In the case of the United Kingdom the enactment of the Human Rights Act is itself a significant event in discharging that obligation.

22–031 Article 2 guarantees the right to life. It did not outlaw capital punishment following conviction by a court for a crime for which that penalty was provided by law. The Sixth Protocol, however, now forbids the death penalty except in time of war or imminent threat of war.[44] The Article refers to the right to life being protected by the law. The meaning of that provision was considered in *Osman v. United Kingdom*[45] where the Court held that the failure of the police to prevent injury to a young boy and the death of his father at the hands of a teacher who had developed an obsessive attachment to the boy was not a breach of Article 2. What is required in each case depends on all the circumstances and involves, in a case such as *Osman* the balancing of the rights of the alleged

[36] *Hashman and Harrup v. United Kingdom* (2000) 30 E.H.R.R. 241.
[37] *Kruslin v. France* (1990) 12 E.H.R.R. 547. *A fortiori, Malone v. United Kingdom* (1985) 7 E.H.R.R. 14 (telephone tapping regulated by unpublished ministerial guidelines).
[38] *Handyside v. United Kingdom* (1976) 1 E.H.R.R. 737.
[39] *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347.
[40] *Handyside v. United Kingdom supra.* For the position of domestic courts, see *ante* para. 22–023.
[41] See above, n. 12 on para. 22–038: *Airey v. Ireland* (legal aid).
[42] *Plattform Ärzte für das Leben v. Austria* (1991) 13 E.H.R.R. 204.
[43] *Otto-Preminger-Institut v. Austria* (1994) 19 E.H.R.R. 34.
[44] See *post*, para. 22–045, n. 19.
[45] [1999] Fam.L.R. 86. See too *Re A (Children)* [2000] 4 All E.R. 961, CA.

wrongdoer against the feared risks to the potential victim. In *Jordan v UK*[45a] the European Court held that a failure by the State to conduct appropriate investigations into deaths of persons caused by agents of the State was in itself a violation of the right to life guaranteed by Article 2. The second paragraph provides that the deprivation of life is not in contravention of the Article when it results from the use of force which is no more than absolutely necessary in the defence of persons against unlawful violence, to effect a lawful arrest or to prevent an escape by a person lawfully detained or to quell a riot or insurrection.[46] Obviously Article 2 will be relevant in any situation where, for example, a householder has killed an intruder or police have caused death in the circumstances envisaged in the Article: in such cases the question for the court will be the extent to which the Convention imposes a stricter test than that of the common law or the Criminal Law Act 1967, section 3, namely such force as is reasonable in the circumstances.

Article 2 may, however, turn out to be relevant in other areas. It might be argued, for example, that public health authorities have failed to protect life by failing to provide adequate resources in terms of intensive care units, facilities for surgical procedures of various kinds such as organ transplantation or the provision of expensive drugs. The question of withholding treatment from a patient in a permanent vegetative state may be open to reconsideration.[47] Legislation on highly charged issues such as abortion and euthanasia will also now be subject to judicial consideration in the light of their compliance with the Convention.[48]

Article 3 (the prohibition of torture and inhuman or degrading treatment or punishment) is interesting in not allowing any derogation from its terms. Torture is never permitted even to extract information in times of war or terrorist violence. Torture involves suffering of particular intensity and cruelty. Sophisticated techniques of interrogation may be inhuman or degrading without amounting to torture.[49] Notions of what is degrading change with the times, as evidenced by the decisions of the Court finding corporal punishment as a judicial sanction degrading[50] and, at least in some circumstances, domestically administered punishment.[51] In *Costello-Roberts v. United Kingdom*[52] the Court did not find, on the facts, that corporal punishment of a young boy in school was degrading. In

22–032

[45a] *The Times*, May 18, 2001.

[46] *McCann, Farrell and Savage v. United Kingdom* (1996) 21 E.H.R.R. 97; *Kaya v. Turkey* (1999) 28 E.H.R.R. 1.

[47] For the present law, see *Airdale NHS Trust v. Bland* [1993] A.C. 789, HL and *Re A (Children), supra*.

[48] For an unsuccessful attempt to invoke the Convention, see *Paton v. United Kingdom* (1980) 3 E.H.R.R. 409: application by father complaining wife had had abortion against his wishes rejected by Commission.

[49] *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25 (Prisoners made to stand against walls; deprived of sleep, food and drink; made to wear hoods, subjected to continuing noise). *Tomasi v. France* (1993) 15 E.H.R.R. 1 (Slapping, kicking, threatening with a firearm, handcuffed, deprived of food "and so on"). A number of cases have concerned Turkey. *Aksoy* (1996) 23 E.H.R.R. 553; *Aydin* (1997) 25 E.H.R.R. 251; *Selçuk and Asker* (1998) 26 E.H.R.R. 477. See too *Ribitsch v. Austria* (1995) 21 E.H.R.R. 573.

[50] *Tyrer v. United Kingdom* (1978) 2 E.H.R.R. 1. (Isle of Man: see *post* para. 35–002).

[51] *A. v. United Kingdom* (1999) 27 E.H.R.R. 611.

[52] (1995) 19 E.H.R.R. 112. *Campbell and Cosans v. United Kingdom* (1982) 4 E.H.R.R. 293 involved a breach of Art. 2 of Protocol 1; parents' objection to threat of corporal punishment based on philosophical convictions which were entitled to be respected. Corporal punishment in all schools is now forbidden by section 31, School Standards and Framework Act 1998.

Price v. United Kingdom[52a] the Court held that the detention of a severely disabled person in a police cell and later in prison amounted in the circumstances to degrading treatment contrary to Article 3. Although there was no intention to humiliate or degrade the prisoner her ill treatment reached the minimum level required to constitute a breach of the Article.

Although the English courts have been reluctant to allow litigation about the conditions in which prisoners are held,[53] they will now have to be prepared to consider whether the treatment of prisoners is degrading within the meaning of the Convention, for example the use of handcuffs, intimate body searches, the use of solitary confinement or other punitive regimes. Similar consideration may apply to claims by patients detained in mental hospitals.[54]

22–033 Another area of law where reliance may well be placed on Article 3 is that of extradition and deportation. In *Soering v. United Kingdom*[55] the Court held that the extradition of a German national to the United States to face a charge of murder and the likelihood of a sentence of death was contrary to Article 3. Although the death penalty itself could not (before the adoption of the Sixth Protocol) amount to inhuman or degrading punishment, the Court took account of the likely conditions of detention after conviction, the lengthy period spent in "death row" subject to a harsh regime and exposed to mental stress.[56] A similar approach was taken with regard to deportation in *Cruz Varas v. Sweden*[57] where, however, the claim, of a real risk of ill-treatment by the Chilean authorities, if returned to that country, failed on the facts.

Article 4 prohibits slavery and forced or compulsory labour. It has given rise to little case law and seems to offer little hope to even the most imaginative litigant.

Article 5 (the right to liberty and security of the person) on the other hand has been the basis for considerable case law and may provide opportunities for challenges to domestic law over a wide area. Many of the provisions of Article 5 are relevant to issues discussed later in Chapter 23, Immigration and Deportation, in Chapter 24, Freedom of Person and Property and in some specific instances to Terrorism, discussed earlier in Chapter 19. An important aspect of Article 5, which has already had an impact on our domestic law through decisions of the Court is the requirement in paragraph 4 that anyone deprived of liberty by arrest or detention can take proceedings by which the lawfulness of his detention can be speedily determined by a court and his release ordered if the detention is not lawful.

22–034 The person or body determining the lawfulness of detention need not be part of the normal judicial structure of the state but must be independent of the executive and the parties, and impartial. The judicial character of the body also involves the ability to make a legally binding decision. Thus a mental health review tribunal was held not to satisfy paragraph 4 because it could only make

[52a] *The Times*, August 13, 2001. (Difficulties in using lavatory; humiliating treatment at hands of male prison officers; initial period in prison cell when she suffered from extemely cold conditions; lavatory inaccessible; emergency buttons and light switches out of her reach.)

[53] *R. v. S. of S. for Home Dept ex p. McAvoy* [1984] 1 W.L.R. 1408; *R. v. Deputy Governor of Parkhurst ex p. Hague* [1992] 1 A.C. 58, HL and see *post* Chap. 24.

[54] For details of case law involving a variety of unpleasant situations see Harris, O'Boyle and Warbrick, *op. cit.* pp. 61–73.

[55] (1989) 11 E.H.R.R. 439. See too *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413.

[56] See *post* Chap. 37 for Privy Council decisions on inhuman and degrading treatment in relation to the death penalty.

[57] (1991) 14 E.H.R.R. 1.

a recommendation.[58] Similarly, although the Parole Board had the necessary independence and impartiality it lacked judicial character in cases where it lacked power to make binding decisions.[59] Difficulties have arisen under the English legal system where convicted prisoners are sentenced to indeterminate periods of imprisonment, for example, a discretionary life sentence or, in the case of juveniles, to be detained during Her Majesty's pleasure. In such cases, in the view of the Court, there is a right to a regular judicial review of the detention to take account of possible changes in such factors as likely risk to the public and, particularly in the case of juveniles, intellectual and emotional development.[60]

Even where there is a right of challenge to a judicial tribunal it may fail to satisfy the requirements of Article 5 if the grounds which the tribunal may investigate are too narrowly restricted—an issue which may arise in English law in connection with the distinction between "appeal" and "review".[61] Thus in *Weeks v. United Kingdom*[62] a right to challenge the continued detention of a discretionary life prisoner did not satisfy the Article since the ground of the decision by the Home Secretary—that the prisoner remained a danger to the public—was not open to question by the court. But the Court, even in a case where it found English law defective in its remedies, has emphasised that Article 5(4) does not mean that in examining the legality of detention a court must be entitled to substitute its won decision for that of the decision-making authority "on all aspects of the case including questions of pure expediency."[63]

A right to compensation for wrongful arrest or detention is given by Article 5(5). Compatibility with the Convention is achieved under the Human Rights Act by two provisions: section 8(2) provides generally for the awarding of damages by courts for the wrongful acts of public bodies. In the case of "judicial acts done in good faith" damages are not available in proceedings brought under the Act, otherwise than to compensate a person to the extent required by Article 5(5) (section 9(3)). **22–035**

Article 6 (the right to a fair trial) has been described as having a position of pre-eminence in the Convention, both because of the importance of the right involved and the volume of applications it has attracted.[64] There is no reason to believe it will be less significant in a domestic setting, extending as it does over the entire field of civil and criminal litigation and, to a certain extent, to proceedings before disciplinary and administrative tribunals and beyond.

Paragraph (1) applies to the determination of "civil rights and obligations" and criminal charges, the subsequent paragraphs to criminal proceedings alone. Civil rights and obligations are not confined to what continental systems would regard as private law rights, in common law systems typically claims in tort and contract **22–036**

[58] *X v. United Kingdom* (1981) 4 E.H.R.R. 188. This necessitated a change in the law: Mental Health Act 1983, ss.72–74. A number of outstanding difficulties in English law in the light of the Court's decision in *Winterwerp v. The Netherlands* (1979) 2 E.H.R.R. 387 are discussed in *Human Rights Act 1998: A Practitioner's Guide* (ed. Baker 1998), Chap. 10.

[59] *Weeks v. United Kingdom* (1988) 10 E.H.R.R. 293. Again, the law was changed: Criminal Justice Act 1991, s.34.

[60] *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 E.H.R.R. 666 (discretionary life sentences); *Hussain v. United Kingdom* (1996) 22 E.H.R.R. 1 (detention during Her Majesty's pleasure); *T. and V. v. United Kingdom* [2000] 30 E.H.R.R. 121.

[61] See *post* Chap. 32.

[62] (1988) 10 E.H.R.R. 293.

[63] *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413. The scope of review appropriate may vary with the various categories of cases listed in Article 5(1) which, in turn, may lead to differing views on the adequacy of *habeas corpus* as a remedy under the Convention): *post* para. 24–034 *et seq.*

[64] Harris, O'Boyle, Warbrick, *op. cit.*, p. 164.

or the law of trusts. The Court has extended the protection of Article 6 to such issues as disputes between citizens and public authorities relating to land use, planning, water rights and other property matters. The granting of licences to run businesses or to practice a profession have similarly been brought within the Article. Social security benefits may be regarded as giving rise to civil rights for the purposes of Article 6.[65] Criminal charges are those which the relevant state so characterises but also other proceedings which share the qualities normally regarded as typical of criminal proceedings, in particular the nature of the offence and the severity of the sanction.[66] This leaves open the question whether, in particular cases, proceedings are criminal and entitled to the full protection of the provisions of Article 6 or merely disciplinary, when they might well still fall within Article 6(1).[67] The right guaranteed by Article 6(1) is to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In *Golder v. United Kingdom*[68] the Court held that Article 6(1) was meaningless unless it impliedly guaranteed the right of access to a court. Hence the refusal by the Home Secretary of permission to a prisoner to write to a lawyer with a view to initiating legal proceedings was in breach of the Convention. A court or tribunal cannot be independent unless its members have security of tenure and are free from pressure from particularly, the executive. The Court has held, for example, that a planning inspector lacks the necessary independence because he is appointed by a Secretary of State and his appointment can be revoked at any time.[69] In *McGonnell v. United Kingdom*[70] the Court found a breach of Article 6 where the same person was President of the States of Deliberation (the legislature of Guernsey) and the sole professional judge in the Royal Court where he sat with lay jurats.

Reference has already been made to the impact of the Convention on the system of courts-martial,[71] following the finding of the Commission, upheld in *Findlay v. United Kingdom*,[72] that the extensive powers of the convening officer in relation to the decision to prosecute, the composition of the court, the confirmation of the decision and confirmation or variation of sentence meant that such courts could not be regarded as sufficiently independent and impartial.

22–037 The right to a fair and public hearing is already well recognised in English law,[73] even if in particular cases it will always be open to argument whether, for

[65] Harris, O'Boyle, Warbrick, *op. cit.* pp. 174–186.

[66] *Engel v. The Netherlands* (1976) 1 E.H.R.R. 647, *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165.

[67] Consider proceedings to remove a doctor's name from the medical register, for medical incompetence? For conviction of a criminal offence? Is it relevant that dismissal from an appointment following such proceedings results in loss of pension rights? What is the nature of University proceedings to expel student on a charge of cheating in examinations? Or to expel for failing an examination? Or for behaviour, *e.g.* relating to illegal dealing in drugs, which has not been the subject matter of proceedings in the courts?

[68] (1975) 1 E.H.R.R. 524. In *Osman v. United Kingdom* (2000) 29 E.H.R.R. 245 the Court treated as a question of access under Art. 6, what in reality was a substantive question of liability under English tort law and not, therefore, a matter for the Strasbourg Court. See Lord Hoffman, "Human Rights and the House of Lords" (1999) 62 M.L.R. 159.

[69] *Bryan v. United Kingdom* (1996) 21 E.H.R.R. 342.

[70] [2000] 30 E.H.R.R. 289. R. Cornes, "*McGonnell v. United Kingdom*, The Lord Chancellor and the Law Lords" [2000] P.L. 166.

[71] *ante*, para. 19–021.

[72] (1997) 24 E.H.R.R. 221. The Armed Forces Act 1996 introduced changes to the system to take account of the earlier Commission's findings.

[73] *ante*, para. 20–038 *et seq.*

example, in particular circumstances a private hearing is justified.[74] The Court has emphasised that the right to a fair hearing is not to be confined to the specific factors mentioned in Article 6 and, for instance, has developed the principle of "equality of arms" (*égalité des armes*) under which, quite generally, each party must have a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage against his opponent.[75]

Of the specific requirements mentioned in Article 6, one that has already provoked discussion in the English courts is the presumption of innocence, Article 6(2) which will be discussed below.[76]

Article 7 enshrines a fundamental principle of legality, *nullum crimen, nulla poena sine lege*. If its prohibition of retroactive criminal liability is unlikely to generate the litigation arising under Article 6 (or the succeeding Article 8) it is, nonetheless, important, particularly in its historic context, for recognising and outlawing what is almost a defining characteristic of tyrannies. It is a principle of the common law that statutes should be construed not to have a retrospective operation in the absence of language that plainly requires such operation.[77] Here the Convention merely strengthens the existing position. A difficulty might, however, have been thought to arise from the inherently retrospective nature of judge made law. The Court, however, has accepted that "clarification" of the law by judicial decision is not forbidden by Article 7: *Gay News and Lemon v. United Kingdom*[78]; *S.W. v. United Kingdom*.[79]

The prohibition on retrospective penalties has been widely construed[80] and may well lead to challenges to attempts by legislation to extend, for example, the making of orders confiscating the assets of convicted persons.

Article 7(2), which ensures that nothing in the Article prevents the trial and punishment of any person for acts which at the time they were committed were criminal according to the general principles of law recognised by civilised nations, again reflects very clearly its historic context when memories of the Nuremburg trials were still very fresh. It effectively undermines any argument that the War Crimes Act 1991 is contrary to the Convention. **22–038**

Articles 8 to 11 follow a common structure: they affirm a right and then describe justifications for restrictions on the right.[81] Article 8 recognises the right to respect for everyone's private and family life, home and correspondence. It is likely to have a profound impact because of the width of the rights it protects, their inherent vagueness, the undeveloped state of the domestic law in many areas covered by the Article and because, more than in the case of any other Article, the content of these rights is likely to change with changing social **22–039**

[74] *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165. (Prison disciplinary proceedings can justifiably be held in private on grounds of public order and security.)

[75] *Dombo Beheer BV v. The Netherlands* (1994) 18 E.H.R.R. 213.

[76] [1999] 3 W.L.R. 175. The question did not arise on the view taken of the law by the House of Lords: [1999] 3 W.L.R. 972.

[77] *Midland Rv Co v. Pye* (1861) 10 CBNS 179, 191 *per* Erle C.J. (Retrospective legislation a manifest shock to our sense of justice). *Waddington v. Miah* [1974] 1 W.L.R. 683; *Tracomin S.A. v. Sudan Oil Seeds Co. Ltd* [1983] 1 W.L.R. 1026.

[78] (1983) 5 E.H.R.R. 123. (*Mens rea* of blasphemy).

[79] (1995) 21 E.H.R.R. 363 (marital rape). Both decisions of the House of Lords are open to the same criticisms as were levelled, forcefully and tellingly, against *Shaw v. D.P.P.* [1962] A.C. 220 (Common law conspiracy: "Ladies Directory" Case).

[80] *Welch v. United Kingdom* (1995) 20 E.H.R.R. 247.

[81] See *ante* para. 22–028; Harris, O'Boyle, Warbrick, *op. cit.* Chap. 8.

standards, cultural beliefs and values.[82] Cases before the Court from the United Kingdom which illustrate the importance of Article 8 include *Smith and Grady v. United Kingdom*[83] (policy of exclusion of homosexuals from the Armed Forces; investigations into applicants' sexual orientations and subsequent discharge from the armed forces constituted grave interferences with the private lives); *Dudgeon v. United Kingdom*[84] (criminalisation of homosexual activity in Northern Ireland); *Halford v. United Kingdom*[85] (bugging of office telephone); *Gaskin v. United Kingdom*[86] (right of access of applicant to local authority's records of his upbringing by foster parents); *X, Y and Z v. United Kingdom*[87] (relationship between post-operative male transsexual, natural born woman and her child constituted a family); *Powell and Rayner v. United Kingdom*[88] (aircraft noise wrongful interference with right of enjoyment of home); *Malone v. United Kingdom*[89] (telephone tapping unregulated by precise and ascertainable rules of law); *Khan v. United Kingdom*[90] (installation of bugging devices on private property unregulated by law).

Applications which have been successful under other Articles show the potential for further reliance on Article 8. For example, in *Abdulaziz, Cabales and Balkandali v. United Kingdom*[91] the applicants established that United Kingdom immigration law was in breach of Article 14 which forbids discrimination in the enjoyment of Convention rights. The court went on to point out that immigration rules may affect the right to respect for family life under Article 8—for example if X is lawfully settled in the United Kingdom and his or her family is refused admission and there is no other state in which they could establish a home together.

22–040 The importance of the opening phrase of Article 8—"the right to respect for . . . "—lies in its use by the court to justify its view that the Article goes beyond a prohibition on interference with the relevant rights. It guarantees positive protection by State authorities, which may require the State to take steps against third parties. In *Marck v. Belgium*[92] the Court held that the failure to provide by legislation for the rights of illegitimate children was a breach of the duty to respect family life.

The impact of Article 8 on English law with regard to a right to privacy is likely to be considerable, precisely because the English courts have affirmed on many occasions that no such general right is known to English law. Other areas of the law which may call for re-examination under Article 8 include the right to

[82] *cf. R. v. Ministry of Defence ex p. Smith* [1996] Q.B. 17, 554, *ante*, para. 22–028, n. 33; *Fitzpatrick v. Sterling Housing Association Ltd* [1998] Ch. 304 (CA); [1999] 3 W.L.R. (HL) (Rent Act 1977, Sched. 1, Part 1, para. 2(1): can "living with the original tenant as his wife or her husband" extend to the survivor of a homosexual relationship?)

[83] (2000) 29 E.H.R.R. 493.

[84] (1981) 4 E.H.R.R. 149. The State has a margin of appreciation in taking account of issues of public health and morality when restricting sexual activities even in private: *Lasky, Jaggard and Brown v. United Kingdom* [1997] 24 E.H.R.R. 39. But the limits to that right were emphasised in *ADT v. United Kingdom, The Times* August 1, 2000.

[85] (1997) 24 E.H.R.R. 523.

[86] (1990) 12 E.H.R.R. 36; *post* Chap. 33.

[87] (1997) 24 E.H.R.R. 143.

[88] (1990) 12 E.H.R.R. 355.

[89] (1985) 7 E.H.R.R. 14.

[90] [2000] Crim.L.R. 684.

[91] (1985) 7 E.H.R.R. 471.

[92] (1979) 2 E.H.R.R. 330.

search premises, the law relating to sexual offences and restrictions on prisoners.

Article 9 (freedom of thought, conscience and religion) by contrast has played a less significant part in the jurisprudence of the Court and there is little reason to see it provoking litigation in the United Kingdom. Where questions of freedom of thought, conscience and religion do arise they are likely to involve also Article 10 (freedom of expression) and Article 14 (freedom from discrimination in the exercise of Convention rights).[93] The scope of the protection given by Article 9 is not clear. A different phrase is used in the First Protocol, Article 2 which refers to parents' "religious and philosophical convictions". It is not clear whether the two provisions should be interpreted separately or, together to indicate that the Court should give the widest possible protection to ideas, philosophies and beliefs of all kinds. In *Arrowsmith v. United Kingdom*[94] the Commission concluded that pacifism was a "philosophy" which fell "within the ambit" of the Article. Otherwise, at present, the case law offers little help.

In *Otto-Preminger-Institut v. Austria*[95] the Court upheld blasphemy laws on the grounds that Article 9 requires the State to protect religious believers from expressions of views and opinions which are gratuitously offensive to them. But in *Kokkinakis v. Greece*[96] the Court refused to hold that attempting to convert citizens from one religious belief to another could be prohibited consistently with Article 9—unless it could be shown that the law was proportionate to the aim of protecting the rights of others. 22–041

In domestic law Article 9, again, is unlikely to have a large impact. It may, directly or indirectly, lead to a recommendation of the present position under which the law of blasphemy protects only believers in Christianity.[97]

Article 10 (freedom of expression) deals with a right of fundamental importance in a free society, which is dealt with at length in Chapters 25 and 26. The House of Lords in *Derbyshire County Council v. Times Newspapers Ltd*[98] felt able to assert the essential compatibility of the common law and Convention rules on freedom of speech. That case involved an unsuccessful action of libel brought by an elected public body against a newspaper for criticisms of the local authority's management of its employees' pension fund.

Nonetheless, the adoption of the Convention into domestic law will require the courts in other, more difficult cases to examine in a principled manner what is meant by "expression".[99] Do differing forms of expression deserve differing degrees of protection.[1] It will no longer be possible, or sufficient, for courts to

[93] *e.g. Ahmed v. Inner London Education Authority* [1978] Q.B. 36, C.A. (Lord Denning M.R. described the Convention as "drawn in such vague terms that it can be used for all sorts of unreasonable claims and provoke all sorts of litigation"). An application to the European Commission on Human Rights was unsuccessful (1981) 22 DR 27.

[94] (1980) 3 E.H.R.R. 218.

[95] (1994) 19 E.H.R.R. 34; *ante*, para. 22–030. See also *Wingrove v. United Kingdom* (1997) 24 E.H.R.R. 1.

[96] (1994) 17 E.H.R.R. 397.

[97] *ex p. Choudhury* [1991] 1 Q.B. 429, DC; S. Ghandhi and J. James, "The English Law of Blasphemy and the European Convention on Human Rights" [1998] E.H.R.L.R. 430.

[98] [1993] A.C. 534.

[99] For example, the wearing of particular clothes to symbolise support for a political group? Burning a flag to indicate disapproval of government policy? See E. Barendt, *Freedom of Speech* (1985).

[1] Forms of expression may range from criticism of a political system to advocacy of the merits of soap powder or ridicule of generally accepted religious or social beliefs: *Barendt, op. cit.*

reject challenges to legislation restricting freedom of expression by reference to the supremacy of Parliament, as was appropriately done in *R. v. Jordan*.[2]

22–042 Article 11 (freedom of assembly and association) similarly deals with an area of the law which has been the subject of considerable domestic legislation and case law which is considered in Chapter 27. In preparation, perhaps, for the coming into effect of the Human Rights Act, Lord Irvine had already recognised the importance of a public right of assembly.[3] Article 10 will require the scrutiny of all legislation in the light of that basic right. The case law of the Court has emphasised that the right of association entails the right of non-association an important principle which domestic legislatures may prefer for political or practical reasons to overlook. Here again British legislation will now be open to judicial scrutiny.[4] The Commission has also held that the State, in appropriate cases, must protect the rights of individual members against associations to which they belong.[5]

Article 12 recognises the right to marry and found a family, according to the national laws governing the exercise of this right. The case law of the Court does not suggest the likelihood of any great impact on domestic law. The right guaranteed "refers to the traditional marriage between persons of opposite biological sex . . . Article 12 is mainly concerned to protect marriage as the basis of the family."[6]

The limits on the right of the State to lay down rules governing the exercise of the right to marry were considered by the Commission in *Hamer v. United Kingdom*[7] which concluded that while the State was entitled to lay down rules concerning formalities or relating to matters recognised as involving a genuine public interest, for example, degrees of consanguinity, prohibitions on prisoners marrying could not be justified.[8]

22–043 Article 13 guarantees a right to an effective remedy for a violation of any right protected by the Convention. Although this Article was deliberately omitted from the Act,[9] section 8 gives the Courts wide powers to grant remedies and section 2 directs them to take account of the jurisprudence of the Court which, of course, includes the role of Article 13. If the exclusion of Article 13 from Schedule 1 of the Act does, in the view of the courts, restrict their ability to award an effective remedy, litigants will, of course, be free to resort to Strasbourg.

Article 13 has been interpreted by the Court to mean that everyone has a right to a remedy in relation to an arguable *claim* that a Convention right has been breached, as well as an effective remedy if such breach is established.[10]

The remedy, to be effective, need not be to a judicial authority, for example a right of petition to the Home Secretary by a prisoner could be an effective

[2] [1967] Crim. L.R. 483.
[3] *D.P.P. v. Jones* [1999] 2 A.C. 240.
[4] *Young, James and Webster v. United Kingdom* (1982) 4 E.H.R.R. 38 (right not to join a trades union); *Sigurjonsson v. Iceland* (1993) 16 E.H.R.R. 462 (right not to join automobile association before applying for taxi-driver's licence); *Chassagnou v. France* (2000) 29 E.H.R.R. 615 (right of landowner not to join hunting association).
[5] *Cheall v. United Kingdom* (1985) 42 D.R. 178.
[6] *Rees v. United Kingdom* (1986) 9 E.H.R.R. 56. See also *Cossey v. United Kingdom* (1990) 13 E.H.R.R. 622; *Sheffield and Horsham v. United Kingdom* (1998) 27 E.H.R.R. 163.
[7] (1979) 4 E.H.R.R. 139.
[8] See now Marriage Act 1983, s.1.
[9] *ante*, para. 22–017.
[10] *Klass v. Germany* (1978) 2 E.H.R.R. 214; *Silver v. United Kingdom* (1983) 5 E.H.R.R. 347.

remedy: *Silver v. United Kingdom*.[11] On the other hand in *Chahal v. United Kingdom*[12] a right of appeal against a decision to deport on the ground of national security to a panel which could not reach a decision but only advise the Secretary of State was not an effective remedy.

Of particular importance is the possibility that judicial review may not constitute an effective remedy because of the limitations on the ability of the courts to examine the legality of a minister's decision. Thus in *Smith* and *Grady v. United Kingdom*[13] the Court held that the difficulty of establishing the required degree of irrationality before a ministerial decision could be impugned meant that the court was prevented from considering whether the decision (to ban all homosexuals from serving in the armed forces) could be justified by a pressing social need or proportionality to legitimate concerns such as national security.

22–044 Article 14 prohibits discrimination in the enjoyment of other rights and freedoms set out in the Convention on any ground. The list given in the Article is regarded as merely illustrative, not exhaustive. In the fields covered by United Kingdom statute law such as employment and discrimination on the grounds of race and sex, Article 14 has little, if anything, to add to domestic law. In areas where it might be invoked its usefulness may be limited by the fact that it is not clear if it extends to indirect discrimination, unlike British legislation in the areas where that applies.[14]

It is not necessary to establish a breach of a substantive right before Article 14 can be invoked: that would render the Article useless. It is sufficient to show that a measure which in itself is in conformity with the requirements of the Convention infringes the relevant Article when read in conjunction with Article 14.[15] Thus, as the Court pointed out, the establishment of a system of appellate courts, although not required by Article 6 is entirely consistent with it. But if those courts were only available to an arbitrarily defined group of litigants there would be a breach of Article 6, read with Article 14.

Discrimination does not mean "any distinction".[16] A distinction is not discriminatory where it has objective and reasonable justification. The existence of such a justification is to be assessed in relation to the aims and objects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.

22–045 Article 16 which entitles States to impose restrictions on the political activities of aliens is unlikely to be of any significance and has been recognised as outdated by the Court in the only case before it involving this Article.[17]

Article 17 prevents any person or State relying on rights guaranteed under the Convention to destroy those rights, for example a totalitarian party seeking to rely on the freedom of speech, guaranteed by Article 10, to advocate the overthrow of democracy. Nonetheless, restrictions imposed under Article 17 must be strictly proportionate to any threat posed to the rights of others and, for

[11] *ante*, n. 10. *N.b.* The question of an effective remedy for a breach of a Convention right under Art. 13 is distinct from the right to a trial before an independent and impartial tribunal under Art. 6.
[12] (1998) 23 E.H.R.R. 413. In addition the applicant had no legal representation, was given only an outline of the case against him and was unable to see the panel's advice. The decision led to a change in the law; see *post*, para. 23–034.
[13] (2000) 29 E.H.R.R. 493.
[14] Harris, O'Boyle and Warbrick, *op. cit.* p. 477.
[15] *Belgian Linguistic case* (1968) 1 E.H.R.R. 252.
[16] Despite the French text, *sans distinction aucune*.
[17] *Piermont v. France* (1995) 20 E.H.R.R. 301. (German M.E.P. taking part in anti-nuclear demonstrations in French Polynesia: not an alien for the purposes of Art. 16).

example, while it may be justifiable to restrict the rights of members of terrorist organisations the State is not therefore entitled to take away the rights guaranteed by Article 5 and Article 6.[18]

Article 18 provides that permitted restrictions on Convention rights may not be resorted to for any purpose other than those which justified their imposition. No litigant has yet persuaded the court that a restriction, *prima facie* justifiable, has been wrongfully relied on.

In addition to the rights and freedoms guaranteed by the original Convention the Human Rights Act incorporates the First Protocol to the Convention (which deals with the Protection of Property, the Right to Education and the Right to Free Elections) and the Sixth Protocol which outlaws the death penalty except in time of war or imminent threat of war. The latter calls for no comment since United Kingdom law now accords with its provisions.[19]

22–046 Article 1 of the First Protocol recognises the right of every natural or legal person to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law. The Article in its second paragraph expressly recognises the right of the State to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. The Court has given a wide meaning to the term "possessions", including tangible and intangible property such as the right to a sum of money under an arbitral award,[20] hunting rights[21] and the goodwill of a business.[22]

In practice, the Court while requiring "a fair balance" to be struck between the individual's right to property and the demands of the general interest of the community[23] has allowed states a wide power to interfere with private rights in the public interest. The availability of compensation is an important element in striking the balance although Article 1 does not guarantee a right to full compensation in all circumstances.[24]

22–047 The retrospective nature of legislation depriving an applicant of his property is not in itself sufficient to render the taking unlawful but the Court is particularly mindful in such cases of the dangers of retrospective legislation.[25]

Article 1 may, in the domestic courts, be invoked to challenge legislation to ban or control hunting and, more generally, to challenge various aspects of tax law.[26]

Article 2 of the First Protocol, despite its negative phraseology—No person shall be denied the right to education—recognises a right to education. Where the State assumes the function of providing education (as opposed to provision by

[18] *Lawless v. Ireland* (1961) 1 E.H.R.R. 15.

[19] Murder (Abolition of Death Penalty) Act 1965; Crime and Disorder Act 1998, s.36; Human Rights Act 1998, s.21(5).

[20] *Stran Greek Refineries & Stratis Andreadis v. Greece* (1995) 19 E.H.R.R. 293 (Greek law retrospectively cancelling award in favour of applicants).

[21] *Chassagnou and Others v. France* [2000] 29 E.H.R.R. 615.

[22] *Van Marle and Others v. The Netherlands* (1986) 8 E.H.R.R. 491.

[23] *Sporrong and Lonnroth v. Sweden* (1983) 5 E.H.R.R. 35.

[24] *James v. United Kingdom* (1986) 8 E.H.R.R. 123. (Leasehold reform legislation, compensation to landlord justifiably limited to value of site, excluding value of buildings). See also *Lithgow v. United Kingdom* (1986) 8 E.H.R.R. 329.

[25] *The National and Provincial Building Society, The Leeds Permanent Building Society and the Yorkshire Building Society v. United Kingdom* (1997) 25 E.H.R.R. 127. (Retrospective validation of tax regulations to prevent windfall from defects in earlier tax legislation.)

[26] See further *Human Rights Act: 1998* (ed. C. Baker 1998), Chap. 14.

religious or other organisations) it must respect the religious and philosophical convictions of parents.[27] The United Kingdom ratified Article 2 subject to the reservation that this principle is accepted only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure.[28] Article 2 does not require States to establish particular forms of educational systems at their own expense but it does require, in conjunction with Article 14, that access to state funded institutions is on a non-discriminatory basis.[29]

The meaning of religious and philosophical convictions has been considered in a number of cases.[30] To be protected the convictions must be worthy of respect in a democratic society and not inconsistent with the fundamental right of a child to education. In determining the meaning of religious or philosophical convictions for the purpose of Article 2 of the Protocol the Court takes account of its jurisprudence on Articles 8, 9 and 10 of the Convention. Parental view on sex education[31] and corporal punishment[32] have been held to fall within the limits of convictions to which respect must be paid.

22–048 The emphasis of the Article is on primary and secondary education, as might seem to be obvious from the reference to parental convictions. Where the State provides tertiary education it is entitled to limit it to those likely to benefit from it.[33]

Despite the United Kingdom's reservation, Article 2 in conjunction with Article 14 of the Convention, may well encourage litigation involving allegations that particular ethnic or religious groups have been less generously provided for by the State-funded educational system than others. In an area of increasing litigation and parental choice, litigation may equally focus on the adequacy of the provision of facilities to meet special educational needs, despite the United Kingdom reservation. Questions may also arise about the independence of tribunals in the education field where there is a close link with the education authorities against whose decisions parents may be appealing.[34]

22–049 Article 3 of the First Protocol imposes an obligation on the Contracting Parties to hold free elections at reasonable intervals by secret ballot under conditions which ensure the free expression of the opinion of the people. The traditional British system of voting—"first past the post"—has been held by the Commission to be compatible with Article 3 despite the fact that a small party with support spread throughout the United Kingdom will inevitably obtain fewer seats in Parliament than its percentage of the votes would indicate.[35] The same principle would presumably apply *mutatis mutandis* to elections to the new devolved legislatures although, as discussed earlier, in all these cases varying systems of voting designed to produce, in some cases at least, "fairer" results have been introduced[36] and reform of voting methods for the Westminster

[27] *post* n. 52.
[28] See the Human Rights Act 1998, ss.1(2) and 15; Sched. 3, Pt II.
[29] *Belgian Linguistics Case* (1968) 1 E.H.R.R. 252.
[30] See *e.g. Campbell and Cosans v. United Kingdom* (1982) 4 E.H.R.R. 293; *Valsamis v. Greece* (1996) 24 E.H.R.R. 294.
[31] *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) 1 E.H.R.R. 711.
[32] *Campbell and Cosans, ante* n. 30.
[33] *X v. United Kingdom* (1981) 23 D.R. 228; *Glasewska v. Sweden* (1986) 45 D.R. 300.
[34] *Human Rights Act 1998* (ed. Baker), p. 349.
[35] *Liberal Party, R. and P. v. United Kingdom* (1980) 21 D.R. 211.
[36] *ante*, para. 5–013.

Parliament is allegedly under consideration.[37] The Court has emphasised that electoral systems must be assessed in the light of the political evolution of the country concerned; features that would be unacceptable in the context of one system may be justified in another.[38]

Domestic law relating to expenditure by political parties and other organisations may fall for consideration in the light of this Article and the right to freedom of expression under Article 10.[39]

Arguably the system of voting at present in use in the United Kingdom which allows for identification of a voter from the electoral roll number which is recorded on the counterfoil of each ballot paper is not "secret" for the purposes of the Protocol.[40]

Applying the Act[41]

22–050 The Human Rights Act 1998 took effect in England on October 2, 2000 but as explained in Chapter 5 it became effective in Scotland and Wales and Northern Ireland earlier under the terms of the devolution legislation. As a result of this timetable, and the accidents of litigation, the first decisions to demonstrate the potential of the Act were from Scotland. Article 6 (the right to a fair hearing) has, as had been expected, been the most commonly invoked provision of the Convention.

In *R. v. Lambert*[41a] the House of Lords held that the Human Rights Act 1998 does not have retrospective effect and can not be invoked to challenge the legality of a trial held before the Act took effect.

Article 2, the right to life, has been referred to, without English law being found incompatible, in cases involving the separation of conjoined twins[42] and the withdrawal of treatment from a patient in a persistent vegetative state, with no hope of recovery: *NHS Trust A v. M.*[43]

Article 3 (inhuman or degrading treatment) was also unsuccessfully relied on in the *NHS Trust* case and in *R. v. Offen*[44] where it was argued that the Crime (Sentences) Act 1997, s.2, which required the imposition of a life sentence on certain offenders except where there were "exceptional circumstances" was contrary to the terms of the Article. The Court of Appeal (Criminal Division) held that while the automatic imposition of a life sentence might amount to inhuman or degrading punishment the discretion given to the Court by the words "exceptional circumstances" avoided that risk, enabling the Court, for example, not to impose a life sentence where an offender did not pose a considerable risk to the public. In *Offen* the Court of Appeal for similar reasons rejected the argument that section 2 might amount to the imposition of an arbitrary punishment contrary to Article 5.

[37] Jenkins Commission Report, Cm. 4090 (1998), *ante* para. 10–060.
[38] *Mathieu-Mohin and Clerfayt v. Belgium* (1998) 10 E.H.R.R. 1.
[39] *e.g. Bowman v. United Kingdom* (1998) 26 E.H.R.R.1, but see now Political Parties Elections and Referendums Act 2000, s.131.
[40] See Representation of the People Act 1983, s.23 and Sched. 1, Part III; *ante* para. 10–057.
[41] J. Croft, *Whitehall and the Human Rights Act 1998* (The Constitution Unit, 2000).
[41a] *The Times*, July 6, 2001. HL Lord Slynn recanted his comments to the contrary in *R. v. D.P.P. ex p. Kebilene* [2000] 2 A.C. 326, HL; *post*, para. 22–052.
[42] *Re A (Children) (conjoined twins: surgical separation)* [2000] 4 All E.R. 961, CA.
[43] [2001] 1 All E.R. 801. Butler-Sloss P. followed and applied *Airedale NHS Trust v. Bland* [1993] A.C. 789, HL.
[44] [2001] 1 W.L.R. 253, CA.

Article 5 has, however, been successfully invoked in two relating to mental health legislation and practice. In *R(H) v. Mental Health Tribunal, North and East London Region*[44a] the Court of Appeal held that section 73 of the Mental Health Act 1983 placed the burden of proving that he was no longer suffering from a mental illness on the patient seeking an order for his discharge and that this was incompatible with the right to liberty guaranteed by Article 5. In *R(C) v. Mental Health Review Tribunal*[44b] the Court of Appeal held that the practice of listing hearings before the Tribunal eight weeks after the date of the application was incompatible with Article 5(4) which required that such hearings should take place as soon as practicable.

The potential of Article 6 (right to a hearing) to cause serious upheavals in the domestic legal systems of the United Kingdom was strikingly demonstrated when, within months of the Scotland Act 1998 taking effect the High Court of Justiciary held, on appeal, that a temporary Sheriff whose appointment and continuance in office was, in practice, dependent on the Lord Advocate, a member of the Scottish Executive, in whose name prosecutions were undertaken, could not constitute an independent tribunal within Article 6(1): *Starrs v. Procurator Fiscal (Linlithgow)*.[45] With these consideration in mind, the appointments of deputy High Court judges and Assistant Recorders in England and Wales have been amended to give them a fixed term of office likely to be sufficient to ensure their independence for the purposes of Article 6.[46] The judicial role of the Lord Chancellor is unique and will inevitably come under scrutiny. It can hardly be argued that he has the guarantee of tenure which entitles him to be regarded as independent.[47] His multiplicity of roles, as judge, minister and Speaker of the Upper House of the legislature call to mind the decision of the Strasbourg Court in *McGonnell v. United Kingdom*.[48] 22–051

Apart from the Convention, the Law Lords have had to address the question of bias in relation to their own proceedings[49] and inevitably increasing attention will be paid to this issue. The increasing willingness of the law lords to participate in controversial issues before the House of Lords in its legislative role for example may lead to challenges to their judicial impartiality—which, as the Court of Human Rights emphasised in *McGonnell*[50] is a question, not of actual bias, but of impartiality from an objective viewpoint. The risk of judicial figures imperilling their own impartiality is starkly demonstrated by the Scottish decision, *Hoekstra v. H.M. Advocate*[51] where the appearance of bias, arising from the judge's journalistic writings, related to his views on the wisdom of adopting conventions of human rights.[52]

[44a] [2001] H.R.L.R 752, CA. For remedial action under s.10, see *post*, para. 29–034.
[44b] *The Times*, July 11, 2001, CA.
[45] 2000 J.C. 208.
[46] H.C. Deb. Vol. 348, *col.* 222w April 12, 2000.
[47] See R. F. V. Heuston, *Lives of the Lord Chancellors 1940–1970*, p. 176 for an account of the abrupt nature of Lord Kilmuir's dismissal. He was called from a Cabinet committee meeting at 11.15 a.m. to see the Prime Minister. Mr Macmillan. At 11.30 the Lord Chancellor's Office was telephoned to be told, "you have a new Lord Chancellor".
[48] (2000) 30 E.H.R.R. 289; *ante*, para. 22–036.
[49] *R. v. Bow Street Magistrate ex p. Pinochet (No. 2)* [2000] 1 A.C. 119, HL, *post*, para. 31–014.
[50] (2000) 30 E.H.R.R. 289.
[51] [2001] A.C. 216, 2001 S.L.T. 28, PC.
[52] "A field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers"; Lord McCluskey's view of the Canadian Charter of Rights and Freedoms, as reported in Scotland on Sunday.

22–052 Challenges in the English courts to the status of courts martial in relation to Article 6 failed in *R. v. Spear*[53] and in *Scanfuture UK v. Secretary of State for Trade and Industry*[54] the Employment Appeal Tribunal held that new procedures for appointing lay members of employment tribunals were in compliance with the European Convention.

Article 6(2) expressly recognises the presumption of innocence in criminal trials. Is it compatible with this provision for a statute to, for example, enact that the possession of drugs, or housebreaking equipment, or other items constitutes an offence unless the accused can provide an explanation for the possession? In legislation suppressing terrorism or bribery it is often said to be necessary to shift the burden of proving innocence to the accused once the prosecution has established the existence of certain defined *prima facie* incriminating facts. In *R. v. D.P.P. ex p. Kebilene*,[55] decided before the Human Rights Act had come into effect, the Divisional Court and House of Lords considered the compatibility with Article 6(2) of sections 16A and 16B of the Prevention of Terrorism Act 1989. Section 16A provided that a person was guilty of an offence if he had any article in his possession in circumstances giving rise to a reasonable suspicion that the article was in his possession for a purpose connected with the commission of acts of terrorism. Subsection 3 provided that it was a defence for a person charged to prove that the item in question was not in his possession for such a purpose. Section 16B related to the collecting of information useful for terrorist purposes. The person charged could avoid liability by proving "lawful authority or reasonable excuse" for the collecting. Both provisions, in the view of the Divisional Court undermined, in a blatant and obvious way the presumption of innocence and were incompatible with Article 6(2). The Court did not, however, consider whether, had the Human Rights Act 1998 been in force, the sections could, under section 3 of the Act, have been read in a way which was consistent with the Convention. The House of Lords, however, did venture to express a view on the hypothetical possibility of reconciling the sections with the 1998 Act and concluded such reconciliation was possible.

22–053 Their Lordships thought the provisions were compatible if they merely imposed an evidential burden on the defendant. If evidence was adduced which raised a real issue as to the innocence of their possession, the burden of proving guilt would have to be undertaken by the prosecution.[56] In *R. v. Benjafield*[57] a challenge to a confiscation order under the Drug Trafficking Act 1994 on the ground that it deprived the applicant of the presumption of innocence failed. Lord Woolf C.J. said that Article 6(2) was only an application of the broad principle of a fair trial contained in Article 6(1) and the question was one of the fairness of the trial overall.

Two cases before the Judicial Committee of the Privy Council involving Article 6 also illustrate the application of the Convention in the context of devolution. In *Brown v. Stott*[58] the Judicial Committee held that a devolution issue had arisen within the Scotland Act 1998, Schedule 6 which the Committee

[53] *The Times*, January 30, 2001; *ante* para. 19–021.
[54] *The Times*, April 26, 2001.
[55] [1999] 3 W.L.R. 175; [2000] 2 A.C. 326; *ante* para. 19–055. See, too, *Att.-Gen. of Hong Kong v. Lee Kwong Kut* [1993] A.C. 951, PC.
[56] Their Lordships' explication of ss.16A and 16B have found statutory expression in the Terrorism Act 2000, s.118; *ante* para. 15–055.
[57] [2001] 2 W.L.R. 75; [2001] 2 Cr.App.R. 87, CA.
[58] [2001] 2 W.L.R. 817, PC.

was entitled to determine and went on to hold that it was not a breach of Article 6 for a prosecutor at her trial to rely on an admission by a defendant that she had been driving a car at the time of an alleged offence, made compulsorily under section 172 of the Road Traffic Act 1988. In *Montgomery v. H.M. Advocate*[59] the Judicial Committee refused to interfere with the findings of the High Court of Justiciary that pre-trial publicity had deprived the appellants of a fair trial on a charge of murder.

The compatibility of the power of the Secretary of State to decide planning appeals under the Town and Country Planning Act 1990, and appeals against orders under the Transport and Works Act 1992, the Highways Act 1980 and the Acquisition of Land Act 1981 with Article 6 was upheld by the House of Lords in the important case of *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and Regions*[60] Lord Slynn held that the European Court had consistently accepted the propriety of administrative law decisions being taken by ministers, answerable to elected bodies, provided that those decisions are subject to judicial control.

The prohibition on retrospective criminal legislation contained in Article 7 was unsuccessfully relied on in *Gough v. Chief Constable of Derbyshire*[60a] where the Court of Appeal held that banning orders under the Football Spectators Act 1989 were not penalties within the Article and hence legislation could retrospectively lengthen the terms of such orders.

Article 8 (right to privacy and family life) is potentially of significance because of the undeveloped state of English law in this field[61] and the controversial nature of many of the issues involved at a time when society's views are changing and technological developments are raising new questions.[62] The Article was invoked successfully in *R. (Daly) v. Secretary of State for the Home Department*[62a] where the House of Lords held that a rule that prisoners cannot be present during searches of their cells was contrary both to the common law and Article 8 as an infringement of their right to confidentiality of privileged legal correspondence. In *Secretary of State for the Home Department ex p. Montana*[63] the father of an illegitimate child challenged the refusal of the Secretary of State to register that child as a British citizen. The relevant provisions of the British Nationality Act 1981 which dealt with the citizenship of children born outside the United Kingdom to British citizens distinguished between the position of illegitimate children claiming citizenship by reference to their mothers and those seeking citizenship by reference to the status of their fathers. The Court of Appeal held that the distinction did not violate Article 8. The right to respect for family life did not entail a right to have the same nationality as one's parent.

22–054

[59] [2001] 2 W.L.R. 779. PC.

[60] [2000] 2 W.L.R. 1389. HL. See also *R Carroll and Another) v. Secretary of State for the Home Department, The Times* August 16, 2001, CA (Prison discipline proceedings not criminal proceedings within Article 6); *Preiss v. General Dental Council, The Times* August 14, 2001, PC (GDC disciplinary procedure lacked necessary independence and impartiality required by Art. 6.1 but no breach of Convention because of availability of unrestricted right of appeal to PC).

[60a] *The Times* July 19, 2001, CA. Nor were such orders in breach of right of freedom of movement under Community law: see para. 6–021, n. 54.

[61] *e.g. Malone v. Metropolitan Police Commissioner* [1979] Ch. 344; For later judicial thoughts see *Hellewell v. Chief Constable of Derbyshire* [1995] 1 W.L.R. 804, 807, *per* Laws J; *Douglas v. Hello! Ltd. The Times*, January 16, 2001, CA.

[62] *post*, Chap. 26.

[62a] [2001] 2 W.L.R. 1622, HL.

[63] *The Times*, December 5, 2000, CA. See *post*, para. 23–009. The Family Law Reform Act 1987 and the Children Act 1989 do not apply to the British Nationality Act.

In *Payne* v. *Payne*[64] the Court of Appeal held that the principles of English law governing the awarding of custody of children, with the welfare of the child as the paramount consideration were not inconsistent with Article 8. In *R.* v. *Bracknell Forrest D.C.*[65] the right of a local authority to terminate a tenancy under the Housing Act 1996 was held not to be in breach of Article 8.

The prohibition on discrimination in Article 14 was raised in *R.* v. *Secretary of State for the Home Department ex p. Montana*[66] as a second ground of challenge to the impugned provisions of the British Nationality Act 1981. The Court of Appeal, however, held that there was no discrimination within the Article because there were objective and reasonable grounds for distinguishing between the rights of illegitimate children in relation to their mothers as opposed to fathers.

22–055 Article 1 of the First Protocol (peaceful enjoyment of possessions) was invoked in *Regina (Professional Contractors Group Ltd and Others)* v. *Inland Revenue Commissioners*[67] in which the applicants challenged legislation known as IR35, which was aimed at eliminating a particular form of tax avoidance. Burton J. held that the legislation—a mixture of statutory provisions and delegated legislation—did not, in its effects on the taxpayers it was aimed at, come anywhere near to a de facto confiscation of property or an abuse of the government's right to levy tax.

The feudal liability of some landowners to contribute to the cost of repairing the chancel of their parish church[68] was held by the Court of Appeal in *Parochial Church Council of Aston Cantlow and Wilmcote with Billesley Warwickshire* v. *Wallbank*[69] to be contrary to Article 1 of the Protocol because of the arbitrariness of the way the liability fell, both in terms of its incidence and the scope of liability.

Parliamentary supervision of the working of the Act will be exercised through the Joint Committee on Human Rights, a Select Committee of both Houses of Parliament which was established in February 2001.

Despite suggestions that Human Rights Commission be established to promote the rights guaranteed under the 1998 Act the government finally decided against including provision for such a body in the Human Rights Act. The creation of such a body and its possible role and structure was envisaged as a suitable topic for consideration by what is now the Joint Committee.[70]

[64] *The Times*, March 9, 2001, CA.
[65] *Daily Telegraph*, February 13, 2001. See also *Poplar Housing and Regeneration Community Association Ltd.* v. *Donoghue*, *The Times* June 21, 2001, CA.
[66] *The Times*, December 5, 2000, CA.
[67] *The Times* April 5, 2001.
[68] *Wickhambrook Parochial Church Council* v. *Coxford* [1935] 2 K.B. 417, CA; *Chivers & Sons Ltd* v. *Air Ministry* [1955] 1 Ch. 585.
[69] *The Times* June 15, 2001, CA. The CA rejected an argument that the parochial council was not a public body within s.6 of the Human Rights Act: the relationship was based on law, not contract.
[70] S. Spencer, "A Human Rights Commission", Chap. 5 in R. Blackburn and R. Plant (eds), *Constitutional Reform* (Longman, 1999).

CHAPTER 23

NATIONALITY, CITIZENSHIP, IMMIGRATION AND EXTRADITION

1. INTRODUCTION

"British nationality law is probably more complex than that of any other country and, on its own, certainly more complex today than at any time in the past."[1]

Nationality and allegiance[2]

23–001 Nationality is a nineteenth-century concept. It is important in international law as well as constitutional law in connection with such matters as diplomatic protection abroad, immigration, deportation and the negotiations of treaties. In constitutional law the distinction between nationals and aliens is also important because the latter are subject to certain disabilities, especially as regards public or political rights.

Until 1948, British nationality law, which had been put on a statutory basis in 1914, was founded on the common law doctrine of allegiance. Allegiance was defined by Blackstone as "the tie, or *ligamen*, which binds the subject to the King, in return for that protection which the King affords the subject."[3] A natural or permanent allegiance was owed by subjects, who at common law were persons born within the King's dominions; while aliens within the King's dominions owed the Sovereign a local or temporary allegiance. No one could relinquish his nationality ("*nemo potest exuere patriam*"). Conversely, a special Act of Parliament was necessary to give an alien English or British nationality.

The distinction between natural-born subjects and others (including naturalised aliens) was in earlier times more important than that between subjects and aliens.[4] General provision was made by the Naturalisation Act 1870 to enable aliens to acquire British nationality by executive grant of the Home Secretary instead of by private Act of Parliament.

The common law doctrine of allegiance plays no part in the new concept of nationality. Allegiance is no longer a source of British nationality, although it

[1] *Fransman's British Nationality Law* (3rd ed. 1989) p. viii.

[2] A Dummett and A. Nicol, *Subjects, Citizens, Aliens and Others* (Weidenfeld and Nicolson, 1990)

[3] Bl.Comm. I. 366. See also *Calvin's Case* (1608) Co.Rep. 1a, where it was decided that "*postnati*," *i.e.* persons born in Scotland after the accession of James VI of Scotland to the English throne as James I, were not aliens in England. *cf. Isaacson v. Durant* (1886) 17 Q.B.D. 54 (Hanoverian born before accession of Queen Victoria).

[4] An Act of 1705 provided that the lineal descendants of Princess Sophia should be deemed to be natural-born British subjects: see *Att.-Gen. v. Prince Ernest Augustus of Hanover* [1957] A.C. 436; Clive Parry, "Further Considerations upon the Prince of Hanover's Case" (1956) 5 I.C.L.Q. 61; note by C. d'O. Farran in (1956) 19 M.L.R. 289. And see *Duke of Brunswick v. King of Hanover* (1844) 6 Beav. 1, 19, 34.

may be a consequence of it. It must be regarded henceforth as relevant to the law of treason rather than nationality, and perhaps also to "acts of state."[5]

The Act of 1914

23–002 The British Nationality and Status of Aliens Act 1914 repealed the Naturalisation Act 1870 (except as regards persons born before 1915) and provided a comprehensive code for the acquisition and loss of British nationality. Part I, relating to natural-born British subjects, applied throughout the British Empire. The general principles governing the status of natural-born British subjects were: (a) birth in British territory; or (b) birth abroad of a father who was a British subject; and (c) a married woman acquired British nationality if she married a British subject, and she lost British nationality if she married an alien. Part II related to naturalisation.[6]

British Nationality Act 1948[7]

23–003 Before 1948 British nationality was based on the common law doctrine that (with certain exceptions) every person born in British territory was a natural-born British subject. The pre-1948 statutes embodied this doctrine, but also laid down conditions on which persons born outside British territory might become natural-born British subjects, and made rules regarding naturalisation, the status of married women and children, and loss of British nationality. The combination of United Kingdom legislation and Dominion legislation along similar lines would constitute, it was hoped, a common code of British nationality for the British Commonwealth.

In the course of time divergencies began to appear between the laws of various members of the Commonwealth, in particular in relation to married women. In 1946 Canada enacted a Citizenship Act which defined Canadian *citizens*, provided that all Canadian citizens were British subjects, and further provided that all persons who were British subjects under the law of any other Commonwealth country would be recognised by Canada as British subjects. The Act thus retained the common status of British subjects, but abandoned the common code of nationality. A Commonwealth legal conference was held in London in 1947, and it was decided to accept the principles of the Canadian Citizenship Act 1946 for general application throughout the Commonwealth. The British Nationality Act 1948, as amended from time to time, gave effect to these principles so far as the United Kingdom and British colonies are concerned. It provided a new method of giving effect to the principle that people of each of the self-governing countries within the Commonwealth have both a particular status as citizens of their own country and a common status as members of the wider association of peoples comprising the Commonwealth. The Act was divided into two main parts: Part I dealt with British nationality, Part II with citizenship of the United Kingdom and colonies.

[5] *ante*, Chap. 15.

[6] Further Acts were passed dealing notably with the status of married women, and this legislation was known as the British Nationality and Status of Aliens Act 1914–1943. These Acts were almost entirely repealed by the British Nationality Act 1948, but they are still of practical importance for they determine whether any person born before 1949 was a British subject, so as to retain British nationality under the transitional provisions of the Act of 1948.

[7] See E. C. S. Wade, "British Nationality Act, 1948" (1948) xxx *Journ. Comp. Leg.* 67; Clive Parry, *Nationality and Citizenship Laws of the Commonwealth* (2 vols. 1957–60).

Section 1 of the British Nationality Act 1948 provided that:

"(1) Every person who under this Act is a citizen of the United Kingdom and Colonies,[8] or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country, shall by virtue of that citizenship have the status of a British subject.

(2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen: and accordingly in this Act and in any other enactment or instrument whatever, whether passed or made before or after the commencement of this Act, the expression 'British subject' and the expression 'Commonwealth citizen' shall have the same meaning."

Subsection (3), specifying the Commonwealth countries concerned, was amended from time to time so as to include all independent members of the Commonwealth, Southern Rhodesia, as it then was, and any other Commonwealth country that had been granted power to enact its own citizenship laws. Each of the countries mentioned in subsection (3), as amended, was a legislative unit for nationality or citizenship purposes. It was intended that each of them should enact a citizenship law containing the principle of section 1(1), *ante*, by which mutual recognition as British subjects would be given to the citizens of other Commonwealth countries. The result would be that "British subjects," instead of being ascertained by a common code, would simply comprise the citizens of all Commonwealth countries, as is shown by the alternative title "Commonwealth citizens."

23–004 The 1948 Act provided for the acquisition of citizenship by *birth* in the United Kingdom and Colonies on or after January 1, 1948 (s.4)[9]; and by *descent* if a child's father was a citizen of the United Kingdom and Colonies at the time of the birth (s.5).[10]

Any person who was a British subject immediately before January 1, 1949[11] became a citizen of the United Kingdom and Colonies if: (a) he was born in the United Kingdom and Colonies; or (b) he was naturalised in the United Kingdom and Colonies; or (c) he became a British subject by annexation of territory to the United Kingdom and Colonies; or (d) his father was a British subject and fulfilled any of the above conditions; or (e) he was born in a British protectorate, protected state or trust territory (s.12).[12]

Provision was also made for the acquisition of citizenship by *naturalisation* (in the case of aliens and British protected persons) and by *registration* in the case

[8] *post*, para. 23–007.

[9] Unless (a) the father of the child enjoyed diplomatic immunity and was not a citizen of the United Kingdom and Colonies, or (b) the father was an enemy alien and the birth occurred in a place then under enemy occupation.

[10] Subject to the proviso that if the father were a citizen by descent one of a number of other conditions had to be satisfied.

[11] Under the British Nationality and Status of Aliens Act 1914–1943 the following persons born after 1914 were natural-born British subjects:

(a) Any person born within His Majesty's dominions and allegiance; and

(b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject and fulfilled one of a number of conditions; and

(c) Any person born on board a British ship.

[12] See *post*, para. 35–008 *et seq.* for protectorates, protected states and trust territories.

of Commonwealth citizens and the wives of citizens of the United Kingdom and colonies.

II. The British Nationality Act 1981[13]

Introduction

23–005 British subjects were free at common law to come into or leave the "mother country." The British Nationality Act 1948, which created citizenship of the United Kingdom and Colonies, retained the old term "British subject" as an alternative to the new term "Commonwealth citizen" for the citizens of other independent Commonwealth countries. In 1962 Parliament passed the Commonwealth Immigrants Act 1962 to give some power to control immigration into the United Kingdom by citizens of Commonwealth countries. All other Commonwealth countries had power to control such immigration.[14] The power of control conferred in 1962 applied to all Commonwealth citizens except those born in the United Kingdom and those holding United Kingdom passports, and also to British protected persons and Irish citizens.

The Home Secretary was also given for the first time a limited power to deport from the United Kingdom Commonwealth citizens.[15] British protected persons and Irish citizens on the recommendation of a court that had sentenced them to imprisonment. The power to deport in such cases was possessed by practically every other territory in the Commonwealth.

The Commonwealth Immigrants Act 1968 amended the Act of 1962 with regard to (*inter alia*) exemption from control enjoyed by citizens of the United Kingdom and Colonies holding United Kingdom passports, and made it an offence to land otherwise than in accordance with immigration regulations. The Acts of 1962 and 1968 were repealed and replaced by the Immigration Act 1971.

The result of the introduction of immigration controls was that there were two categories of citizens in the United Kingdom and Colonies: those entitled to enter and reside in the United Kingdom (called by the Immigration Act "patrials") and those not entitled ("non-patrials"). The object of the British Nationality Act 1981[16] is to distinguish clearly a category of citizenship which carries with it the right of entry and residence from other categories. The old law which was outlined in the previous section remains of importance because (i) it defines the nationality or citizenship of people born before the 1981 Act came into effect (January 1, 1983); (ii) claims under the 1981 Act may turn on the status of parents and grandparents born under the old law[17] and (iii) the terminology of the old law is to be found in the case law and confusion can be caused unless it is realised that, for example, British subject is used in the new law in an entirely different sense from that in which it was formerly used.

[13] *Fransman's British Nationality Law* (3rd ed. 1989).

[14] Colonies can also restrict immigration: see *Thornton v. The Police* [1962] A.C. 339, PC.

[15] *cf. R. v. Sabri, The Times*, November 10, 1964, CCA. Before 1962 a deportation order against a British subject would be quashed: *R. v. Home Secretary, ex p. Château Thierry (Duke)* [1917] 1 K.B. 922, 930 *per* Swinfen Eady L.J.

[16] See commentaries by C. Blake, "Citizenship, Law and the State" (1982) 45 M.L.R. 179 and R. White and F. J. Hampson, "The British Nationality Act 1981" [1982] P.L. 6.

[17] In *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Ross-Clunis* [1991] 2 A.C. 493, HL a claim to citizenship under the 1981 Act hinged on events dating back to 1905.

Categories of citizenship

The 1981 Act recognises three categories of citizenship: **23–006**

(i) British;

(ii) British Dependent Territories;

(iii) British Overseas.

It also recognises the special status of

(i) British protected persons; and

(ii) British subjects without citizenship (British subjects).

A further category of British National (Overseas) was created by the Hong Kong Act 1985.

The term Commonwealth citizen embraces all categories (apart from that of British Protected Persons) and citizens of independent Commonwealth countries.[18]

Citizens of Eire continue to enjoy their own unique status: they are not aliens and possess the right to vote when resident in the United Kingdom.[19]

British citizenship

British citizenship is the only type of citizenship under the 1981 Act which confers a legal right to live in, and to come and go into and from, the United Kingdom by right. **23–007**

British citizenship is acquired, as a general rule, in the case of persons born before January 1, 1983 if they were patrials, that is citizens of the United Kingdom and Colonies who under the Immigration Act 1971, were entitled to enter the United Kingdom by right.[20]

Patrials were (a) citizens of the United Kingdom and Colonies and (b) Commonwealth citizens who possessed one of the special links with the United Kingdom defined in the Immigration Act. That status largely corresponds to British citizenship as defined in the 1981 Act in the case of persons born after January 1, 1983.[21]

In the case of persons born after the commencement of the Act, British citizenship may be acquired by

(i) *Birth* in the United Kingdom provided that one parent was at the time of birth a British citizen or was settled in the United Kingdom.[22] This provision marks the abandonment of the former principle that, subject to minor exceptions, birth in the United Kingdom conferred British nationality.[23] A person who does not acquire citizenship by birth in the United

[18] s.37.

[19] s.50(1); Representation of the People Act 1983, s.1. Citizens of Eire can continue to claim to be British subjects under s.31.

[20] The term patrial was given legal significance and currency but not invented by the Immigration Act 1971. It has been removed from the 1971 Act by s.39 of the 1981 Act and replaced by British citizen.

[21] Some patrials do not become British citizens; and lose their right of abode: s.11(2). Some patrials do not become British citizens but retain a right of abode: s.39(2).

[22] s.1. "Settled" has a technical meaning: s.50(1)–(4); *post*, para. 23–028.

[23] *ante*, para. 23–003.

Kingdom may, however, be subsequently entitled to citizenship, for example, if one of his parents later acquires citizenship or he spends the first 10 years of his life in the United Kingdom.[24]

(ii) *Descent*: when birth occurs abroad but one parent is a British citizen other than by descent.[25] This represents an extension of the rule in the 1948 Act which allowed the acquisition of citizenship by descent only through the father. The new rule, however, is more restrictive than the old in that, subject to exceptions, it allows acquisition by descent for one generation only. Formerly United Kingdom citizenship could be transmitted indefinitely by registration at a British consulate in a foreign country. Persons born abroad whilst a parent possessing British citizenship is in the service of the Crown are treated as acquiring citizenship by birth and can transmit that citizenship even if the relevant parent was a citizen by descent.[26] In some cases British citizenship may be claimed following birth abroad where one of the parents was a British citizen by descent but had resided in the United Kingdom for the three years preceding the birth.[27]

Citizenship by naturalisation

23–008 Naturalisation is now governed by section 6 of and Schedule 1 to the British Nationality Act 1981. Naturalisation is a matter within the discretion of the Secretary of State. Section 44 provides that in exercising any discretion under the Act the Secretary of State must pay no regard to "race, colour or religion."[28] Section 6 distinguishes between applications by persons of full age and capacity (subsection 1) and applications by persons of full age and capacity who at the date of the application are married to a British citizen (subsection 2). In the case of naturalisation under subsection 1 the applicant must first satisfy a residence requirement which involves within the five years before the application presence in the United Kingdom, subject to absences not exceeding 450 days, and in the 12 months before application presence except for a maximum absence of 90 days.[29] In the alternative an application can show that at the date of application he is serving outside the United Kingdom in Crown service under the United Kingdom government. Secondly he must establish that he is of good character; thirdly that he has sufficient knowledge of the English, Welsh or Scottish Gaelic language, and fourthly that he intends (i) to reside in the United Kingdom, or (ii) to enter into or continue in Crown service under the United Kingdom Government, or service under an international organisation of which the United Kingdom Government is a member, or service in the employment of a society or company established in the United Kingdom. The Home Secretary is expressly given a wide discretion to waive the requirements relating to residence and language proficiency.

[24] s.1(3); s.1(4).
[25] s.2.
[26] s.2.
[27] s.3(3).
[28] Although subs. 2 provides that the Secretary of State is not required to give any reason for his decision, the Court of Appeal has held that fairness requires him to give such explanation as to enable the applicant to challenge the exercise of his discretion in the courts: *R. v. Secretary of State for the Home Department, ex p. Faved* [1998] 1 W.L.R. 763; *post* para. 31–016.
[29] Furthermore the applicant must not at any time in the five year period have been in breach of the immigration laws and in the final twelve months must not at any time have been subject to any restriction on the period for which he might remain in the United Kingdom.

The requirements to be satisfied by the spouse of a British citizen who seeks naturalisation under subsection 2 are less onerous. The period of five years is reduced to three (subject to absences not exceeding 270 days) and there is no need to show "sufficient knowledge" of the three listed languages.

Naturalisation is only available to allow aliens to acquire British citizenship. A British citizen by descent, for example, cannot apply for naturalisation.[29a]

Citizenship by registration

23–009 The Home Secretary is given a discretion to register minors as British citizens by Section 3 which spells out particular requirements to be satisfied in specific types of application.[30]

Registration by right is available to British Dependent Territories citizens, British Overseas citizens, British subjects and British protected persons who satisfy the residence requirements of section 4.

An applicant whose right to be registered depends on her own antecedent fraud is not entitled to challenge the Secretary of State's refusal to register her as a British citizen: *R. v. Secretary of State for the Home Department, ex p. Puttick*.[31]

Registration is available by right to British Dependent Territories citizens who are nationals of the United Kingdom for the purpose of the Community Treaties, that is people having a link with Gibraltar (section 5).[32]

Transitional provisions preserve for five years after the commencement of the 1981 Act the rights of individuals to register as British citizens who could formerly have registered as citizens of the United Kingdom (i) by virtue of residence (section 7); (ii) in the case of women, by marriage to a citizen of the United Kingdom (section 8) and (iii) by registration at a United Kingdom consulate (section 9).

British Nationality (Falkland Islands) Act 1983

23–010 This Act which is deemed to have come into effect on the same day as the British Nationality Act confers British citizenship on inhabitants of the Falkland Islands born before January 1, 1983 who would otherwise be British Dependent Territories citizens by virtue of a link with the Falkland Islands—for example, birth, naturalisation or registration there. In the case of persons born after January 1, 1983 British citizenship is conferred on persons born in the Islands who satisfy *mutatis mutandis* the requirements of the 1981 Act. Provision is also made for acquisition of British citizenship by registration and descent.

Loss of citizenship

23–011 In the case of naturalised citizens and citizens by registration, citizenship may be lost by *deprivation* under section 40 of the British Nationality Act 1981. The

[29a] *R. v. Secretary of State for the Home Department ex p. Ullah, The Times* June 27, 2001, CA. (Application presumably inspired by limitation on transmission of citizenship by citizens by descent).

[30] Statutory distinction between illegitimate male/female children for purposes of registration not contrary to European Convention on Human Rights: *R. v. Secretary of State for the Home Department, ex p. Montana, The Times*, December 5, 2000, CA; *ante* para. 22–054.

[31] [1981] 1 Q.B. 767, CA (Marriage to British subject procured only by deceiving registrar as to identity of P, a German national wanted in Germany on charges of terrorism). See too *Puttick v. Attorney-General* [1980] Fam. 1 where Sir George Baker P. refused to grant a declaration of the validity of the marriage.

[32] K. Simmonds, "The British Nationality Act 1981 and the definition of the term 'national' for Community purposes" (1984) C.M.L. Rev. 675.

Home Secretary may deprive any person to whom the section applies of citizenship if satisfied that the registration or certificate of naturalisation was obtained by fraud, false representation or concealment of any material fact; or if he is satisfied that the person has shown himself disloyal to Her Majesty, or has traded with the enemy during any war, or (unless the effect of deprivation would be to render that person stateless) has been sentenced to not less than twelve months' imprisonment within five years of naturalisation. A person is not to be deprived of citizenship under the section unless the Home Secretary is satisfied that it is not conducive to the public good that that person should continue to be a British citizen; and except in the case of continuous residence abroad, a person against whom an order is proposed to be made may require that the case be referred to a committee of inquiry called the Deprivation of Citizenship Committee.[33]

A British citizen of full age and capacity may under section 12 of the 1981 Act *renounce* his British nationality.[34] A declaration must be made in a prescribed form and registered by the Home Secretary if he is satisfied that after registration the person concerned will acquire some citizenship or nationality other than British citizenship. If another citizenship or nationality is not acquired within six months of registration the person shall be deemed to be and have remained a British citizen. It is provided, however, that the Home Secretary may withhold registration of any such declaration if made during any war in which Her Majesty may be engaged in right of Her Majesty's government in the United Kingdom.[35]

Resumption of citizenship

23–012 Provision is made for resumption of citizenship by persons who have earlier renounced citizenship, for example a wife might have to renounce British citizenship under the law of her husband's state and wish to return to the United Kingdom on divorce or following his death.[36]

British Dependent Territories Citizenship

23–013 This, in effect, is a colonial citizenship, acquired by a connection with a colony analogous to that needed with the United Kingdom to establish the status of British citizenship.[37] The status does not confer a right of entry to the United Kingdom or to any particular colony, immigration being a matter left to each colony to determine for itself. As we have seen, Gibraltarians and Falkland Islanders have, within this category, special rights to British citizenship; on the other hand the Hong Kong Act 1985 makes provision for converting this type of citizenship arising from a connection with Hong Kong into "a new form of

[33] There is no right to an inquiry where the registration or naturalisation has been procured by fraud as to identity: *R. v. Secretary of State for the Home Department, ex p. Akhtar* [1981] Q.B. 46.

[34] For the purposes of s.40 any person who has been married is deemed to be of full age.

[35] At common law a British subject could not become naturalised in a foreign country (*ante*, para. 23–001). The Naturalisation Act 1870 provided that if he did so he should be deemed to have ceased to be a British subject and be regarded as an alien. The 1948 Act in order to prevent statelessness provided that the acquisition of a foreign nationality or of another Commonwealth citizenship, instead of involving automatic forfeiture, should entitle a person to renounce his citizenship of the United Kingdom and Colonies if he so desired. In *R. v. Lynch* [1903] 1 K.B. 444, it was held that naturalisation in a country with which Britain was at war not only amounted to treason, but was probably null and void: *ante*, para. 23–001.

[36] s.13. See also s.10.

[37] British Nationality Act 1981, Part II. For dependent territories, see *post*, Chap. 35.

British nationality the holders of which shall be known as British Nationals (Overseas)".[38]

British Overseas Citizenship[39]

This status was conferred on citizens of the United Kingdom and Colonies who did not, when the 1981 Act came into effect, acquire British citizenship or British Dependent Territories Citizenship. It is a transitional and residual status. They may at the same time hold another citizenship. 23–014

British subjects[40]

Unlike British Overseas Citizens, British subjects cannot possess any other citizenship. They are persons who were British subjects under the 1948 Act who failed to acquire citizenship when the country in which they lived adopted its own nationality laws. This, too, is a transitional status, destined to disappear. 23–015

British Overseas Citizens and British subjects are entitled to British passports but, as will be seen, have no right of entry to the United Kingdom. If admitted to the United Kingdom they may under section 4 acquire British citizenship by registration.

British Protected Persons

British Protected Persons are defined by Order in Council made under section 38 of the 1981 Act and the Solomon Islands Act 1978.[41] They are connected with territories which were protectorates, protected states of United Kingdom trust territories.[42] They may hold citizenship of a non-Commonwealth country. Like the two preceding categories, the significance of this one is the right to a British passport and, if admitted to the United Kingdom, the chance of registration as a British citizen. 23–016

British National (Overseas)

This new form of British nationality was created by the Hong Kong Act 1985 and was intended to replace the British Dependent Territories citizenship which would come to an end for inhabitants of the Colony formerly entitled to it on the handing-over of Hong Kong to China. The new form of nationality was in effect no more than a right to a British passport. The value of this new status was a matter of controversy between the United Kingdom government and residents of Hong Kong and their supporters in Parliament. As a result three further statutes were enacted. 23–017

The British Nationality (Hong Kong) Act 1990 authorised the conferment by registration of British citizenship on up to 50,000 persons and their dependents, recommended by the Governor of Hong Kong. It was hoped that this would encourage those registered to feel able to stay in Hong Kong under the new administration.

[38] See further, *post*, Chap. 35.

[39] Pt III. This category includes East African Asians in India and East Africa and certain classes of inhabitants of Malaysia.

[40] Pt IV. British subjects are believed to number about 50,000 and reside mainly in Sri Lanka, India and Pakistan.

[41] The Solomon Islands Act 1978 was unusual in the provision it made for citizenship on the coming into effect of independence. Only "indigenous Solomon Islanders" became citizens of the new state. Other residents who lacked a nationality as a consequence of the new legislation became British Protected Persons.

[42] *post*, Chap. 35.

The Hong Kong (War Wives and Widows) Act 1996 authorised the conferment on a group of applicants indicated by the title of the Act, believed to number about 50. Finally the British Nationality (Hong Kong) Act 1997 provided for the registration as British citizens of a number of inhabitants of Hong Kong, believed to number between 5,000 and 8,000, who, because of their non-Chinese ethnic origins did not acquire Chinese nationality under the terms of the Joint Declaration. It was argued that the United Kingdom owed a particular obligation to them because they were largely descendants of people who had settled in Hong Kong in the service of the Crown as soldiers and civil servants from other parts of the Empire, particularly India.

III. Aliens and Citizenship of the Union

23–018 Until the Immigration Act 1971 the law distinguished between British subjects and aliens (subject to the special situation of citizens of the Republic of Ireland).[43] The Immigration Act 1971 introduced a new distinction between patrials (with the right of entry and abode) and non-patrials. Since the coming into effect of the British Nationality Act 1981 that terminology has been abandoned and the appropriate term for persons not coming within the terms of the British Nationality Act 1981 is again alien. Where, however, a non-British citizen or subject is a national of a member state of the European Community his rights in the United Kingdom fall to be treated under Community law. The importance of such rights as those of freedom of movement within the Community led to the introduction of the concept of Citizenship of the Union in the Maastricht Treaty (Article 17(1)[8]).

Aliens

23–019 Under the medieval common law aliens had practically no public or private rights. The rules were gradually relaxed by statute and a more liberal attitude on the part of the common law courts. By the end of the sixteenth century it was recognised that aliens in the King's dominions owed a temporary and local allegiance. Friendly aliens could bring personal actions such as trespass and debt, and could own personal property, including leaseholds.

At common law an alien probably had no right to enter this country.[44] The Crown probably had no prerogative power to send an alien (other than an enemy alien) compulsorily out of the realm,[45] but since the eighteenth century[46] the government has sought statutory powers to do so.

[43] The Ireland Act 1949, s.2 provided that citizens of the Republic of Ireland were not to be regarded as aliens. S.5(1) provided for the retention of British nationality (with certain exceptions) by persons born in Eire, or the Irish Free State, before 1922 (the date of the Anglo-Irish Treaty) who were British subjects immediately before 1949.

[44] *Musgrove v. Chun Teeong Toy* [1891] A.C. 272; criticised, Thornberry (1963) 12 I.C.L.Q. 422. But see *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149, 168, *per* Lord Denning M.R. Nothing in the Immigration Act 1971 impairs any prerogative powers possessed by the Crown in relation to aliens (s.33(5)). This saving applies *only* to aliens and hence is not applicable to British Overseas Citizens: *R. v. Immigration Appeal Tribunal, ex p. Secretary of State for the Home Department* [1990] 1 W.L.R. 1126.

[45] Forsyth, *Cases and Opinions on Constitutional Law* (1869) p. 181; Holdsworth, *History of English Law*, Vol. X, pp. 393–400. *cf.* dictum of Lord Atkinson in *Johnstone v. Pedlar* [1921] A.C. 262, 283.

[46] Aliens Act 1793.

Friendly aliens, i.e. citizens of countries with which the Crown is not at war,[47] have long had the right to contract, to own and dispose of personal property, and to bring and defend actions. They may now own and dispose of real property. Resident aliens owe allegiance to the Crown, and are subject to the general civil and criminal law.[48] They do not enjoy the parliamentary or local government franchise,[49] they may not sit in either House of Parliament[50] or hold any public office; but they may be employed in any civil capacity under the Crown (a) outside the United Kingdom, or (b) under a certificate issued by a Minister with Treasury approval. Aliens are subject to restrictions with regard to employment in the armed forces, the Civil Service in this country, and the merchant navy; jury service; the ownership of British ships; holding a pilot's certificate; change of name; and taking part in certain industrial activities.[51]

Enemy aliens,[52] *i.e.* nationals of countries with which the Crown is at war, were at one time virtually rightless, unless exceptionally they were here with the licence of the King. In course of time it came to be seen that what mattered so far as commerce was concerned was to prevent any trade with the enemy country, regardless of what persons were carrying it on. And so an "enemy" came to mean any person (whether a British subject or not) who voluntarily resided or carried on business in an enemy country.[53] An enemy alien in this sense cannot enter into contracts by English law, and contracts entered into with him before the war are suspended for the duration of the war. "Enemy character" is largely of importance in relation to corporations, and in relation to offences under the Trading with the Enemy Acts. **23–020**

An enemy alien cannot bring an action in the British courts; nor, if he was plaintiff in an action begun before the war, can he appeal during the war; for the enemy cannot be given the advantage of enforcing his rights by the assistance of the Sovereign with whom he is at war. On the other hand an enemy alien can be sued during the war, as that permits British subjects or friendly aliens to enforce their rights with the assistance of the Sovereign against the enemy; and if he is

[47] "Friendly" aliens may in some context include nationals of countries with which the Crown is at war, but who have come to reside or are allowed to remain here by the Sovereign's licence: *Wells* v. *Williams* (1697) 1 Ld.Raym. 282. The Sovereign's licence, express or implied, gives the protection of the law and the courts: *Sylvester's Case* (1702) 7 Mod. 150. A licence is commonly implied by the fact that an alien has registered and has been allowed to remain: *Thurn and Taxis (Princess)* v. *Moffitt* [1915] 1 Ch. 58; *Schaffenius* v. *Goldberg* [1916] 1 K.B. 284. See further, W. E. Davies, *The English Law relating to Aliens* (1931), Chap. 1.

[48] See also the Aliens Restriction (Amendment) Act 1919, s.3 which makes it an offence punishable by 10 years imprisonment for an alien to attempt or do any act calculated to cause sedition or disaffection among the civilian population; and by three months imprisonment if he promotes or attempts to promote industrial unrest in any industry in which he has not been bona fide engaged in the United Kingdom for the previous two years.

[49] But see for Citizens of the Union *post* para. 23–022

[50] Act of Settlement 1700.

[51] See generally British Nationality and Status of Aliens Act 1914; Aliens Restriction (Amendment) Act 1919; Aliens Employment Act 1955. But see also *post*, para. 23–022 for Citizens of the Union.

[52] See Lord McNair and A.D. Watts, *Legal Effects of War* (4th ed., 1966) McNair, *Legal Effects of War* (3rd ed.).

[53] *Wells* v. *Williams* (1697) 1 Ld.Raym. 282; *The Hoop* (1799) 1 C.Rob. 196; *Janson* v. *Driefontein Consolidated Mines* [1902] A.C. 484. For the position of corporations, see *Daimler Co.* v. *Continental Tyre and Rubber Co* [1916] 1 A.C. 307; as to firms, see *Rodriguez* v. *Speyer Bros.* [1919] A.C. 59. Territory occupied by the enemy is regarded as enemy territory: *Sovfracht (V.O.)* v. *Van Udens Scheepvaart en Agentur Maatschappij (N.V. Babr.)* [1943] A.C. 203.

sued justice demands that he be allowed to appear and defend. Further, if he is unsuccessful as defendant he may appeal, for he is entitled to have the case decided according to law and therefore to have the error of a court of first instance rectified (*Porter v. Freudenberg*[54]). The Crown has the prerogative of confiscating enemy property, but if it is taken it is usually handed over to a Custodian during the war.[55]

23–021 With regard to the control of aliens for the security of the realm in time of war, the original distinction between enemy and friendly aliens is commonly used. Wartime legislation and emergency powers during both the two world wars gave the Crown very extensive powers of control over enemy aliens in this sense. The legislation expressly preserved the Crown's prerogative in relation to enemy aliens. At common law their licence to remain at large may be revoked at any time at the complete discretion of the Crown, and they can be interned[56] or deported.[57] The internment of an enemy alien is an act of state, and he has no right to apply for a writ of habeas corpus against the executive to challenge the Crown's power to intern or deport (*R. v. Bottrill, ex p. Kuechenmeister*[58]). In the last case it was discussed, but not decided, whether an interned enemy alien is in the position of a prisoner of war. Internment, however, does not revoke the licence to bring civil actions in the courts, or, probably, to commence habeas corpus proceedings against private persons.[59]

Citizenship of the Union[60]

23–022 In Chapter 6 we saw the impact on domestic law of the right of freedom of movement of workers under Article 39[48] of the Community Treaty. The *Factortame* litigation emphasised the importance of non-discrimination between community nationals: Article 43[52]. The Maastricht Treaty took further the recognition of individual rights arising from being a national of a member state and recognised a new Citizenship of the Union: Article 17(1)[8]. It also recognised new rights for such citizens, in particular the right to vote and stand as a candidate in local elections to the European Parliament in the State in which he resides.

IV. Immigration, Asylum and Deportation

23–023 The restriction on entry to the United Kingdom by legislation has a long history.[61] Since 1962 when Parliament passed the Commonwealth Immigrants

[54] [1915] 1 K.B. 857, CA *per* Lord Reading C.J. See also *Eichengruen v. Mond* [1940] 1 Ch. 785; *cf. Weber's Trustees v. Riemer*, 1947 S.L.T. 295 (counterclaim not permissible).

[55] See *e.g. Administrator of Austrian Property v. Russian Bank for Foreign Trade* (1931) 48 T.L.R. 37; *Bank voor Handel en Scheepvaart N.V. v. Administrator of Hungarian Property* (1954) A.C. 584.

[56] *R. v. Commandant of Knockaloe Camp* (1917) 117 L.T. 627; *ex p. Liebmann* [1916] 1 K.B. 268; *ex p. Weber* [1916] A.C. 421.

[57] *Netz v. Chuter Ede* [1946] Ch. 224; *Att.-Gen. for Canada v. Cain* [1906] A.C. 542, PC.

[58] [1947] K.B. 41, CA.

[59] *Ibid. per* Asquith L.J.

[60] See further, Wyatt and Dashwood, *op.cit.* pp. 494–497.

[61] V. Beavan, *The Development of British Immigration Law* (Croom Helm, 1986). See, too, A Dummett and A. Nicol, *op. cit.* Modern legislation may be regarded as beginning with the Aliens Act 1905 which followed a growth in the number of refugees fleeing, particularly from Russia and Poland, in the last decades of the nineteenth century.

Act restrictions have also applied to many categories of people falling within in the widest sense of the terms, British subjects of Commonwealth citizens. The period following the enactment of the Immigration Act 1971 has seen continuing legislative activity and constant litigation.[62] At the same time as Parliament has sought to restrict immigration the United Kingdom has become a party to the Geneva Convention relating to the Status of Refugees which seeks to protect those seeking asylum from persecution and prevent the deportation of refugees to countries where they face a well-founded fear of persecution.[63] The provisions of immigration law are also now subject to review in the courts in the light of the Human Rights Act 1998[64] and, in the case of citizens of the Union, in the light of Community law.[65]

In this immensely complex area it will not be possible here to do more than indicate in outline some of the more important issues raised by the legislation and the response of the courts to challenges to the legality of ministerial decisions.

Immigration

The detailed rules governing immigration and deportation are to be found in the Immigration Act 1971 (as amended) and the Immigration Rules made under section 3(2) of that Act. The content of the Act and the Rules, the application of the law and the role of the courts in reviewing the decisions of immigration officials and the Home Secretary have all been matters of controversy. To the individuals involved hardly any matter could be of greater moment than whether they are to be allowed entry to a particular country where, for one reason or another, they wish to live or whether, having settled in the United Kingdom they are to be required to leave. The legislation is couched in the widest terms, conferring extensive discretionary powers. The reluctance of Parliament to fetter the executive (or of the executive to be fettered) can hardly be better shown than by the fact that the Immigration Rules are not in the strict sense, delegated legislation which clarify and restrict the wider provisions of a statute. Section 3(2) speaks of "statements of the rules . . . laid down by [the Secretary of State] as to the practice to be followed in the administration of this Act."[66] A typical judicial comment on the status of the Rules is that of Lord Bridge in *R. v. Immigration Appeal Tribunal ex p. Singh*:[67] **23–024**

> "The rules do not purport to enact a precise code having statutory force. They are discursive in style, in part merely explanatory and, on their fact, frequently

[62] S. Legomsky, *Immigration and the Judiciary* (Oxford, 1987) provides a useful but now somewhat outdated survey.

[63] Convention and Protocol Relating to the Status of Refugees (1951, Cmd 9171) and (1967 Cmnd 3906); Asylum and Immigration Appeals Act 1993.

[64] And see the explicit reference to the Human Rights Act 1998 in the Immigration and Asylum Act 1999, s.65.

[65] *e.g. Van Duyn v. Home Office* [1974] E.C.R. 1337; [1975] 1 C.M.L.R. 1; *R. v. Bouchereau* [1978] Q.B. 732; *R. v. Secretary of State for the Home Department, ex p. Santillo* [1981] Q.B. 778; *R. v. Secretary of State for the Home Department, ex p. Dannenberg* [1984] Q.B. 766 *ante* para. 6–035. See Immigration Act 1988, s.7 *post* para. 23–026.

[66] The rules must be laid before Parliament and, if disapproved by either House the Home Secretary shall make such changes as seem required. Four sets of rules were made initially, dealing with Commonwealth citizens (H.C. 79 and H.C. 80), and EEC and non-Commonwealth nationals (H.C. 81 and H.C. 82) (the 1973 Rules). A revised version was produced in 1980: H.C. (1979–1980) No. 394 (Statement of Change in Immigration Rules). The current rules are H.C. 1984 No. 395, as amended, Cm. 4851 (2000).

[67] [1986] 1 W.L.R. 910, 917. See further, *post*, para. 29–004.

offer no more than broad guidance as to how discretion is to be exercised in different typical situations. In so far as they lay down principles to be applied, they generally do so in loose and imprecise terms."

They nonetheless have legal status to the extent that section 19 requires an adjudicator to allow an appeal against a decision that was "not in accordance with the law or with any immigration rules applicable."

Right of abode

23–025 Section 1 of the 1971 Act provides that all persons who have "the right of abode" under section 2 are free to live in, and to come and go into and from, the United Kingdom. Persons not having that right may live, work and settle in the United Kingdom by permission and subject to regulation and control; and those who were settled here when the Act came into force are treated as if they had been given definite leave to enter or remain. The Act does not control local journeys between the United Kingdom, the Isle of Man, the Channel Islands and the Republic of Ireland ("the common travel area"), subject to section 10 (*infra*).

Section 2, as amended by the British Nationality Act 1981, section 39 provides that a person has the right of abode in the United Kingdom if he is

(i) a British citizen; or

(ii) a Commonwealth citizen who satisfies certain requirements set out in the Section which in effect preserve for their lifetimes the right of abode possessed by certain Commonwealth citizens before the enactment of the 1981 Act.[98]

British citizen is used under the Act to include both categories of persons (section 2(2) as amended).

Regulation and control

23–026 Section 3 makes general provisions for regulation and control. Persons who are not British citizens require leave to enter or remain, which may be given for a limited or indefinite period, and may be subject to conditions restricting employment and occupation or requiring registration with the police.

The Immigration and Asylum Act 1999 amends section 3, allowing, for example, leave to enter to be granted before a person arrives in the United Kingdom.

[98] s.2(1)(d). He is a Commonwealth citizen born to or legally adopted by a parent who at the time of the birth or adoption had citizenship of the United Kingdom and Colonies by his birth in the United Kingdom or in any of the Islands.

(2) A woman is under this Act also to have the right of abode in the United Kingdom if she is a Commonwealth citizen and either—

(a) is the wife of any such citizen of the United Kingdom and Colonies as is mentioned in subsection (1)(a), (b) or (c) above or any such Commonwealth citizen as is mentioned in subsection (1)(d); or

(b) has at any time been the wife—

(i) of a person then being such a citizen of the United Kingdom and Colonies or Commonwealth citizen; or

(ii) of a British subject who but for his death would on the date of commencement of the British Nationality Act 1948 have been such a citizen of the United Kingdom and Colonies as is mentioned in subsection (1)(a) or (b).

Anyone claiming to be entitled to enter the United Kingdom by virtue of having the right of abode has the burden of proving the necessary status (section 3(8)).

As amended by section 3 of the Immigration Act 1988, section 3(9) of the 1971 Act provides that such proof can only be established by possession of a United Kingdom passport describing the holder as a British citizen or as a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom; or, a certificate of entitlement certifying that he has such a right of abode.[69]

The Immigration Act 1988, section 7 provides that anyone entering or remaining in the United Kingdom by virtue of an enforceable Community right or any provision made under section 2(2) of the European Communities Act 1972 does not require leave under section 3 of the 1971 Act.[70]

Crews of ships or aircraft may enter for limited periods without leave. Diplomats and their families and members of home, Commonwealth and visiting forces are exempt from control (section 8, as amended by the Immigration and Asylum Act 1999). Provision may be made by Order in Council with regard to persons entering otherwise than by ship or aircraft[71] *e.g.* by land from the Republic of Ireland. Such provisions may exclude the Republic of Ireland from the common travel area (section 10).

Refusal of leave

23–027 Persons who fail to satisfy immigration officials that they fulfil the requirements of the Immigration Rules will normally be refused leave to enter the United Kingdom. Applicants may be refused leave if they seek entry for a purpose not covered by the Rules.[72] Applicants who prima facie satisfy the requirements may be refused entry if already subject to a deportation order or if they have been convicted of an extraditable offence or on medical grounds.[73] Leave may also be refused because in the view of the Home Secretary an individual's exclusion is conducive to the public good.[74] This last reason for refusal confers a very wide discretion on the Home Secretary.[75]

Illegal entrants

23–028 An illegal entrant is defined by section 33(1) of the Immigration Act 1971 as "a person unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, and includes also a person who has so entered."

A criminal offence is committed under section 24 if an immigrant enters the country illegally. An illegal entrant can be removed from the United Kingdom before he is entitled to appeal against the order. If he wishes to appeal he must do so from outside the United Kingdom (section 16 and Schedule 2). (In some circumstances the decision to remove an individual on the ground that he is an

[69] See *R. v. Secretary of State for the Home Department, ex p. Minta, The Times*, June 24, 1991 (British citizen's right to enter UK after holiday in Belgium challenged: he had travelled on a British Visitor's Passport).

[70] See the Immigration (European Economic Area) Regulations which apply not only to nationals of the European Union but also to those of members states of the EEA which are not members of the Union. See similarly the Immigration and Asylum Act 1999, s.90.

[71] By swimming the Channel?

[72] H.C. 395 para. 320(1).

[73] H.C. 395 para. 320(2) and (7).

[74] H.C. 395 para. 320(6).

[75] *cf. Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149.

illegal entrant may be open to judicial review, as we shall see). For the purposes of the British Nationality Act 1981, an illegal entrant cannot claim to be "settled" in the United Kingdom for the purposes of that Act.

The meaning of "in breach of a deportation order" is clear but the Courts have found great uncertainty in the meaning of "in breach of the immigration laws". The law seems now to be settled that an immigrant is an illegal entrant not merely if he has evaded the immigration authorities in his entry but if he has obtained leave to enter by fraud or deception. There is no general duty of candour on an applicant to draw every fact to the attention of the immigration authorities which they might, had they known, have regarded as material: *R. v. Secretary of State for the Home Department, ex p. Khawaja*.[76]

The definition of section 33(1) has retrospective effect and applies to immigrants who had unlawfully entered the United Kingdom before the 1971 Act came into effect: *R. v. Governor of Pentonville Prison ex p. Azam*.[77]

23–029 The House of Lords in *Khawaja (supra)* not merely restricted the previously wide definition of illegal entrant but also extended judicial control over the removal of illegal entrants by holding that whether a person is an illegal entrant is a fact to be established to the satisfaction of the court: it is not sufficient that the immigration authorities regard him as such.[78]

An entrant who has relied in good faith on documents issued by British officials in error or for some improper motive is not an illegal entrant.[79] The prospect of such a person being branded as a criminal filled Sir Thomas Bingham M.R. with horror.[80]

Removal of persons unlawfully in the United Kingdom

23–030 Section 10 of the Immigration and Asylum Act 1999 contains a new and important power to order the removal from the United Kingdom of (i) any person who is in breach of the terms of a limited leave to enter or remain or remains beyond the time limited by the leave (ii) any person who obtained leave to remain by deception or (iii) directions have been given for the removal under the section of a person to whose family he belongs.

The power is exercisable by any immigration officer, as opposed to the power of deportation which is exercisable by the Secretary of State.

The statute envisages (section 66) that anyone falling within section 10 will have to pursue a right of appeal from the country to which they are returned unless the appeal is based on the human rights' provisions of section 65 or the Convention on Refugees (section 69(5)). A challenge to the removal order may be available by judicial review.

Asylum

23–031 One of the most controversial issues in the law of immigration in the last decade has been the position of immigrants claiming to be refugees from

[76] [1984] A.C. 74, HL; reversing *R. v. Secretary of State for the Home Department, ex p. Zamir* [1980] A.C. 930.

[77] [1974] A.C. 18.

[78] *i.e.* the question of status is a jurisdictional fact which must exist before the power of removal can be validly exercised, not a matter within the judgment or discretion of the relevant official or minister: see *post*, Chap. 31.

[79] *R. v. Secretary of State for the Home Department, ex p. Ku* [1995] Q.B. 364, CA.

[80] At p. 374.

persecution within the terms of the United Nations Convention relating to the Status of Refugees to which the United Kingdom is a party.

The Asylum and Immigration Appeals Act 1993, section 2 recognises the United Kingdom's obligations under the Convention by providing that nothing in the immigration rules shall lay down any practice which would be contrary to the Convention. Section 2 of the Asylum and Immigration Act 1996, however, allowed the Secretary of State to remove from the United Kingdom a person who had made a claim for asylum within the terms of the Convention provided that he is to be removed to another country (falling within subsection 3) of which he was not a national where he would not be treated in a way inconsistent with the Convention nor sent on to a third country otherwise than in accordance with the Convention. Subsection 3 applied to any country of the European Union or any country designated for the purposes of the subsection by statutory instrument. In *R. v. Home Secretary, ex p. Adan*[81] the Court of Appeal held that it could review the Secretary of State's decision to return an applicant to member states of the European Union to establish whether, in the view of the Court, the practice of those states was consistent with the true interpretation of the Convention. In the view of the Court the practice in France and Germany was not so consistent. The Secretary of State fared equally badly in attempting to designate Pakistan (*inter alia*) as a "safe country". The Court of Appeal held that it was entitled to review the minister's decision, despite its approval by Parliament, on the ground of irrationality.[82]

The Immigration And Asylum Act 1999 contains new provisions for removal to member states of the European Union (section 11) or to other "safe" third countries (section 12). Section 11 dispenses with the need for ministerial certification. Removal is subject to an appeal under section 65 (human rights) unless the Secretary of State has issued a certificate under section 72(2)(a) that the appeal is manifestly unfounded. Section 12(1)(a) and (b) provide for removal to member states not falling within section 11 (because they are not parties to the "standing arrangements" referred to in that section) or to other states designated by order. Section 12(4) and (5) provide for removal to countries not falling within section 12(1)(a) and (b) where the Secretary of State has issued a certificate that the person's life and liberty is not a risk by reason of his race, religion, etc. and that the third country would not send him to another country in breach of the Refugee Convention. In the case of countries falling in this second category (but not in the case of those falling within section 11 and section 12(1)(a) and (b)) there is a right of appeal to an adjudicator while still in the United Kingdom under section 71. In the latter cases there is a right of appeal under section 65 but it is not exercisable in the United Kingdom if the Secretary of State has certified that it is manifestly unfounded. It remains to be seen whether these sections have defeated the ability of the courts to intervene.

23–032 To fall within the Convention the applicant must show that owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion he is outside the country of his nationality and is unable or unwilling, owing to such fear, to avail himself of the protection of that country. The basis for the existence of a well founded fear is to be determined by the Secretary of State who has to conclude

[81] [1999] 3 W.L.R. 1274, CA.

[82] *R (Javed) v. Secretary of State for the Home Department, The Times*, May 24, 2001. The Asylum (Designated Countries of Destination and Designated Safe Third Countries) Order 1996; *post* para. 29–021.

that there is no real and substantial danger before he can order an applicant's return: *R. v. Secretary of State for the Home Department, ex p. Sivakumaran*.[53] The fear has to exist at the time of the proceedings: an "historic fear" which explains why the applicant originally left his country is not sufficient: *Adan v. Secretary of State for the Home Department*.[54] Fear of "persecution" in the form of violence from private citizens—such as skinheads—does not constitute persecution within the meaning of the Convention unless it could be shown that the State was unable or unwilling to offer protection to individuals at risk from such violence: *Horvath v. Secretary of State for the Home Department*.[55] The meaning of "social group" was considered by the House of Lords in *R. v. Immigration Appeal Tribunal, ex p. Shah*.[56] Two women applied for asylum on the ground that they feared persecution if they were returned to Pakistan as women who had been falsely accused of adultery and abandoned by their husbands. The House of Lords held that they belonged to a particular social group by virtue of the fact that the law in Pakistan discriminated against women as a group or, more specifically, according to Lord Steyn and Lord Hutton, the applicants belonged to a group identified as women suspected of adultery and lacking protection from the state.

The Convention does not protect persons accused of having committed serious non-political crimes in the country from which they have fled. The meaning of non-political crime was considered by the House of Lords in *T. v. Secretary of State for the Home Department*[57] where it upheld the decision of the Secretary of State to refuse asylum to T who had been involved in a bomb attack on Algiers airport in which 10 people died. Lord Mustill found the identifying of non-political crime in terrorism, a criminal act directed against a state, intended or calculated to create a state of terror in the minds of people. Lord Slynn thought some crimes, including the one in which T was involved, were so obviously beyond the pale that there was no need to pursue difficult questions of drawing the line generally between political and non-political crimes. Lord Lloyd (with whom Lord Keith and Lord Browne-Wilkinson concurred) suggested that to be political a crime had to have a political purpose and to have a close and direct link to the purpose. The bombing of the airport failed to satisfy his second requirement.

23–033 Parliament and ministers, by delegated legislation, have sought by various means to discourage the arrival in the United Kingdom of immigrants claiming to be entitled to asylum under the Convention. The Immigration (Carriers' Liability) Act 1987, for example, made the owners of aircraft or ships liable to fines for bringing to the United Kingdom anyone who was unable to produce to an immigration officer a valid passport or other document satisfactorily establishing his identity and nationality or citizenship. In 1996 the Secretary of State attempted to restrict the rights to social security benefits of various classes of asylum seekers by regulations made under the Social Security Contributions and Benefits Act 1992. The Court of Appeal held in *R. v. Secretary of State for Social*

[53] [1988] 1 A.C. 958, HL.
[54] [1999] 1 A.C. 293, HL (Civil war in Somalia: applicants at no greater risk than others involved in the fighting).
[55] [2000] 3 W.L.R. 379, HL (Applicants, Roma or Gypsies, failed to show that the authorities of Slovakia offered insufficient protection against racially motivated violence from other citizens).
[56] [1999] 2 A.C. 692.
[57] [1996] A.C. 742, HL. The House reviewed the authorities on the meaning of a crime of a political character in the law of extradition: see *post* para. 23–044.

Security, ex p. Joint Council for the Welfare of Immigrants[88] that the regulations were *ultra vires* because they amounted to rendering nugatory the rights of asylum seekers under the Asylum and Immigration Appeals Act 1993. General enabling words such as those in the Social Security Act 1992 could not extend to the making of delegated legislation which took away statutory rights conferred by another Act.

The Immigration and Asylum Act 1999 represents the most recent comprehensive attempt to build on these earlier efforts to reduce the attractions to would-be immigrants of attempting to enter the United Kingdom. In addition to provisions which have been considered earlier.[89] Part II creates new offences of carrying clandestine entrants (section 32), gives powers to detain vehicles used in such carrying and to sell them (sections 37 and 42, Schedule 1). Part V might be regarded as helping immigrants in that it is restricts the giving of advice on immigration law to qualified persons (section 84), and establishes an Immigration Services Commissioner to promote good practice by those who provide immigration advice or services (section 83). Appeals from decisions of the Commissioner lie to the Immigration Services Tribunal (section 87). Part VI regulates the provision of support for asylum seekers. The Secretary of State may provide support for destitute asylum seekers and their dependents under section 95. The Act envisages the provision of accommodation with the assistance of local authorities (sections 99 to 100), and gives the Secretary of State the power to designate "reception zones" (section 101), if local authorities fail to co-operate. Section 115 provides for the withdrawal of the social security benefits listed in subsection 1 from persons subject to immigration control. Part VIII contains elaborate provisions to put the running of detention centres on a statutory footing and Part VII inserts into the Immigration Act 1971 a number of sections giving the police and immigration officers powers of arrest, search, entry and search of premises, and the seizing of material. All these powers must, in the modern manner, be exercised according to such codes of practice as may be specified under section 145 and (apart from section 65 of the Act which refers to the Human Rights Acts 1998) are open to challenge on the ground of infringing the terms of the European Convention on Human Rights.

Deportation

The Home Secretary—as opposed to immigration officials—may order the deportation of persons lacking the right of abode[90] under the Immigration Act 1971, section 3(5), as amended by the Immigration and Asylum Act 1999, Schedule 14 **23–034**

The power arises where the Secretary of State believes (i) the deportation of an individual is conducive to the public good[91]; or (ii) another person to whose family he belongs is deported; or (iv) being seventeen or over he is convicted of an offence punishable with imprisonment and the court recommends him for deportation.[92] A deportation order is an order requiring a person to leave and

[88] [1997] 1 W.L.R. 275, CA; *post*, para. 29–013.

[89] *ante*, para. 23–26 and para. 23–030

[90] Subject to exceptions under section 7 in favour of Commonwealth citizens and citizens of the Republic of Ireland who satisfy specified residence tests.

[91] Those deported on this ground include Rudi Dutschke, the German political activist, in 1970, and Mark Hosenball and Philip Agee in 1977; see *R. v. Secretary of State for the Home Department, ex p. Hosenball* [1977] 1 W.L.R. 766, CA.

[92] Guidelines to be followed by courts in exercising this power were laid down in *R. v. Nazari* [1980] 1 W.L.R. 1366, CA.

prohibiting him from entering the United Kingdom (section 5). The Home Secretary has a discretionary executive power to make such an order,[93] and according to domestic law is not bound to afford the deportee a hearing before making an order.[94] Whether or not that remains the position, Article 5(4) of the European Convention guarantees a right to challenge the lawfulness of arrest or detention in a court, a provision which has already affected United Kingdom deportation law.[95] A bona fide order of deportation for the public good may be made to send an alien back to his own country, even though that country has requested his surrender for a criminal offence that is not extraditable.[96]

Decisions to deport are not necessarily taken by the Secretary of State personally. Under the *Carltona*[97] principle a decision may properly be taken by a senior civil servant: *R. v. Secretary of State for the Home Department, ex p. Oladehinde*.[98]

Section 3(6) authorises courts to recommend deportation after conviction of an offence punishable with imprisonment. The deportation order is made by the Home Secretary under section 5.

Appeals and Judicial Review

23–035 Part IV of the Immigration and Asylum Act 1999 establishes a comprehensive system for appeals in immigration matters, apart from those raising issues of national security which fall within the Special Immigration Appeals Commission Act 1997, as amended by the Immigration and Asylum Act 1999. Although Judicial Review is considered later, in Chapter 23, its importance in immigration matters justifies a specific reference to it here.

Appeals

23–036 The Immigration and Asylum Act 1999 continues the system of appeals to Adjudicators (Section 57 and Schedule 3) from whom appeal lies to the Immigration Appeal Tribunal (section 56 and Schedule 2), not to be confused with the Immigration Services Tribunal established under Part V.

Appeals lie against decisions that an applicant requires leave to enter the United Kingdom or refusal of leave (Section 59)[99] or against decisions which are alleged to be in breach of the right of asylum under the Convention on the Status of Refugees (Section 69). In the case of decisions to deport there are two possibilities. Section 63 provides for an appeal to an adjudicator where the deportation is on the grounds of the public good or as a consequence of a recommendation by a court under section 3(6) of the Immigration Act 1971.

[93] *ex p. Venicoff* [1920] 3 K.B. 72. *cf. R. v. Chiswick Police Superintendent, ex p. Sacksteder* [1918] 1 K.B. 578.

[94] *R. v. Governor of Brixton Prison, ex p. Soblen* [1963] 2 Q.B. 243, CA. *per* Lord Denning M.R. There is nothing in the 1971 Act to change the law on this point. In certain cases a statutory right of appeal is provided, see *post* para. 23–036.

[95] The Special Immigration Appeals Commission Act 1997 was passed following *Chahal v. UK* (1997) 23 E.H.R.R. 413 where the Court cited Art. 5 and Art. 13: *post* para. 23–036. Art. 8 may also be relevant. Immigration and Deportation issues do not as a general rule fall within Art. 6.

[96] *R. v. Governor of Brixton Prison, ex p. Soblen* [1963] 2 Q.B. 243, CA. The action of the Home Secretary was criticised as "disguised extradition": P.O'Higgins, "Disguised Extradition: the Soblen Case" (1964) 27 M.L.R. 521; and see C. H. R. Thornberry, "Dr Soblen and the Alien Law of the United Kingdom" (1963) 12 I.C.L.Q. 414 *post*, para. 23–041.

[97] *Carltona Ltd v. Commission of Works* [1943] 2 All E.R. 560, CA.

[98] [1991] A.C. 254, HL.

[99] Section 60 restricts the right to appeal against a decision that leave to enter is required to appellants who possess the documents defined in the Immigration Act 1971, s.3: *ante* para. 23–026.

Where, however, deportation has been decided on as being in the interests of national security or foreign relations or for other reasons of a political nature appeal lies to the Special Immigration Appeals Commission established by the Special Immigration Appeals Commission Act 1997, as amended by the Immigration and Asylum Act 1999, Schedule 14. Before the establishment of the Commission such cases were referred to a non-statutory panel of advisers who made a report to the Secretary of State who was not bound to accept their advice. In *Chahal v. United Kingdom*[1] the Court of Human Rights held that such a panel was not a court within Article 5(4) and its existence and non-binding advice did not constitute an effective remedy within Article 13.

23–037 The Chairman and members of the Commission are appointed by the Lord Chancellor and is duly constituted to hear an appeal if it consists of three member, one of whom holds, or has held, high judicial office (within the meaning of the Appellate Jurisdiction Act 1876) and one is or has been appointed as chief adjudicator under the Immigration Act 1971 or is a member of the Immigration Appeal Tribunal. Section 4 gives binding effect to the Commission's decisions and section 5(2) provides for a right of legal representation—both provisions intended to rectify the shortcomings in the earlier procedure identified in *Chahal*. In the light of possibly delicate (or serious) issues raised in these cases section 5(3) recognises the possibility of proceedings taking place in the absence of the appellant and his legal representative.

Finally in an attempt to prevent the duplication of appeals sections 74 to 78 provide a "One Stop" procedure which is intended to ensure that all possible grounds of appeal can be dealt with in one set of proceedings. Thus, in cases falling within section 74 an applicant who wishes to appeal against a refusal of leave to enter may have to disclose whether he also wishes to claim a right of asylum or that his rights under the Human Rights Act 1998 have been breached. To discourage appeals which are bound to fail, section 79 entitles the Immigration Appeal Tribunal to impose a penalty in cases where it considers an appeal has no merits.

Judicial Review

23–038 Although the Immigration Act 1971 does not provide for *appeal* to the High Court, decisions of immigration officials and tribunals, and of the Home Secretary may be open to *review* on the grounds discussed later in Chapter 32. Thus a decision can be examined to see if the facts precedent to the valid exercise of a statutory power exist: is the applicant an illegal entrant?[2] A decision can be quashed if it is based on an error of law.[3] In *R. v. Immigration Appeal Tribunal, ex p. Begum*[4] Simon Brown J. quashed a decision on this ground, holding that the tribunal ought not to have applied a Rule in the Immigration Rules which was so unreasonable that it was invalid. Immigration officials must act fairly[5] and the Home Secretary must not, having created a "legitimate expectation" that he

[1] (1997) 23 E.H.R.R. 413.
[2] *R. v. Secretary of State for the Home Department ex p. Khawaja* [1984] A.C. 74.
[3] *R. v. Chief Immigration Officer, Gatwick Airport, ex p. Kharrazi* [1980] 1 W.L.R. 1396, CA; *R. v. Immigration Appeal Tribunal ex p. Singh* [1986] 1 W.L.R. 910, HL.
[4] *The Times*, July 24, 1986; applying to the Rules the test applicable to by-laws (*Kruse v. Johnson* [1898] 2 Q.B. 91), on the basis that the Rules were not delegated legislation in the normal sense; *post*, para. 29–004.
[5] *Re H.K.* [1967] 2 Q.B. 617.

would reach a decision on the basis of certain grounds, take into account other considerations."

Judicial review is, however, a discretionary procedure. It should not be used as a means to avoid recourse to statutory procedures which are available under the Act. Normally the appropriate way to challenge a decision by an immigration officer is by the appellate process laid down in the 1971 Act: *R. v. Secretary of State for the Home Department, ex p. Swati.*[7]

23–039 On the other hand the Courts may refuse to interfere because the dispute does not involve a justiciable issue. For example, the special voucher scheme under which British Overseas citizens may be admitted to the United Kingdom has been held by the House of Lords to operate outside the Immigration Act 1971 and not to give rise to enforceable legal rights.[8] Whether an applicant was a refugee and therefore entitled to asylum was similarly regarded as non-justiciable by the Court of Appeal in *R. v. Secretary of State for the Home Department, ex p. Budaycay* but the House of Lords held that while the question of refugee status was for the Home Secretary to determine, the Courts could intervene if in doing so he had acted unlawfully or irrationally.[9] Lord Templeman, in words he repeated in *R. v. Secretary of State for the Home Department, ex p. Sivakumaran*[10] said:

> "Applications for leave to enter and remain do not in general raise justiciable issues. Decisions under the Act are administrative and discretionary rather than judicial and imperative. Such decisions may involve the immigration authorities in pursuing inquiries abroad, in consulting official and unofficial organisations and in making value judgments. The only power of the court is to quash or grant other effective relief in judicial review proceedings in respect of any decision under the Act of 1971 which is made in breach of the provisions of the Act or the rules thereunder or which is the result of procedural impropriety or unfairness or is otherwise unlawful . . . where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process."

23–040 In the area of immigration law the remedy which is particularly important is that of habeas corpus: the writ by which an immigrant can challenge the legality of his detention before he is returned to the country from which he came or is deported to a third state which is prepared to accept him. The origin of the writ is discussed later in Chapter 24. It is in the sphere of immigration law that it has been most invoked in recent times. Dicta and decisions before the decision of the House of Lords in *R. v. Secretary of State for the Home Department, ex p. Khawaja*[11] had cast doubt on the efficacy of habeas corpus in immigration cases. In *Khawaja*, however, the House of Lords emphasised that once the applicant has established a prima facie case the burden of justifying the legality of any restraint of liberty lies on the executive. Lord Bridge said that the House should "regard

[6] *R. v. Secretary of State for the Home Department ex p. Asif Khan* [1984] 1 W.L.R. 537. See too *R. (Zeqiri) v. Secretary of State for the Home Department, The Times* March 16, 2001, CA (Legitimate expectation that all members of class would be treated in same manner as that member whose case had been submitted to courts for judicial determination).

[7] [1986] 1 W.L.R. 477, CA.

[8] *R. v. Entry Clearance Officer, ex p. Amin* [1983] 2 A.C. 818.

[9] [1987] 2 A.C. 514.

[10] [1988] 1 A.C. 958, 996.

[11] [1984] A.C. 74.

with extreme jealousy any claim by the executive to imprison a citizen without trial and allow it only if it is clearly justified by the statutory language relied on. The fact that, in the case we are considering detention is preliminary and incidental to expulsion from the country . . . strengthens rather than weaken the case for a robust exercise of the judicial function in safeguarding the citizen's rights".[12]

Habeas corpus, although not available as of right may not be refused *merely* because of the existence of an alternative remedy.[13]

In later cases the Court of Appeal expressed greater doubt about the usefulness of habeas corpus in immigration and deportation cases on the ground that the scope of judicial review had extended to a point at which it provided a more appropriate and effective remedy.[14]

V. Extradition

Introduction

23–041 Extradition may be used in a wide sense to refer to any surrender of a criminal—suspected or convicted—from one jurisdiction to another. In a narrow sense it may be used to refer to surrender under the Extradition Act 1989, as opposed to surrender under the Backing of Warrants (Republic of Ireland) Act 1965. (Inside the United Kingdom a warrant issued in any part of the Kingdom may be executed in any other: Criminal Law Act 1977, s.38). The increased ease of travel between countries, and more recently the growth of violent terrorist crimes, have emphasised the importance of effective arrangements for the extradition of criminals (and have cast doubt on the sanctity of the asylum formerly given to the perpetrators of political offences).

Extradition is not, unlike deportation, a punishment or sanction but part of the procedure of enforcing the criminal law and on that ground the English courts have rejected the argument that in the case of EEC nationals the process may be a violation of Article 39[48].[15]

An attempt by the executive to use deportation to return an individual to another state in circumstances not falling within the terms of the Extradition Act would, as was seen in the previous part of this chapter, be an abuse of power. Although such a challenge failed on the facts in the domestic case of *Soblen*,[16] a successful challenge in a similar situation in France resulted in the European Court of Human Rights holding that the applicant's detention was unlawful because it was not "with a view to deportation" within Article 5(1)(f) but

[12] p. 122. Also, see C. Vincenzi, "Aliens and the Judicial Review of Immigration Law" [1985] P.L. 93.

[13] *R. v. Governor of Pentonville Prison, ex p. Azam* [1974] A.C. 18, 32; *Quigley v. Chief Constable, Royal Ulster Constabulary* [1983] N.I. 238, 239; *post* para. 24–037.

[14] *R. v. Secretary of State for the Home Department, ex p. Cheblak* [1991] 1 W.L.R. 890, CA; *R. v. Secretary of State for the Home Department, ex p. Muboyayi* [1992] Q.B. 244, CA; *post* para. 24–034, n.83.

[15] *R. v. Governor of Pentonville Prison, ex p. Budiong* [1980] 1 W.L.R. 1110, DC; *R. v. Governor of Pentonville Prison, ex p. Healy, The Times*, May 11, 1984, DC (Proceedings under Backing of Warrants (Republic of Ireland) 1965 Act).

[16] *R. v. Governor of Brixton Prison, ex p. Soblen* [1963] 2 Q.B. 243, CA. "The law of extradition is one thing: the law of deportation is another": *per* Lord Denning M.R. at p. 299.

disguised extradition designed to circumvent the refusal of the French courts to order his extradition: *Bonzano v. France*.[17]

Extradition Act 1989

23–042 The law of extradition is currently to be found in the Extradition Act 1989 which consolidates a number of earlier statutes dealing with extradition[18] and the provisions of the Fugitive Offenders Act 1967 which governed the procedure for the return of wanted persons between members of the Commonwealth.[19] The Act also amends the earlier law to give effect to recommendations of the Law Commission and the Scottish Law Commission.[20]

Section 1 provides three procedures for dealing with the extradition of a person *accused* of an *extradition crime* or unlawfully at large after the conviction of an *extradition crime*. These are (1) the new procedure established by Part III of the 1989 Act; (2) the procedure contained in Schedule 1 of the 1989 Act which applies to cases falling within the Extradition Act 1870; (3) the procedure for dealing with the return to a Commonwealth country.

23–043 Normally a person accused will be a person charged with an offence under the law of the requesting state. In *Re Ismail*,[21] however, the House of Lords held that "accused" was not a term of art. The court should take "a cosmopolitan approach" and give the word a purposive interpretation.[22] Their Lordships held that the term was wide enough to extend to a person against whom a warrant had been issued in Germany alleging that he was involved in criminal fraud and requiring him to give evidence in pre-trial inquiries.

Extradition Crime is defined for the purposes of the Act (apart from cases falling within Schedule 1) generally by reference to conduct punishable by imprisonment under the law of the requesting state and the United Kingdom of not less than 12 months. Formerly under the Extradition Act 1870 crimes were only extraditable offences if listed in Schedule 1 of that Act,[23] as amended from time to time.[24] The relevant date for determining whether the conduct if it had been committed in the United Kingdom would be criminal is the date of the occurrence of the facts alleged to have occurred in the requesting state, not the date of the request for extradition. In the view of the House of Lords in *R. v. Bow*

[17] (1987) 9 E.H.R.R. 297.

[18] There is no prerogative power to seize an alien in this country and hand him over to a foreign state: Forsyth, *Cases and Opinions on Constitutional Law*, pp. 369–370; *cf. East India Co v. Campbell* (1749) Ves.Sen. 246; *Mure v. Kaye* (1811) 4 Taunt. 43. See *Diamond v. Minter* [1941] 1 All E.R. 390.

[19] The Fugitive Offenders Act 1967 replaced the earlier Fugitive Offenders Act 1881. It was based on an agreement between the law ministers of 20 Commonwealth countries. It contained a number of improvements on the Extradition Act 1870 which have been carried forward into the Extradition Act 1989.

[20] For the interpretation of consolidation Acts, see F. Bennion, *Statutory Interpretation* (3rd ed., 1997, Butterworths), pp. 462–465. The courts will, of course, refer where appropriate to case law on the earlier legislation.

[21] [1999] 1 A.C. 320.

[22] *per* Lord Steyn at p. 500.

[23] According to Lord Diplock in *Government of Denmark v. Nielsen* [1984] A.C. 606, 615 the relevant crimes were described "in general terms and popular language"

[24] Additions were made, *e.g.* by the Genocide Act 1969, the Internationally Protected Persons Act 1978, the Suppression of Terrorism Act 1978 and the Aviation Security Act 1982. See *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Government of USA* [2000] 2 A.C. 216, HL. (Computer Misuse Act 1990, s.15: provision that crimes within the Act were extradition crimes impliedly amended Order in Council made under the Extradition Act 1870).

Street Metropolitan Stipendiary Magistrate, ex p. Pinochet (No. 3)[25] such was clearly the rule under the Extradition Act 1870 and despite the ambiguous wording of section 2 of the 1989 Act there was no reason to believe Parliament intended to change that rule.

23–044 Section 6 of the Extradition Act 1989 preserves the traditional rule that a person is not to be surrendered for "an offence of a political character". The difficulty of defining political character is illustrated by a number of cases which were considered by the House of Lords in the context of the law of asylum in the case considered earlier, *T. v. Immigration Officer*.[26] Traditionally the case law assumed that the classification of an offence as political required the existence of a struggle between two parties over the government of the country in question. Thus a killing of a member of government forces by a member of an insurgent group might well be "political": *Re Castioni*[27] whereas the indiscriminate killing of members of the public by anarchists is not "political": *Re Meunier*.[28] In *Schtraks v. Government of Israel*,[29] where the charges involved were perjury and child-stealing, the case had become a political issue in Israel but that did not make it an offence of a political character. The idea behind the latter phrase, said Viscount Radcliffe, is that the fugitive is at odds with the state that applies for his extradition on some issue connected with the political control or government of the country. On the other hand in *ex p. Kolyczynski*,[30] where the member of a Polish trawler had taken charge of a ship, putting the master under restraint, and steered her into an English port because they feared they would be punished for their political opinions if they returned to Poland, they were successful in their application for habeas corpus, the Divisional Court holding that the offences were committed in order to escape from political tyranny. In *R. v. Governor of Winson Green, ex p. Littlejohn*[31] Widgery C.J., after reviewing the earlier authorities, said, "An offence may be of a political character either because the wrongdoer had some direct ulterior motive of a political kind when he committed the offence, or because the requesting state is anxious to obtain possession of the wrongdoer's person in order to punish him for his politics rather than for the simple criminal offence referred to in the extradition proceedings." An offence which might otherwise be of a political character will fall outside section 3 if it is committed not in the state against whose government it is directed but in the

[25] [2000] 1 A.C. 147, HL. The references in their Lordships' speeches to "double criminality" are, in the context, directed to the issue of the criminality of the conduct of the accused under United Kingdom law. They can hardly be intended to revive the doctrine of double criminality in the sense in which it was rejected in *Re Nielsen* [1984] A.C. 606O, HL and *U.S. v. McCaffery* [1984] 1 W.L.R. 867, HL: the duty of the English court is to satisfy itself that the conduct it committed in England would have been a crime by domestic law, not to examine the substantive law of the requesting state to establish whether its terms are in substantial agreement with those of the relevant, hypothetical, domestic offence. *Re Nielsen* was distinguished in *Government of Canada v. Aronson* [1990] 1 A.C. 579 on the different wording of the Fugitive Offenders Act 1967, s.3(1)(c), but the Extradition Act 1989 applies the one test of hypothetical conduct criminal by domestic law, subject to a "double punishability" requirement.

[26] [1996] A.C. 742, HL; *ante* para. 23–032.

[27] [1891] 1 Q.B. 149.

[28] [1894] 2 Q.B. 415.

[29] [1964] A.C. 556, HL. See C. F. Amerasinghe, "The *Schtraks* Case, defining Political Offences and Extradition" (1965) 28 M.L.R. 27.

[30] *R. v. Brixton Prison Governor, ex p. Kolczynski* [1955] 1 Q.B. 540.

[31] [1975] 1 W.L.R. 893, DC.

territory of a third state which is the state requesting extradition.[12] The concern which was earlier felt for offering asylum to political refugees has in recent years been replaced by a desire to ensure that terrorists cannot escape justice by claiming that status for themselves. Modern statutes have indirectly dealt with the problem by conferring power on United Kingdom courts to deal with violent crimes committed abroad which are in many cases likely to be the work of terrorists.[13] In order to facilitate the surrender of wanted criminals successive statutes, such as the Suppression of Terrorism Act 1978, provided that specific crimes were not to be regarded as being political offences. The Extradition Act 1989 continues this practice and provides for extradition for offences against a list of international conventions (section 22)[14] charges of genocide (section 23) and offences under the Suppression of Terrorism Act 1978 (section 24).

23–045 On the other hand, in addition to the plea of "offence of a political character", (section 6(1)(a)) section 6 also provides that a person is not to be extradited if:

> (b) the offence is one under military law which is not also an offence under the general criminal law;
>
> (c) the request for his return (though purporting to be made on account of an extradition crime) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions;
>
> (d) he might, if returned, be prejudiced at his trial, or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.[15]

Where an applicant fails to establish that he falls within any of the provisions of section 6, the Secretary of State has a discretion under section 12 not to order his return if he thinks it would be unjust or oppressive to do so.[16]

Before a State can seek to rely on the provisions of the Extradition Act 1989 it must comply with one of the three procedures envisaged by section 1 of the Act. The first of these is the existence of an extradition arrangements within section 3. This may take the form of a bilateral or multilateral treaty, for example the European Convention on Extradition.[17] In the case of Commonwealth countries (which are not signatories to the Convention) section 5 provides for their designation by-Order in Council. No treaty is required, thus continuing the

[12] *Cheng v. Governor of Pentonville Prison* [1973] A.C. 931. (Appellant convicted in New York of an attempted murder there of visiting member of the ruling Taiwan regime; appellant, member of organisation dedicated to the overthrow of the regime; alleged crime not "of a political character".)

[13] *e.g.* Internationally Protected Persons Act 1978; Suppression of Terrorism Act 1978; Taking of Hostages Act 1982; Criminal Justice Act 1988, s.134(1) (Torture).

[14] Including the UN Convention Against Torture; see *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet (No. 3)* [2000], 2 A.C. 147, HL.

[15] Section 25 contains further specific protection in the case of offences under the Taking of Hostages Act 1982.

[16] *Atkinson v. United States Government* [1971] A.C. 197, HL; *Royal Government of Greece v. Brixton Prison Governor* [1971] A.C. 250, HL.

[17] For the purposes of the Act, commonwealth signatories of the Convention are regarded as foreign states: s.3(2).

system which applied under the Fugitive Offenders Act 1967.[38] Designation is dependant on the relevant country adopting extradition legislation in parallel terms to the British. Thirdly, section 1 of the 1989 Act continues in existence, via Schedule 1, extradition arrangements made under section 2 of the Extradition Act 1870. In cases arising under Schedule 1 the definition of extradition crime will depend on the terms of the relevant Order in Council, as subsequently amended.[39]

23–046 Extradition is a judicial procedure which begins once the Secretary of State has agreed to a request for proceedings to begin.[40] The Extradition Act 1989 provides for proceedings to be heard before the chief metropolitan magistrate (or designated metropolitan magistrate) or the Sheriff of Lothian and the Borders.[41] In the absence of authorisation from the Secretary of State a metropolitan magistrate or sheriff may issue a provisional warrant (section 8(1)(b)).

Under the former law the requesting state had to satisfy the magistrate that there existed a *prima facie* case, justifying committal for trial under English law.[42] Section 9 of the 1989 Act, however, provides for the making of extradition arrangements under which there is no need to furnish evidence justifying committal to the court. This brings English (and Scottish) law into harmony with the provisions of the European Convention on Extradition. In *Re Evans*[43] the House of Lords upheld the refusal of the magistrate to allow the applicant to lead evidence to prove that he could not be convicted in Sweden of the offence with which he was charged. The magistrate's only concern is whether the conduct alleged could constitute an extraditable offence if committed within the United Kingdom: questions of evidence are for the foreign court.[44] Similarly, the magistrate or sheriff faced with a request for the return of a convicted prisoner within the terms of the Act is not entitled to examine an allegation of abuse of process.[45]

23–047 If a magistrate or sheriff commits the defendant for surrender he must inform him of his right to apply for habeas corpus or an application for review of the order of committal, as the case may be (section 11).[46] A person committed to be surrendered cannot be returned to the requesting state until the expiration of 15 days from the making of the order. Apart from the general law relating to habeas

[38] A State remains a designated Commonwealth country even after leaving the Commonwealth until its name is removed from the Order in Council designating it: *R. v. Brixton Prison Governor, ex p. Kahan* [1989] Q.B. 716, DC (Fiji).

[39] See *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex p. Government of U.S.A.* [2000] 2 A.C. 216, HL; *supra*, n.24. See too *In Re Burke* [2001] 1 A.C. 422, HL. (Meaning in Order in Council of the phrase "sentence imposed").

[40] s.7; Sched. 1, para. 4.

[41] The earlier legislation confined all extradition proceedings to the metropolitan magistrates except in two cases: (1) Under s.16 of the Extradition Act 1870 where the crime for which extradition was sought was committed on board a ship which docked at a Scottish port; (2) under the Extradition Act 1985 if the removal to London of a prisoner arrested under the 1870 Act would be prejudicial to his life or health. See W. Finnie, "The Procedure of Extradition from Scotland" [1983] S.L.T. News 25 and 41.

[42] See, for example, *R. v. Governor of Pentonville Prison, ex p. Alves* [1993] A.C. 284, HL (Extradition to Sweden under Schedule 1 of the 1989 Act).

[43] [1994] 1 W.L.R. 1006, HL.

[44] And see *supra* n.25.

[45] *R. v. Governor of Pentonville, ex p. Sinclair* [1991] 2 A.C. 64, HL.

[46] A further example of the remedying of an oversight in the Extradition Act 1870: *Wan Ping Nan v. West Federal Minister of Justice, Secretary of State for Scotland and Lord Advocate*, 1972 S.C. 43, JC. (Absence of Habeas Corpus in Scots law made good by exercise of nobile officium of the High Court).

corpus, section 11(3) expressly gives the High Court (or the High Court of Justiciary) the power to free the applicant if it would be unjust or oppressive to return him in all the circumstances, having regard to the trivial nature of the offence or the passage of time since the date of the alleged offence or escape from detention.[47] The Court has no inherent jurisdiction to entertain an application for habeas corpus in relation to extradition proceedings in circumstances falling outside the provisions of section 11(3): *Re Schmidt*.[48]

If a person has been committed for return to the requesting state and any application for habeas corpus has been unsuccessful the Secretary of State may make an order for his extradition under section 12 which again confers on the minister a discretion in similar terms to that conferred on the Court by section 11. Section 12 expressly directs attention to the possibility of the prisoner facing the death penalty. Apart from other considerations, to return a wanted person in such circumstances could now be open to challenge under the Human Rights Act 1998 in the light of *Soering v. United Kingdom*.[49]

Backing of warrants

23–048 The surrender of wanted criminals between the Republic of Ireland and the United Kingdom is governed by the Backing of Warrants (Republic of Ireland) Act 1965[50] and the Criminal Jurisdiction Act 1975. By section 1(1) of the 1965 Act a warrant issued in the Republic of Ireland by a judicial authority shall, subject to the provisions of the Act, be indorsed by a justice of the peace upon police application. Subsection (2) provides that an Irish warrant for the arrest of an accused person cannot be indorsed unless it is issued (a) in respect of an indictable offence, or (b) in respect of an offence punishable on summary conviction with imprisonment for six months and the requirements of the subsection relating to service or failure to appear before the Irish court is satisfied. The endorsement is a formal process, the English (or Scottish) judge is not concerned with the existence of evidence to support the warrant.[51] Subsection (3) provides that an Irish warrant for the arrest of a person convicted of any offence against the laws of the Republic shall not be endorsed unless the purpose of the arrest is to enable him to be brought before a court of the Republic for sentence in respect of the conviction. In *Re Lawlor*[52] habeas corpus was granted to release a prisoner arrested on an Irish warrant where the Divisional Court was satisfied that it had been issued not to secure the return of the applicant to sentence him for an offence of which he had been earlier convicted but to ensure his availability as a witness at a murder trial.

Section 2 provides that after being brought before a magistrates' court on an endorsed warrant the court shall order his delivery to the Republican authorities unless (a) the offence specified does not correspond to any offence under the law of the relevant part of the United Kingdom which is an indictable offence, or is punishable on summary conviction with imprisonment for six months, or (b) is

[47] For an unsuccessful attempt to rely on the similar provisions of the Fugitive Offenders Act 1967, relating to unfairness arising from delay, see *Oskar v. Government of the Commonwealth of Australia* [1988] A.C. 366, HL.

[48] [1995] 1 A.C. 339, HL.

[49] (1989) 11 E.H.R.R. 439. See too *Chahal v. United Kingdom* (1996) 23 E.H.R.R. 413; *ante* para. 22–033.

[50] See "Anglo-Irish Extradition," (1967) 2 Irish Jurist 43; (1966) 29 M.L.R. 186.

[51] *Keane v. Governor of Brixton Prison* [1972] A.C. 204; *R. v. Governor of Risley Remand Centre, ex p. Marks* [1984] Crim.L.R. 238, DC (Similar rule applicable to return of convicted prisoner).

[52] (1977) 66 Cr.App.R. 75, DC.

of a political character[53] or an offence under military law which is not also an offence under the general criminal law, or (c) an offence under an enactment relating to taxes, duties or exchange control, or (d) there are *substantial grounds* for believing that if returned to the Republic the prisoner will be prosecuted or detained for another offence within category (b). The Suppression of Terrorism Act 1978 added to section 2 of the 1965 Act similar words to those quoted earlier in relation to section 6 of the Extradition Act 1989 to give added protection against the risk of prosecution on grounds of race, religion, etc.

A defendant who cannot bring himself within section 3 cannot resist extradition proceedings on the ground that he is liable on his return to be prosecuted for a non-political crime but a different crime from that for which his return has been sought: the Act leaves no room for the application of the international law rule of speciality: Re *McFadden*.[54] **23–049**

Nor can a claim of abuse of process be raised to challenge a warrant being enforced under the 1965 Act which clearly intended to provide an expeditious procedure for returning wanted persons to the Republic of Ireland, subject only to the precise and limited protection against oppressive claims provided by the wording of the Act: *R. v. Governor of Belmarsh Prison, ex p. Gilligan*.[55]

The Criminal Jurisdiction Act 1975[56] sought to avoid the difficulties inherent in the surrender of wanted criminals from one jurisdiction in Ireland to the other by conferring extra territorial jurisdiction on the courts of Northern Ireland in the case of certain crimes. Any act committed in the Republic of Ireland which, if committed in Northern Ireland, would constitute one of the crimes listed in Schedule 1 (serious crimes of violence against the person, damage to property by fire, offences involving explosives and fire arms) will constitute a crime by the law of Northern Ireland. The Act also creates a new offence of hijacking a vehicle or ship anywhere in Northern Ireland or the Republic of Ireland which is triable in Northern Ireland. Consequential amendments are made to the Backing of Warrants (Republic of Ireland) Act 1965 to prevent the enforcement of warrants issued in the Republic against offenders who are or have been convicted or acquitted of an extra-territorial offence in Northern Ireland.

[53] For an unsuccessful attempt to rely on this provision see *R. v. Governor of Durham Prison, ex p. Carlisle* [1979] Crim.L.R. 175, DC (Detention in England under Prevention of Terrorism (Temporary Provisions) Act 1974 which defined terrorism as use of violence for political ends: Irish warrant issued for offences relating to explosions).

[54] *The Times*, March 13, 1982.

[55] [1999] 3 W.L.R. 1244, HL.

[56] See Report of the Law Enforcement Commission (Cmnd. 5627). There is corresponding legislation in the Republic of Ireland.

CHAPTER 24

FREEDOM OF PERSON AND PROPERTY[1]

I. FREEDOM OF THE PERSON

General principles

24–001 "The right to personal liberty as understood in England," says Dicey,[2] "means in substance a person's right not to be subjected to imprisonment, arrest, or other physical coercion in any manner that does not admit of legal justification." It is "one of the pillars of liberty," said Lord Atkin in *Liversidge v. Anderson*,[3] that "in English law every imprisonment is *prima facie* unlawful, and that it is for a person directing imprisonment to justify his act." Today the justification for imprisonment or other type of detention must also be in accordance with the E.C.H.R., as must the treatment of those imprisoned or detained. The Convention rights most likely to arise in this context are: "the right to liberty and security of person" (Article 5); "right to life" (Article 2); the right to "a fair and public hearing" in the determination of civil rights and criminal charges (Article 6)[4]; the right to "respect for private and family life, home and correspondence" (Article 8); the prohibition of discrimination (Article 14). When determining the scope of a statute restricting personal liberty, a court will have to interpret the law to comply with the Convention rights, "so far as it is possible to do so" (Human Rights Act 1998, s.3). In addition police officers are "public authorities" for the purpose of section 6(1) of the Human Rights Act 1998, and as such it is unlawful for them to act in a way incompatible with a Convention right. All those who are empowered to interfere with personal liberty, and the courts who are called upon to adjudicate on such matters, must in particular consider the E.C.H.R. requirement of "proportionality". This means that even justified actions have to be proportionate to the threat or problem they seek to prevent.[5]

The justification for detention or imprisonment is usually that the person is arrested and detained pending trial in court on a charge of crime, or after trial by a court of competent jurisdiction he has been convicted and sentenced to imprisonment or some other kind of detention provided by statute. Other kinds of lawful detention are committal for contempt of court[6] or Parliament,[7] custody pending deportation or extradition,[8] children in need of care and protection,[9] patients under Mental Health and Public Health Acts, and imprisonment for

[1] See D. Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed., 2001); H. Fenwich: *Civil Rights* (2000).
[2] Dicey, *Law of the Constitution* (10th ed., E. C. S. Wade, 1959) pp. 207–208.
[3] [1942] A.C. 206, HL.
[4] See Andrew Ashworth, "Article 6 and the Fairness of Trials", [1999] Crim.L.R. 261.
[5] See further Chap. 22.
[6] See *ante* Chap. 20.
[7] See *ante* Chap. 13.
[8] See *post* Chap. 23.
[9] Children Act 1989, Pt V.

failing to make certain payments in spite of having had the means to do so.[10] Preventive detention may take place under statutory war time regulations and anti-terrorist legislation. Detention for limited periods is also now permitted under the Police and Criminal Evidence Act 1984 (PACE Act), and under the Terrorism legislation.[11] All these types of detention must be considered in the light of Article 5 E.C.H.R., and in particular Article 5(1) which provides an exhaustive definition of the circumstances in which a person may be deprived of his liberty. In addition, to comply with Article 5 the detention procedure must be in accordance with municipal law and with the E.C.H.R. It will be for the relevant British court to consider these issues.

24–002 A restriction on liberty that falls short of detention or imprisonment is provided by Part 1 Chapter 3 of the Criminal Justice and Police Act 2001 (CJP Act 2001). This gives a court the power in certain circumstances to make overseas travel restriction orders on those convicted of one of a list of drug trafficking offences.

For wrongful deprivation of liberty the following remedies are available in English law: (i) civil proceedings for damages in respect of malicious prosecution, false imprisonment or assault; (ii) criminal prosecution for assault, battery, or in respect of false imprisonment itself; (iii) application for a writ of habeas corpus[12] to obtain release; (iv) appeal against conviction or sentence to a higher court; (v) in appropriate cases an order of certiorari or prohibition.[13]

Personal liberty is, however, increasingly seen as not being confined to freedom from physical restraint. Modern methods of surveillance enable telephone calls to be intercepted or private conversations to be overheard.[14] The use of computers has led to concern about the storing of information about individuals and the use of that information by government agencies, the police or private commercial organisations. These and similar matters are discussed later.[15]

Police powers

24–003 Before 1984 the powers of the police derived from the common law and statute. The former were open to criticism for their uncertainty, the latter for varying in many cases from force to force, depending on the existence of local Acts of Parliament. Police methods used in investigating crimes had come under critical scrutiny in the report on the *Confait* Case.[16] In 1977 the government set up a Royal Commission on Criminal Procedure which reported in 1981.[17] The

[10] In *Benham v. United Kingdom* (1996) 22 E.H.R.R., the applicant had been imprisoned for non payment of the community charge (a civil matter). The E.Ct.H.R. held that under E.C.H.R. law he had been charged with a criminal offence (the Convention organs apply an autonomous approach to what is "criminal"), and the protection of Art. 6 applied, entitling him to legal aid.

[11] Prevention of Terrorism (Temporary Provisions) Act 1984, as re-enacted in the Terrorism Act 2000. In *Brogan v. United Kingdom* (1988) 11 E.H.R.R. 117, the E.Ct.H.R. held that detention under the 1984 Act was incompatible with Art. 5(3); the Government's response was to derogate from this article. S. 16 of the Human Rights Act 1998 expressly retains this derogation, but provides that it will cease to have effect after five years unless expressly extended by the Secretary of State.

[12] *post* para. 24–033.

[13] *post* Chap. 32.

[14] The Regulation of Investigatory Powers Act 2000 was passed, *inter alia*, to ensure that certain surveillance methods used by the police and other law enforcement agencies were compatible compatibility with the E.C.H.R. and the E.C. Telecoms Data Protection Directive (97/66/E.C.). See also the Data Protection Act 1998.

[15] *post*, Chap. 26.

[16] Fisher Report on the *Confait* Case, H.C. 338 (1977–78).

[17] Cmnd. 8092.

Report was followed by two Acts, the Prosecution of Offences Act 1985[18] and the PACE Act.[19] The latter Act attempted to strike a balance between the freedom of the citizen and the powers of the police. The powers of the police were increased but their exercise was subject to the restrictions contained in the Act. The PACE Act also changed laws of evidence and procedure and provided for the introduction of Codes of Practice (COP) (section 66.67)[20] to guide the police in the exercise of their powers. A further spate of miscarriages of justice cases, many of which involved allegations of police malpractice, resulted in the establishment of a Royal Commission on Criminal Justice which reported in 1993.[21] Some of its recommendations were included in the Criminal Justice and Public Order Act 1994[22] and the Criminal Procedure and Investigations Act 1996. In addition the Police Act 1997 and the Regulation of Investigatory Powers Act 2000 *inter alia* provide statutory authority for certain types of police surveillance operations, and the CJP Act 2001 gives the police additional powers to seize from premises and the person.[23] The PACE Act does not then provide an exhaustive code of police powers.

Stop and Search

24–004 The introduction of a generalised right to stop persons and vehicles was a particularly controversial provision of the PACE Act.[24] The value of stopping and searching as a crime prevention measure has been doubted and it is argued to have an adverse effect on public-police relations. Article 14 of the E.C.H.R. could be used to challenge a police force which used stop and search powers in a way which disproportionately affects ethnic minorities.[25]

Section 1 confers a power to detain and search on a constable in a place to which the public has access or in any other place "to which people have ready access at the time when he proposes to exercise the power but which is not a dwelling" (section 1(1)). The power extends to (i) persons and vehicles, (ii) to search for stolen or prohibited articles or prohibited blades,[26] (iii) which he has reasonable grounds to suspect that he will find. Prohibited articles are offensive weapons[27] or articles made or adapted for use in burglary, theft and other defined crimes. The police also have a power to search any person on school grounds if there is reasonable grounds to suspect he is in possession of any offensive

[18] *ante* para. 20–014.

[19] Michael Zander, *The Police and Criminal Evidence Act 1984* (2nd ed., 1996); K. Lidstone and C Palmer, *The Investigation of Crime* (2nd ed., 1996). The PACE Act, with some modifications, was extended to Northern Ireland in 1989.

[20] There are currently five Codes of Practice: COP A. Stop and Search; COP B. Search of Premises and Seizure of Property; COP C. Detention, Treatment and Questioning; COP D. Identification; COP E. Tape-recording of interviews of suspects.

[21] Cm. 2263.

[22] Some of the provisions contained in this Act were contrary to the advise of the Royal Commission.

[23] Replacing the Interception of Communications Act 1985, and amending the Intelligence Services Act 1994 and Part III of the Police Act 1997.

[24] In addition all forces have powers to stop and search under a variety of other statutes such as the Misuse of Drugs Act 1971, s.23(2); for a full list see Annex A. COP A. These additional powers are also subject to the safeguards in s.2 PACE Act, and COP A applies to most of them.

[25] M. Fitzgerald, *Ethnic Minorities and the Criminal Justice System*, R.C.C.J. Research Study 20, (1993).

[26] s.139 of the Criminal Justice Act 1988, s.1(8A) of PACE.

[27] s.1(9)(a) "Offensive Weapon" means any article—
(a) made or adapted for use for causing injury to persons; or
(b) intended by the person having it with him for such use by him or some other person.

weapon or article with a blade or point.[28] The main guarantee that the power conferred by section 1 will not be abused is the requirement of reasonable grounds that a prohibited article or blade will be found. The Code of Practice on Powers of Stop and Search, emphasises that reasonable grounds require a foundation in fact, as opposed to mere suspicion, a hunch which cannot be explained or justified. It specifically excludes factors such as colour, manner of dress or hairstyle as the basis for reasonable suspicion. Procedural safeguards are contained in section 2 which, for instance, requires that a constable not in uniform should produce documentary evidence that he is a constable. In any case the constable must give his name and that of the station to which he is attached and the object of the search. Section 3 requires the making of a written record of searches carried out unless it is not practicable to do so: the person detained is entitled to a copy of the search record. A search to which a person voluntarily consents is outside the provisions of sections 1, 2, and 3 of the PACE Act, and is not governed by COP A.

A power to stop vehicles in a particular locality is conferred by section 4 for the purposes set out in the section, for example to ascertain whether a vehicle is carrying a person who has committed an offence, other than a road traffic offence[29] or a vehicles excise offence; or a person who is unlawfully at large. Such checks must, except as a matter of urgency, be authorised by an officer of at least the rank of superintendent. Again there must be reasonable grounds to believe that one of the requirements of the section has been satisfied.

Section 5 requires the inclusion in the annual reports of chief officers' statistics relating to the exercise of search powers under sections 1 and 4. This is intended to facilitate supervision over the exercise of these powers by police authorities and the Inspectors of Constabulary. **24–005**

Additional powers to stop and search in anticipation of violence are found in section 60 of the Criminal Justice and Public Order Act 1994 (CJPO).[30] This section applies when a senior officer reasonably believes that incidents of serious violence may take place in his police area, or that persons are carrying dangerous instruments or offensive weapons in that area. He may in these circumstances authorise in writing the stopping and searching of persons and vehicles within that locality for up to 24 hours.[31] The officer who conducts the stop and search is not required to have any reasonable suspicion that offensive weapons or dangerous instruments will be found. The Crime and Disorder Act 1998 s.25 further amends section 60 by giving the officer a power to require the removal of masks or other items used to conceal identity, and to seize such items.[32] A power similar to section 60 aimed at preventing certain types of acts of terrorism is found in the Terrorism Act 2000 ss.44–46, with the additional requirement that authorisations have to be confirmed by the Secretary of State within 48 hours of their being made.[33] All these provisions, since they do not require reasonable suspicion by the detaining police officer, could be in breach of Article 5(1)(c) of the E.C.H.R.

[28] s.139B of the Criminal Justice Act 1988, as amended by the Offensive Weapons Act 1996, s.4.
[29] See s.163 of the Road Traffic Act 1988.
[30] As amended by s.8 of the Knifes Act 1997.
[31] May be extended by a further 24 hours.
[32] There is no power to search for such items.
[33] Re-enacting ss. 13A and B of the Prevention of Terrorism (Temporary Provisions) Act 1989.

Arrest

24–006 Arrest is the restraint of a man's person or liberty, obliging him to be obedient to the law. Arrest commonly involves actual physical seizure (apprehension) of a person, using no more force than reasonably necessary, or a token restraint of a person's liberty indicating its compulsory nature.[34] The common law allows a person to use a reasonable amount of force to resist unlawful arrest without warrant, whether by a police officer or private citizen; but it is inadvisable to resist arrest by a police constable as the arrest may turn out to be lawful and resistance therefore an offence.

24–007 *(a) By warrant* No man may be arrested or imprisoned except under due process of law (Petition of Right 1627[35]). Where a person is suspected of having committed a serious indictable offence, the police may apply to a magistrate for a warrant for his arrest.[36] That warrant can only be granted on sworn information. Sufficient particulars of the charge must be specified in the warrant in non-technical language. A "general warrant," *i.e.* one which does not name the person to be arrested, is illegal.[37] In minor cases a summons is usually applied for.[38]

24–008 *(b) Without warrant* A common law power to arrest without warrant still exists for every citizen where a breach of the peace has been committed or threatened.[39] This power is of particular use to the police in public order situations, as it permits an arrest to prevent harm or violence, something not possible by statute.[40] In *Steel v. United Kingdom*,[41] the E.Ct.H.R. decided that breach of the peace was an "offence" in E.C.H.R. terms[42] and in consequence the arrestee had all the rights under Articles 5 and 6. It also accepted that the exercise of such a power is in compliance with the E.C.H.R. where someone's behaviour if it persisted, might provoke others to violence, but not otherwise. In *Foulkes v. Chief Constable of the Merseyside Police*[43] the Court of Appeal held that the police should only arrest in the clearest of circumstances where apparently lawful conduct gave rise to an apprehension of a breach of the peace. It may also be used to arrest for assault, and for assaulting or obstructing a police constable in the execution of his duty, offences for which a statutory power of arrest is limited to situations where the general arrest conditions (see below) are satisfied.

[34] Not every deprivation of liberty (detention) constitutes an arrest, which can only be effected in exercise of an asserted authority: *R. v. Brown* [1977] R.T.R. 160, CA.

[35] Relying on Magna Carta (9 Hen. III, c. 29.).

[36] Magistrates Court Act 1980, s.1. The increased powers of arrest without warrant found in PACE have further decreased the use of arrest warrants.

[37] See *Leach v. Money*, (1756) 3 Burr. 1962, 1984; 19 St.Tr. 1001; *Wilkes v. Lord Halifax* (1769) 19 St.Tr. 1407.

[38] Magistrates' Courts Act 1980, s.1(4).

[39] *R. v. Howell* [1981] 3 All E.R. 383, [1982] Q.B. 416. PACE s.26(5) expressly retains this power.

[40] However the police must have regard to Art. 10 E.C.H.R. and the right to freedom of expression when exercising this power.

[41] (1998) 28 E.H.R.R. 603, the E.Ct.H.R. found that despite inconsistent English decisions on the definition of breach of the peace, the law was sufficiently precise to comply with Art. 5(1)(c).

[42] Breach of the peace is not an offence in English law, *R. v. County Quarter Sessions Appeals Committee, ex p. M.P.C.* [1948] 1 K.B. 260.

[43] [1998] 3 All E.R. 705. See also *Bibby v. Chief Constable of Essex Police* (2000) 164 J.P. 297, where the Court of Appeal referred to the "now exceptional" common law powers of arrest, and provided guidelines.

The majority of the police powers to arrest without warrant are found in the PACE Act which provides a potential power to arrest for every criminal offence. There are two categories of offences in respect of which there is a power to arrest without warrant (sections 24 and 25); in addition there are preserved powers of arrest (section 26) and a variety of post PACE Act statutes providing summary powers of arrest for newly created offences which would not come under section 24 and in respect of which section 25 is considered inappropriate.[44]

The power to arrest without warrant in section 24 is in respect of an arrestable offence[45] which is: **24–009**

(i) any offence for which the sentence is fixed by law: that is murder and treason;

(ii) offences for which a person over 21 may be sentenced on first conviction to five years imprisonment;

(iii) various listed statutory offences.[46]

Any person may arrest without warrant any person who is in the act of committing such an offence or whom he has reasonable grounds for suspecting to be committing such offence[47]; or anyone who has committed such an offence or whom he has reasonable grounds for suspecting to have committed such an offence. In addition a constable may, if he has reasonable grounds for suspecting an offence has been committed, arrest any person whom he has reasonable grounds for suspecting to be guilty of the offence.[48] He may also arrest anyone about to commit an arrestable offence or anyone whom he has reasonable grounds for suspecting to be about to commit an arrestable offence.[49] The powers conferred by the section extend also to conspiring to commit an arrestable offence, to attempting to commit and to inciting, aiding, abetting, counselling or procuring the commission of such an offence.

Section 25 provides a further power of arrest without warrant in the case of non-arrestable offences where one of the "general arrest conditions" in the section exists. A constable has the power under the section if he has reasonable ground for suspecting the commission of a non-arrestable offence and it appears to him that the service of a summons is impracticable for one of the reasons stated: for example that the name of the person concerned cannot be ascertained;

[44] *e.g.* a variety of offences under the Public Order Act 1986 and the C.J.P.O. Act 1994.

[45] Arrestable offence is to be distinguished from serious arrestable offence, defined in s.116; the police have additional powers in this type of offence: *infra*.

[46] Which are added to from time to time, for *e.g.* the new offence of "stalking" in the Protection from Harassment Act 1997 is an arrestable offence. The list was significantly extended by the Criminal Justice and Public Order Act 1994 and the Offensive Weapons Act 1996.

[47] For a consideration of the meaning of "reasonable grounds for suspecting", but in a different statute see *O'Hara v. Chief Constable of the Royal Ulster Constabulary* [1997] 1 All E.R. 129, HL. The E.C.H.R. requires objective grounds for such a suspicion.

[48] This reflects the changed role of arrest from a means of bringing an offender before a court, to an investigative tool for removing a suspect into the police station for questioning. *Mohammed-Holgate v. Duke* [1984] A.C. 437, HL.

[49] The extended statutory powers of the constable reflect the old common law—and are a reminder of the danger of the citizen taking upon himself the right of arrest: *Walters v. W. H. Smith & Son Ltd* [1914] 1 K.B. 595, CA; in *R. v. Self* (1992) 95 Cr. App.R. 42 the Court of Appeal confirmed that the citizen's power of arrest in s.24(5) was dependent on an arrestable offence having been committed.

that arrest is necessary to prevent the person causing himself or other physical harm, or to prevent the commission of an offence against public decency.

24–010 Section 26 rather confusingly repeals earlier statutory provisions authorising arrest without warrant but, by subsection (2), preserves a power to arrest without warrant in a variety of statutes listed in schedule 2.

In the effecting of an arrest section 3 of the Criminal Law Act 1967 provides that any person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders and section 117 of the PACE Act provides that a constable may use reasonable force in the exercise of any power conferred by the Act. What will amount to reasonable force will have to be considered in the light of the E.C.H.R., which provides for the use of force "which is no more than absolutely necessary" (Article 2(2)). In addition Article 3, which prohibits "inhuman or degrading treatment" may mean that force can only be used in response to the detainee's conduct and should be in proportion to that conduct.[50]

The requirements of a valid arrest are defined in section 28. When a person is arrested otherwise than by being informed that he is under arrest, the arrest is not lawful unless the person arrested is informed as soon as practicable that he is under arrest. Where the arrest is by a constable the person arrested must be informed of his arrest even if the fact must be obvious. Whether a person has been told is a matter of fact: polite words of request, inviting a person to go to a police station, may fail to convey that he is being arrested.[51] The ground for the arrest must also be made clear at the time of the arrest or as soon as practicable after the arrest.[52] Again, in the case of arrest by a constable, this requirement must be complied with, even if the ground for arrest is obvious.

24–011 When a police officer has grounds to suspect a person of committing an offence, the suspect must be cautioned[53]: at the latest this will be at the time of arrest. The form of caution is: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence." This has particular significance in the light of sections 34–39 of the CJPO Act 1994 which allow a court or jury in certain circumstances to draw inferences from an accused's silence, or his failure to give an explanation for, *e.g.* objects found with him or marks on him at the time of arrest.[54]

If an arrest takes place other than at a police station then the constable who makes the arrest, or to whom another person[55] transfers the custody of the arrested person, must take the arrested person to a designated police station as soon as practicable (section 30). (A designated station is defined by section 35(1); *infra*.) In these circumstances a constable may search an arrested person

[50] See *Ribbitsch v. Austria* (1996) 8 E.H.R.R. 45.

[51] *Alderson v. Booth* [1969] 2 Q.B. 216, DC, a case under the previous law.

[52] *D.P.P. v. Hawkins* [1988] 1 W.L.R. 1166, although the defendant should have been informed of the ground of his arrest when it became practicable, this did not retrospectively make the arrest unlawful; however a claim for false imprisonment could succeed in respect the time when no reasons were given, but could have been given.

[53] COP C para. 10.

[54] *post* para. 24–017.

[55] See *John Lewis & Co Ltd v. Tims* [1952] A.C. 676, HL, the appellants were not liable for false imprisonment when, before handing the respondent over to the police, their private detectives took her to an office in order that the circumstances of her arrest might be explained to the managing director and to obtain authority to prosecute for theft.

if he has reasonable grounds for believing that the arrested person may present a danger to himself or others. The arrested person may also be searched for anything which might be used by the person to assist him to escape or which might be evidence relating to an offence.[56] Premises in which a person was arrested, or was immediately before his arrest (section 32(2)(b)) may similarly be searched. Again reasonable grounds for believing evidence may be found are required and in the case of a search of premises, a search is permitted only to the extent that it is reasonably required for the purpose of discovering the evidence. Additional powers to enter and search certain premises after the arrest of a person for an arrestable offence are found in section 18.[57]

Detention

Police have no power to detain (apart from exceptional anti-terrorist and emergency legislation) for questioning a person whom they have not arrested. Section 29 of the PACE Act recognises this common law principle. However, the PACE Act by permitting arrest on reasonable suspicion[58] recognises that the police station is the venue for the investigation of most serious offences and in Parts IV and V and COPC, attempt to regulate the treatment and questioning of those in police detention. 24–012

Persons may not be detained for longer than six hours at a police station which is not a designated police station (sections 30 and 35). At each designated station there must be one or more custody officers whose duty is to ensure that the requirements of Parts IV and V of the PACE Act are complied with. The PACE Act seeks to protect detained persons by separating the custodial and investigative powers of the police. It is the duty of the custody officer to decide whether there is sufficient evidence to charge an arrested person or, if not, whether to detain or release him. Where the custody officer decides there is not such evidence, there is a presumption that the arrestee is released, either with or without bail (section 37(2)). The custody officer may only authorise detention without charge if he has reasonable grounds for believing that it is "necessary to secure evidence relating to an offence for which he is under arrest, or to obtain such evidence by questioning him" (section 37(2)).[59] Detention must be reviewed at regular intervals by a custody officer, (if the person has been arrested and charged), or by a review officer (who must be at least the rank of inspector) if the person has been arrested but not charged (section 40). A review may be carried out by telephone where it is not reasonably practicable for an inspector to be present (section 40A as inserted by the CJP Act 2001). A general maximum period of detention without charge of 24 hours is established by section 41. An officer of the rank of superintendent or above may authorise a further period of detention up to 36 hours in the case of a serious arrestable offence (section 42).[60] An extension can be granted by magistrates for a maximum of 36 hours; and

[56] s.32(4) of the PACE Act limits the search to the removal of coat, jacket and gloves; but search of the mouth is permitted by s.59(2) of the CJPO Act which amends s.32(4).

[57] *post*, para. 24–044.

[58] *ante*, para. 24–009.

[59] In practice it appears that the police routinely authorise detention without an examination of the sufficiency of the evidence: I. McKenzie, R. Morgan and R. Reiner, "Helping the Police with their Inquiries: The Necessity Principle and Voluntary Attendance at the Police Station", [1990] Crim. L.R. 22.

[60] s.116 (as amended) creates several categories of serious arrestable offences.

further extensions to a maximum of 96 hours (section 43).[61] It is probable that these procedures and safeguards satisfy the E.C.H.R.

24–013 *Treatment and questioning* (Part V of the PACE Act) If detention has been authorised, the custody officer must start the written custody records of the detention, tell the arrestee of the grounds for the detention and inform him of his "rights"—to inform a third party of his detention (section 56), to free private legal advice (section 58) and to consult the COP.[62] The physical arrangements for the detention of persons at police stations are provided for in COP C and special provisions are made in respect of certain vulnerable groups (*e.g.* children and young persons, the intoxicated, the ill).[63] The main purpose of detention in a police station is to interview a suspect, and the PACE Act requires records to be kept of interviews, but does not require them to be tape recorded although it is general practice to do so, and COP E sets out guidance on this.[64]

Searches in Detention A power of search is conferred by section 54 and a right to retain any object which might be used by the person in custody to injure himself or aid his escape. Items may also be retained if the officer has reasonable grounds for believing that they may be evidence relating to an offence. The decision to search must be made in each instance in the light of the facts, and the detained person should be told the reasons for any seizure, unless it is impracticable to do so (section 54(5)).

24–014 Section 55 (as amended by CJP Act 2001) allows an inspector to authorise an "intimate search," that is a physical examination of a person's bodily orifices (section 65).[65] He must have reasonable grounds for believing that the person arrested and detained has concealed about him (i) anything which he might use to cause physical injury to himself or others and which he might so use while in police detention or the custody of a court; or (ii) a Class "A" drug which he was in possession of, with criminal intent, before arrest. Normally such a search must be conducted by a medically qualified person but a constable (of the appropriate sex) may carry out a search for an object within (i) if the inspector does not think an examination by a medically qualified person is practicable. Controls on this power of search are found in section 55 and COP A. Section 117 provides that constables carrying out searches under the section are entitled to use reasonable force, but it is arguable that in certain circumstances this could constitute "inhuman or degrading treatment" contrary to Article 3 E.C.H.R., or an interference with private life contrary to Article 8.

[61] In *Roberts v. Chief Constable of Cheshire Police* [1999] 2 All E.R. 326, the Court of Appeal held that a person was unlawfully detained once the time for the review of his detention had passed until such time as a lawful review was conducted, and in consequence such detention was the tort of false imprisonment.

[62] Research suggests that there has been an improvement in the way Custody Officers perform this task, compared to the early days of the PACE Act: D. Brown, T. Ellis, K. Larcombe, *Changing the Code: Police Detention under the Revised PACE Codes of Practice*, Home Office Research Study No. 129 (1993).

[63] There is doubt as to how effective these provisions have been, see C. Palmer, "Still Vulnerable after all these years", [1996] Crim.L.R. 633.

[64] Interviews with terrorist suspects and those suspected of Official Secrets offences do not have to be tape recorded.

[65] As amended by s.59(1) of the Criminal Justice Public Order Act 1994 to exclude the mouth from the definition of bodily orifices, enabling the police to search on arrest a suspect's mouth for, *e.g.* drugs.

The PACE Act[96] allows for the taking of intimate bodily samples (blood, semen or any other tissue fluid, urine, saliva or pubic hair, a dental impression or a swab from a body orifice other than the mouth (sections 62 and 65), and non-intimate samples: hair other than pubic hair; a sample taken from a nail or from under a nail; a swab taken from any part of a person's body including the mouth but not any other body orifice; saliva; a footprint or similar impression of any part of a person's body other than a part of his hand (sections 63 and 65). In addition the CJPO Act 1994 amended the PACE Act to provide a power for the police to obtain intimate and non-intimate body from those not in police detention.[97] All the powers to obtain samples are in respect of recordable offences[98]—a wider category than the "serious arrestable offences" as originally found in the PACE Act.

An intimate sample, whether from those who are or are not in police detention, can only be taken with consent. A court may, however, draw such inferences from a refusal to consent without good cause, as appear proper (section 62(10)). It could be questioned whether compelling a suspect to consent to the taking of a bodily sample (an interference with private life) or risk adverse inferences falls within the exceptions to Article 8 of the E.C.H.R.[99] Before a person is asked to provide an intimate sample an inspector has to authorise the taking of the sample on the basis that he has reasonable grounds for suspecting the person to be involved in a recordable offence and reasonable grounds to believe that the sample would confirm or disprove that involvement. The new power to obtain intimate samples from those not in detention (section 62(1A)) is in respect of those from whom at least two non-intimate samples have already been obtained and which were found to be insufficient. Intimate samples may only be taken by a medical practitioner or a registered nurse (section 62 as amended by the CJP Act 2001), and proper records must be kept.

Non-intimate samples may be taken with the suspect's consent, or by the authorisation of an inspector who has to have reasonable grounds for suspecting the person's involvement in a recordable offence and reasonable grounds for believing that the sample will tend to confirm or disprove his involvement. In certain circumstances the non-consensual taking of a non-intimate sample could breach Articles 3 and 8 of the E.C.H.R. The power can be used in respect of those in police detention, and those who have been charged with a recordable offence and have not given a non-intimate sample or where the sample given was insufficient or unsuitable. In addition there is a power to obtain such samples from those convicted of recordable offences (section 63B) or detained following an acquittal on grounds of insanity (section 63C). The new provisions for the collection of non-intimate samples will assist the establishment of a DNA database similar to that which exists for fingerprints. 24–015

A detained person's fingerprints may, under section 61 (as amended by the CJP Act 2001) may be taken without his consent if (i) an inspector so authorises and he has reasonable grounds for suspecting the person's involvement in a criminal

[96] As amended by the CJPO Act 1994, which takes account of advances in D.N.A. technology.

[97] In *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313, the E.Ct.H.R. accepted that the use in evidence of fingerprints, intimate and non-intimate samples did not infringe the privilege against self-incrimination enshrined in Art. 6.

[98] s.27(4) of the PACE Act. These are offences listed in the National Police Records (Recordable Offences) Regulations 1985 and are generally those punishable by imprisonment.

[99] Particularly since the power to do so is in respect of "recordable offences" which covers some non-serious offences. *Saunders v. UK* (1997) 23 E.H.R.R. 313, suggests that such powers do not infringe Art. 6; however British courts could take a different view.

offence and that his fingerprints will tend to confirm or disprove his involvement or (ii) he has been charged with a recordable offence or he has been warned that he may be so charged.

In the case of the three preceding sections, where the person detained is under the age of 14 the consent required is that of the parent or guardian: between 14 and 17 both the person detained and his parent or guardian must consent.

Access to Legal Advice[70]

24–016 Suspects have a statutory right to consult a solicitor privately at any time,[71] and must be permitted to do so as soon as practicable (section 58(1)(2).[72] Delay (of a maximum of 36 hours) is only permitted if authorised by an officer of at least the rank of superintendent and only in respect of serious arrestable offences where he has reasonable grounds for believing that interference with the course of justice is likely (section 58(8)).[73] There has been an increase in the percentage of suspects requesting legal advise, from 24 per cent in the early days to 40 per cent in 1996.[74] The quality of the legal advise offered to suspects has given rise to concern,[75] and the Law Society introduced an "accreditation scheme" in an attempt to deal with this. The prospect of "adverse inferences" from an accused's failure to mention certain fact when questioned after caution[76] make the presence of a solicitor at interview particularly important. The E.Ct.H.R. has in effect suggested that the exclusion of a lawyer from the questioning of a suspect in these circumstances could be a violation of Article 6.[77]

Right to Silence[78]

24–017 The CJPO Act 1994 has affected the use that can be made of an accused's silence in the face of police questioning; it does not remove that right. Section 34(2) allows a court or jury to draw "such inferences as appear proper" from an accused's failure to mention, when questioned under caution or on being charged with an offence, any fact on which he subsequently relies on in his defence, provided that it is one which in the circumstances he could reasonably have been expected to have mentioned. Future use of section 34 must be in the light of

[70] Andrew Sanders and Lee Bridges, "The Right to Legal Advice", Chap. 4 in *Miscarriages of Justice* (Clive Walker and Keith Starmer eds. 1999).

[71] This is also an aspect of Art. 6 E.C.H.R.: the failure of some police stations to provide for telephone advise to be in private could infringe this article: but see *R. (on the application of M) v. Commissioner of Police for the Metropolis The Times*, August 17, 2001.

[72] There is still a common law right to see a solicitor as soon as reasonably practicable. *R. v. Chief Constable of South Wales ex p. Merrick* [1994] Crim.L.R. 852.

[73] *R. v. Samuel* (1988) 87 Cr.App. R. 232, in the absence of persuasive evidence of the existence of circumstances justifying delay the conviction was quashed. To deny a suspect a solicitor could be in breach of Art. 6 E.C.H.R., although the E.Ct.H.R. has accepted that restricting the right for good cause is permissable.

[74] T. Bucke and D. Brown, *In Police Custody: Police Powers and Suspects' Rights under the Revised PACE Codes of Practice*, Home Office Research Study 174 (1997). This, and other research, found great variations between police stations.

[75] J. Baldwin, *The Role of Legal Representatives at Police Stations*, R.C.C.J. Research Study No. 3 (1992).

[76] s.34 CJPO Act 1994.

[77] *Murray v. United Kingdom* (1990) 22 E.H.R.R. 29. However, in the light of other factors Murray's trial was not unfair; the lack of legal advise was not crucial on the facts of the case. As a consequence of this decision, ss.34–37 of the CJPO Act 1994 (below), were amended by s.58 of the Youth and Criminal Evidence Act 1999 to prohibit "adverse inferences" if the suspect had not had an opportunity to consult a solicitor.

[78] In *Smith v. Director of the Serious Fraud Office* [1992] 3 All E.R. 456, Lord Mustill identified six legal meanings for the term, only one of which has been affected by CJPO Act.

Condron v. United Kingdom.[79] In *Condron* the E.Ct.H.R. did not say that section 34 was in breach of the E.C.H.R. but said that it was essential to a fair trial that the judge should direct the jury not to draw an adverse inference if they were satisfied that the defendant had remained silent on his solicitor's advise, and there was a sound reason for this advise.[80] The E.Ct.H.R. has also stated that the powers of compulsory questioning under threat of punishment provided in the Companies Act 1985 are in breach of Article 6.[81] The decisions of the E.Ct.H.R. have implication for the interpretation of three other sections of the CJPO Act which allow inferences to be drawn.[82]

Admissibility of Confessions and Evidence[83]

Section 78[84] gives courts a discretion to refuse to admit evidence if it appears that "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." This could include breaches of the PACE Act or the COP. When exercising its exclusionary discretion under section 78, courts should give additional weight to the breach of a E.C.H.R. right as it is a "constitutional right".[85] The E.Ct.H.R. has permitted the use of unlawfully obtained evidence, its practice had been to assess whether the trial as a whole was fair, taking into account the way the evidence was obtained, and its impact at the trial.[86] However, in *Teixiera de Castro v. Portugal*[87] the E.Ct.H.R. suggested that where certain improprieties such as entrapment were used, then even to exclude the evidence would be insufficient; the prosecution should not have been brought in the first place. 24–018

Section 76 provides for the exclusion of improperly obtained confessions[88]; if the defendant represents to the court that a confession was so obtained, then it is for the prosecution to prove beyond reasonable doubt that this was not the case.[89] Evidence obtained by torture or maltreatment is inadmissible under the E.C.H.R.

[79] [2000] Crim.L.R. 679.

[80] The Court of Appeal in *R. v. Condron* [1997] 1 W.L.R. 827, had suggested that such a direction was "desirable". See also *R. v. Argent* [1997] 2 Cr.App.R. 27; *R. v. Roble* [1997] Crim. L.R. 449. See, R. Munday, "Inferences from Silence and European Human Rights Law", [1996] Crim.L.R. 370.

[81] *Saunders v. United Kingdom* (1997) 23 E.H.R.R. 313. Section 59 of and Sched. 3 to the Youth and Criminal Evidence Act 1999 provides for the inadmissibility in criminal proceedings of answers and statements given under compulsion.

[82] s.35 (failure of an accused to give evidence in court); s.36 (failure to give an explanation for objects, marks, etc. found on him or in his possession); and s.37 (failure to account for his presence at particular place or at a particular time).

[83] For further details see P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence* (1997).

[84] See A. Choo and S. Nash, "What's the matter with s.78?", [1999] Crim.L.R. 929.

[85] See Lord Steyn in *Mohammed v. The State* [1999] 2 A.C. 111, PC.

[86] *Schenk v. Switzerland* (1988) 13 E.H.R.R. 242, subsequently in *Teixeria de Castro v. Portugal* (1999) 28 E.H.H.R. 1, a more interventionist approach was taken; in *Kahn v. United Kingdom* [2000] Crim.L.R. 684, a Chamber of the Court found no breach of Art. 6 despite a breach of Art. 8.

[87] (1998) 28 E.H.R.R. 101. See *Attorney-General's Reference No. 3 of 2000* [2001] Crim.L.R. 647, where the Court of Appeal distinguished *Teixiera*, the case is to go to the House of Lords.

[88] s.77 requires a jury to be given an additional warning before convicting a mentally handicapped person on the basis of a confession.

[89] *R. v. Paris, Abdullahi and Miller* (1993) 97 Cr.App.R. 99, illustrates the use of s.76, the advantages and limitations of tape recording interviews, and the inadequacy of some legal advisers. It is also one of only two cases where s.76 has been successfully invoked, see H. Fenwick, *Civil Rights* (2000) at p. 204.

Assaulting and obstructing a constable[90]

24–019 Section 89 of the Police Act 1996 (re-enacting section 51 of the Police Act 1964)[91] provides that it is an offence to assault a constable (or a person assisting him) in the execution of his duty, punishable on summary conviction with a term of imprisonment not exceeding six months or a fine not exceeding level 5 or both. Section 89(2) provides that it is an offence to resist or wilfully obstruct a constable (or a person assisting him) in the execution of his duty, punishable with a term of imprisonment not exceeding one month or a fine not exceeding level 3 or both.[92]

The importance of these provisions in a chapter on the freedom of the individual is that it is often through litigation arising under this section or its predecessors, that the scope of the powers and duties of the police are elucidated. A policeman, as we have seen, cannot normally detain without arresting: if he does so he is acting outside his powers. But is it an unlawful detention to tap a person on his shoulder and request him to stop and answer a question?[93] The limits of a statutory power to detain may well arise in proceedings under section 89.[94] The meaning of such phrases as "reasonable grounds"[95] and "reasonable force"[96] when used in the PACE Act and the distinction, if any, between "believing" and "suspecting"[97] are likely to be raised in this indirect way by prosecutions and appeals in respect of these offences. The freedom of the individual may be affected by the extent to which the courts are willing to recognise a discretion in constables to take decisions which they regard as necessary to prevent disorder,[98] or to keep traffic moving.[99] In doing so they will have to satisfied that the police officer's actions are proportionate to the harm he seeks to prevent. Equally important is the meaning the courts give to "obstruction," a word which could properly be confined to physical opposition but, on the other hand, has, in English courts, been extended to, for example, taking action which ensures that the criminal law is not broken so that the police find themselves, on arriving at what they expected to be the scene of a crime, unable to arrest anyone—other than the person who gave the warning of their coming.[1] In future all these issues will have to be considered in the light of the E.C.H.R.

[90] J. C. Smith and B. Hogan, *Criminal Law* (9th ed., J.C. Smith, 1999) Chap. 13.

[91] Most of the cases cited are on the 1964 Act.

[92] By s.89(3) this section also applies to a Northern Irish or Scottish constable who is executing a warrant or otherwise acting in England or Wales under a statutory power to do so.

[93] *Donnelly v. Jackman* [1970] 1 W.L.R. 562, DC (Action of constable within execution of duty). Courts are careful to distinguish between a touch to draw someone's attention and to apprehend or detain: *Collins v. Wilcock* [1984] 1 W.L.R. 1172, DC; see also *Mepstead v. D.P.P.* [1996] Crim.L.R. 111, but *cf. Bentley v. Brudzinski* (1982) 75 Cr.App.R. 217, DC.

[94] *e.g. Pedro v. Diss* [1981] 2 All E.R. 59, DC (Prisoner entitled to resist detention because PC had not told him, as the Court held he was bound to, that he was detaining him under statutory powers: Metropolitan Police Act 1839, s.66).

[95] *e.g.* s.1(3); s.25(1); s.32(1); s.54(4); s.55. *cf. Brazil v. Chief Constable of Surrey* [1983] 1 W.L.R. 1155, CA ("reasonable cause"; Misuse of Drugs Act 1971 s.23(2); issue raised but not necessary to be determined by Court); *R. v. Forde* [1985] Crim.L.R., DC.

[96] s.117.

[97] Contrast s.1(3) and s.1(4); s.25(1) and s.32(1); s.61(4)(a) and (b).

[98] *post* Chap. 26, para. 27–008.

[99] *Johnson v. Phillips* [1976] 1 W.L.R. 65 (obstruction to refuse to drive wrong way down a one way street when directed to do so by a constable). See U. Ross, "Two Cases on Obstructing a Constable," (1977) Crim.L.R. 187.

[1] *Green v. Moore* [1982] Q.B. 1044 (DC); *Moore v. Green* [1983] 1 All E.R. 663 (After-hours drinking at Castle Hotel, Chepstow).

Assaulting

The elements of assault are those required normally under the criminal law. It is no defence that the person accused was unaware that he was assaulting a constable.[2] However if the defendant honestly (but mistakenly) believed that he was acting in self defence or in prevention of a crime, he may have a defence on the basis that he did not intend to use *unlawful* force.[3] **24–020**

Obstructing

In *Hinchliffe v. Sheldon*,[4] Lord Goddard L.C.J., defined obstructing as "making it more difficult for the police to carry out their duties." Such a wide definition would require citizens to carry out willingly police constables' instructions (unless they had, correctly, determined that they fell outside the execution of the constables' duties) and to co-operate fully in the investigation of crimes (so that much of the Police and Criminal Evidence Act 1984 would be unnecessary). It cannot be the criminal offence of obstructing a constable to do what one is entitled to do, namely refuse to answer questions. In *Rice v. Connolly*[5] the Divisional Court reached that conclusion by reliance on the wording of section 51(3) (now section 89(2) of the 1996 Act), "to . . . wilfully obstruct." It could not, according to Lord Parker L.C.J. be wilful to do that which one had a legal excuse to do, refuse to answer questions. In *Green v. D.P.P.*[6] it was similarly held that to tell another not to answer questions was not an obstruction. Most of the cases on obstruction have involved a physical element. A positive act, such as drinking a quantity of alcohol to prevent the effective administration of a breathalyser test, may be more likely to be regarded as an obstruction than a mere refusal to act: *Dibble v. Ingleton*.[7] On the other hand a refusal to obey a constable's instruction which is given with a view to avoiding a breach of the peace[8] or to protect life[9] may constitute an obstruction. **24–021**

A number of cases have considered the *mens rea* required before the offence of obstruction is committed. In *Willmott v. Atack*[10] it was held that physically obstructing a constable who was attempting to arrest someone did not constitute an offence under section 51(3) (now section 89(2) of the 1996 Act) when the intention had been to help the police. Croom Johnson J. paraphrased "wilfully" as meaning "done with the idea of some form of hostility to the police." But interference with a policeman who is attempting to arrest someone on the ground that the wrong person is being arrested, constitutes wilfully obstructing: *Hill v. Ellis*.[11] Both decisions were considered in *Lewis v. Cox*[12] where the Divisional

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[2] *R. v. Forbes* (1865) 10 Cox C.C. 362. Proposals to reform the law on offences against the person would require proof that the defendant knew or was reckless that the victim was a police officer: Law Commission Consultation Paper No. 122 (1992).

[3] On the application of *R. v. Williams (Gladstone)* [1987] 3 All E.R. 411, which was applied by the Court of Appeal in *Blackburn v. Bowering* [1994] 3 All E.R. 380, a case on assaulting an officer of the court in the execution of his duty.

[4] [1955] 1 W.L.R. 1207.

[5] [1966] 2 Q.B. 414, DC. It is difficult to see how, as a matter of law, liability can be affected by whether the refusal to answer questions is politely worded or accompanied by obscenities: *quaere Ricketts v. Cox* (1981) 74 Cr.App.R. 298, DC.

[6] (1991) 155 J.P. 816.

[7] [1972] 1 Q.B. 480, DC.

[8] *post* para. 27–008.

[9] *Johnson v. Phillips* [1976] 1 W.L.R. 65.

[10] [1977] Q.B. 498, DC.

[11] [1983] Q.B. 680, DC.

[12] [1985] Q.B. 509, DC.

Court held that justices had erred in refusing to convict an accused who had opened the door of a police vehicle to ask a drunk who had been put inside the vehicle where he was being taken. A constable closed the door and warned the accused not to interfere. The latter, however, again opened the door and so prevented the vehicle from being driven away. The court held that the offence of wilful obstruction was committed by doing an act which interfered with the execution by the police of their duty, knowing or intending that it would interfere. Motive was irrelevant and the court found the use of such phrases as "hostility to the police" or "aimed at the police" unhelpful.[13] Unlike under section 89(1), it would be possible for defendant to argue that he honestly believed that the person he obstructed was not a constable, and in consequence his obstruction was not wilful.

Execution of duty

24–022 A constable is not acting within the execution of his duty when he does something which he has no right to do at law, for example, to attempt to detain someone whom he has not arrested.[14] to search someone whom he has no right to search.[15] to use force to take a person's fingerprints when not entitled to do so.[16] to attempt to enter premises with an invalid search warrant.[17] or to trespass on property.[18] In all these circumstances the citizen is entitled to refuse to co-operate with the instructions of a constable and, if necessary, to use reasonable force to resist unlawful demands.

Where, however, a constable is doing what he is legally entitled to do then he is acting within the execution of his duty, although a jurist might prefer to say that he was acting within the scope of his lawful powers. To resist arrest where a constable is entitled to arrest, for example for an apprehended breach of the peace.[19] or to refuse to keep a vehicle stationary as required under legislation to enable a constable to make inquiries under the relevant Act[20] are examples of assaulting or obstructing a constable in the execution of his duty. Although any touching of a person however slight may amount to a battery, a broad exception exists to this principle to allow, as Goff L.J. put it, "for the exigencies of everyday life",[21] which applies to police constable as well as other citizens. It will be a question of fact in each case whether the physical contact by the constable, "has in the circumstances gone beyond generally accepted standards

[13] The Court did not attempt to cast doubt on *Wilmott v. Atack, supra*, which may perhaps be explained as being correctly decided on the ground that the accused did not intend to obstruct or realise that he was obstructing whereas in *Hill v. Ellis*, whatever his motive, the accused did intend to prevent the effecting of an arrest.

[14] *Collins v. Wilcock* [1984] 1 W.L.R. 1172; *Bentley v. Brudzinski* (1982) 75 Cr.App.R. 217; a police officer who took hold of someone's arm in the mistaken belief that she had been arrested by a colleague, was acting outside the execution of his duty. *Kerr v. D.P.P.* [1995] Crim.L.R. 394.

[15] *Lindley v. Rutter* [1981] Q.B. 128, DC; *Brazil v. Chief Constable of Surrey* [1983] 1 W.L.R. 1155, CA; *R. v. Ecet* [1983] Crim.L.R. 806, Crown Ct. *Cf. McBean v. Parker* [1983] Crim.L.R. 399, DC.

[16] *R. v. Jones (Yvonne)* (1978) 67 Cr.App.R. 166, CA.

[17] *Syce v. Harrison* [1980] Crim.L.R. 649, DC.

[18] *McLorie v. Oxford* [1982] Q.B. 1290, DC; *R. v. McKenzie and Davis* [1979] Crim.L.R. 174, Crown Ct. Whether a P.C. is trespassing or not may be a difficult question: *Ronson v. Hallett* [1967] 2 Q.B. 939.

[19] *R. v. Howell (Errol)* [1982] Q.B. 416. See *post* para. 27–008 for the implications of the E.C.H.R. on this power. *Foulkes v. Chief Constable for Merseyside* [1998] 3 All E.R. 705, CA: power to arrest for an apprehended breach of the peace is "exceptional".

[20] *Lodwick v. Sanders* [1985] 1 W.L.R. 382, DC.

[21] *Collins v. Wilcock* [1984] 3 All E.R. 374, DC.

of conduct". For a police officer to take a man's arm to draw attention to what was being said to him, but without intending to arrest or detain him could, if it lasted no longer than reasonably necessary, still be within the execution of the police officer's duty.[22] To be within the execution of his duty a police officer does not have to be doing something which he is compelled by law to do, provided he is doing something that is within his legal powers, *e.g.* to keep the peace.[23] It is also part of the duty of the police to take steps to apprehend the perpetrators of crimes which they have reason are likely to be committed. In *Green v. Moore*[24] the warning of a licensee that police officers were keeping watch on his premises with a view to securing evidence that he and his customers were breaking the licensing laws was held to be an obstruction of police officers in the execution of their duty.

It should finally be noted that there is no power to arrest without warrant for an offence under section 89 unless a breach of peace has occurred or is reasonably apprehended: *Wershof v. Commissioner of the Police for the Metropolis*.[25] In the case of assaulting or resisting a constable a breach of the peace is almost inevitably involved. In many cases of obstruction it is difficult to believe that there can be any real risk of a breach of the peace. It may also be possible to rely on the power to arrest under the "general arrest conditions" (section 25 of the PACE Act), but the police officer must first indicate to the suspect the nature of the offence he suspects has been committed.[26]

Bail

Article 5 and 6 of the E.C.H.R. are relevant to bail proceedings, and the courts and police now have a duty to interpret the Bail Act 1976, as far as possible, to comply with these rights. Article 5(3) provides that anyone who has been lawfully arrested is entitled to "trial within a reasonable time, or to release pending trial," this in effect creates a presumption in favour of granting bail[27]: where bail is denied it must be justified by relevant and sufficient reasons based on the facts in the particular case.[28] Section 56 of the Crime and Disorder Act 1998 amends section 25 of the Criminal Justice and Public Order Act 1994, which had restricted the right to bail: although it is still not certain that the law on bail complies with Art. 5(3).[29] 24–023

In many cases a person who has been arrested may be released on bail pending trial. Initially a justice of the peace on issuing a warrant for arrest may grant bail by endorsing a direction to that effect and subject to the terms of section 117 of the Magistrates' Courts Act 1980, as amended by the PACE Act, s.47(8). Section 24–024

[22] *Mepstead v. D.P.P.* [1996] Crim.L.R. 111.
[23] *Coffin v. Smith* [1980] 71 Cr.App.R. 221. DC, where the police were found to be acting within their duty when they attended a youth club to ensure that no disorder occurred during a social function.
[24] [1982] Q.B. 1044. DC. See too *Moore v. Green* [1983] 1 All E.R. 663. DC. Contrast *Bastable v. Little* [1907] 1 K.B. 59 described by Donaldson L.J. in *Green v. Moore* as "a very curious decision based upon a highly eccentric view of the facts."
[25] (1978) 68 Cr.App.R. 82.
[26] *Nicholas v. Parsonage* [1987] R.T.R. 199.
[27] *Neumeister v. Austria* (1968) 1 E.H.R.R. 91.
[28] *e.g.* that the accused could interfere with the course of justice, *Wemhoff v. Germany* (1968) 1 E.H.R.R. 155; or for the preservation of public order. *Letellier v. France* (1991) 14 E.H.R.R. 83.
[29] See Philip Leach, [1999] Crim.L.R. 300. Section 56 was enacted in anticipation of the decision of the E.Ct.H.R. in *Caballero v. United Kingdom* (2000) 30 E.H.R.R. 643. The Law Commission Paper, *Bail and the Human Rights Act 1998*, No. 157 (1999), suggests that further amendments to s.25 are required.

38 of the PACE Act[30] regulates the granting of bail by the custody officer where a person arrested without a warrant or arrested under a warrant not endorsed for bail, is charged with an offence.[31] Section 38 provides for release from detention, either on bail or without bail, unless one of the conditions in that section is not complied with.[32] for example the name and address of the person charged cannot be ascertained or the custody officer has reasonable grounds for believing that the detention of the person arrested is necessary for his own protection or to prevent him causing physical injury to any other person. In the case of a person arrested and charged with an imprisonable offence if the custody officer has reasonable grounds to believe that detention is necessary to prevent the arrestee from committing an offence he may authorise detention rather than release. In exercising his powers under section 38 the custody officer is to have regard to the same conditions as a court when deciding whether to withhold bail under the Bail Act 1976.[33] Periodic reviews of the detention of those arrested and charged, similar to those outlined earlier in respect of those arrested and detained are required (section 40). At the end of each period defined in the Act the person must be released on bail unless a further period of detention can be justified. If the custody officer grants police bail he may do so unconditionally or subject to conditions, *e.g.* that the defendant does not interfere with witnesses, or go to a named place.[34] The police may vary the conditions, and the defendant may apply to the Magistrates' Court to have the conditions removed or varied, but in doing so he runs that risk of having more onerous conditions imposed or a decision taken to withhold bail.[35]

Where a person charged appears before magistrates or the Crown Court in connection with criminal proceedings the Bail Act 1976 s.4 confers a general right to bail.[36] The main exceptions to the right of bail of a person accused or convicted of an imprisonable offence are if the court is satisfied "that there are substantial grounds for believing[37] that the defendant if released on bail would: (a) fail to surrender to custody[38]; (b) commit an offence while on bail, or (c) interfere with witnesses."[39] Sections 25 and 26 of the CJPO Act 1994 restrict a court's power to remand on bail two categories of defendant: (i) those charged with murder, manslaughter, rape or attempted rape and who already have a conviction for such an offence; (ii) those charged with an indictable offence which it appears to the court was committed when he was on bail from an

[30] As amended by the CJPO Act 1994.

[31] For the requirements where the custody officer decides that he does not have sufficient evidence to charge the person arrested see *ante* para. 24–012.

[32] There are special rules for arrested juveniles, PACE Act s.38(6), as amended by CJPO Act 1994.

[33] See below.

[34] See s.27 of the CJPO Act 1994, amending the Bail Act 1976. Early research suggests that although this provision has been used, there has also been a significant reduction in unconditional bail: J. Raine and M. Wilson, "Police Bail with Conditions", (1997) 37 B.J. Crim. 593.

[35] s.43B of the Magistrates' Court 1980 as amended by CJPO Act 1994.

[36] A person charged with treason can only be granted bail by order of a judge of the High Court or the Secretary of State, Magistrates' Court Act 1980, s.41.

[37] The onus is on the prosecution to establish those grounds, but only on the balance of probabilities: *Governor of Canterbury Prison, ex p. Craig* [1991] 2 Q.B. 195; this could be contrary to the E.C.H.R.

[38] The E.C.H.R. has been interpreted to require the release on bail of an accused who can provide sufficient surety to ensure his appearance at court: *Neumeister v. Austria* A/8 (1968) 1 E.H.R.R. 55, *Letellier v. France* A/207 (1991) 14 E.H.R.R. 83.

[39] Bail Act 1976, Sched. 1, Pt I, as amended.

existing charge. In the case of the first of these exceptions the original wording which gave the court no discretion in such cases has been altered to allow a court to grant bail if satisfied that "there are exceptional circumstances which justify it." In deciding whether or not to refuse bail the court is to have regard to for *e.g.* the nature and seriousness of the offence, the character, antecedents associations and community ties of the defendant.[40] A Magistrates' Court or Crown Court must give reasons for refusing bail or imposing conditions on bail (section 5(3)), the court must also give reasons if, despite representations to the contrary by the prosecution, it grants bail.[41] To meet the requirements of procedural fairness in Article 6 E.C.H.R. reasons for refusing bail will have to be detailed. A person refused bail may apply to the Crown Court or to the High Court to a judge in chambers, and he must be informed of his right. There is no right for an accused to make repeated bail applications to magistrates where bail has been refused. However, the court has a duty to consider bail in relation to every person with the presumptive right to bail who has been remanded in custody, whenever they appear in court. This appears to allow a defendant at his first hearing after the initial hearing at which bail was refused, to put forward arguments that had been used before, as well as new arguments.[42] The Bail (Amendment) Act 1993, s.1 gives the prosecution the right to appeal to the Crown Court against a decision by the magistrates to grant bail, but only with respect to relatively serious offences.[43] Section 5B of the Bail Act[44] allows the prosecution to apply to court to have the granting of bail or the conditions imposed on bail reconsidered in the light of new information which casts doubt on the earlier decision. This power is restricted to offences which are indictable or triable either way. Bail may also be granted by the higher courts in the course of their proceedings or pending an appeal. It is a criminal offence to fail without reasonable cause to surrender to custody at the time and place appointed (section 6).

Bail can be fixed at any amount, but the Bill of Rights 1688 provides that the bail shall not be "excessive." In such cases as theft, fraud or smuggling, the amount of money involved may be very large, with a corresponding danger that the accused may leave the country. If the accused objects to the amount of bail he may appeal to a judge, or in appropriate cases may apply for a writ of habeas corpus.[45] 2-4—025

The exercise by justices of their power to grant bail is subject to judicial review by the High Court on the grounds discussed in Chapter 32. In particular they must consider each application on its merits and not in the light of a pre-determined policy. In *R. v. Mansfield Justices, ex p. Sharkey*[46] certiorari was sought to quash grants of bail, made subject to the condition that the applicants.

[40] s.9, Sched. 1, Pt I.

[41] The requirement to give reasons was introduced in the Criminal Justice Act, s.153 in respect of charges of murder, manslaughter and rape. The CJP Act 2001, s.129, requires reasons to be given, whatever the charge.

[42] The actual meaning of Part IIA of Sched. 1 of the Bail Act (added by the Criminal Justice Act 1988) is unclear.

[43] Guidance issued to the C.P.S. suggests that this power will not be used very frequently.

[44] As inserted by CJPO Act 1994.

[45] *Ex p. Thomas* [1956] Crim.L.R. 119, DC. *cf. R. v. Governor of Brixton Prison, ex p. Goswami, The Times*, December 22, 1966; in *Neumeister v. Austria (No. 1)* A/8 (1968 E.H.R.R. the E.Ct.H.R. stated that the amount of bail had to be set by reference to the accused and his assets, and not by reference to the amount of loss imputed to him.

[46] [1985] Q.B. 613, DC.

who had been charged with public order offences and obstructing police officers, did not visit any premises for the purposes of picketing or demonstrating in connection with the 1984–85 miners' strike, other than peacefully to picket at their own places of work. The Divisional Court held that provided the magistrates perceived a real and not a fanciful risk of an offence being committed, they were entitled to impose conditions on bail. In the light of their knowledge of local conditions, outlined graphically in Lord Lane L.C.J.'s judgment, they were justified in concluding that there was such a real risk.[47]

Binding over

24–026 The power of magistrates to make a binding over order is a form of preventive justice, that is a power to subject to restriction someone who has not necessarily committed a criminal offence. A binding-over order requires that a person should enter into a recognisance (a bond whereby he binds himself under a penalty) with or without sureties (other persons who will vouch for him under penalty) to keep the peace or to be of good behaviour or both for a certain period. If that person commits a breach of the order, he and his sureties are liable to forfeit the whole or part of the sums in which they are bound. There is no legal limit to the amount of the recognisances or of the sureties, or to the period of the order (which is commonly twelve months). If the person concerned refuses to enter into a recognisance, or if he is unwilling or unable to find satisfactory sureties, the magistrates may commit him to prison for not more than six months or until he sooner complies with the order.[48] The power to bind over to keep the peace is probably of common law origin, and may have been exercised by the Conservators of the Peace. The power to bind over to be of good behaviour towards the Queen and her people is ascribed to the Justices of the Peace Act 1361.

Under the Magistrates' Courts Act 1980, s.115, the power on the complaint of any person to bind over another person to keep the peace or to be of good behaviour towards the complainant, must be exercised on complaint.

24–027 The power of the courts to bind someone over to keep the peace has been considered by the Law Commission and the E.Ct.H.R. The Law Commission considered the power unreasonable and vague and doubted whether it complied with the E.C.H.R.[49] However in *Steel v. United Kingdom*[50] the E.C.t.H.R. upheld the general compatibility of the powers to bind over with Articles 5 and 10 of the E.C.H.R. However in the case of three of the applicants their actions in handing out leaflets and holding a banner were "entirely peaceful", in consequence the police had insufficient grounds for fearing a breach of the peace, and the restrictions placed on their freedom of expression (Article 10) were disproportionate to the prevention of disorder. In deciding whether to make a binding over order magistrates will now have to have regard to the right of freedom of

[47] For a critical note see A. L. Newbold, "Picketing Miners and the Courts", [1985] P.L. 30.

[48] In *Lansbury v. Riley* [1914] 3 K.B. 229, DC, George Lansbury M.P., who incited suffragettes to militant action, was bound over to be of good behaviour in the sum of £1,000 with two sureties of £500 each; as he was unable or unwilling to find the sureties he was committed to prison for three months. It remains to be seen how long a period of detention will be allowed before it would be regarded as "disproportionate" to the danger being averted (Art. 10(2) E.C.H.R.). In *Steel v. United Kingdom* (1998) 28 E.H.R.R. 603, it was only by a slender majority that a period of imprisonment of 28 days was held not to be disproportionate.

[49] *Criminal Law: Binding Over: the Issues* (1994) Law.Com. No. 222.

[50] *op. cit.*

expression when taking decisions about breach of the peace. A further restriction on the powers of a court to bind someone over was imposed by the E.Ct.H.R. in *Hashman and Harrup v. United Kingdom*.[51] The behaviour of the defendants was found by Crown Court not to amount to a breach of the peace, but to be *contra bonos mores*, that is behaviour seen as "wrong rather than right in the judgment of the majority of contemporary fellow citizens"; the defendants were accordingly bound over. The E.Ct.H.R. found that the concept of *contra bonos mores* was inadequately defined for the purposes of Article 10(2) and in consequence the decision to bind the defendants over was contrary to the E.C.H.R. It is unlikely that courts will in future use this power.

The Court has a duty to warn a complainant or witness before binding him over, giving him an opportunity to say why he should not be bound over. A binding-over order is not a conviction and therefore at common law there was no appeal, but a statutory right of appeal was given in 1956.[52]

Other types of deprivation of liberty of the person

Detention on medical grounds

24–028 An exception to the right to liberty and security of the person in Article 5 of the E.C.H.R. is where, in accordance with a procedure prescribed by law the detention is "for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants" (Article 5(e)). These people are those who "have to be considered as occasionally dangerous for public safety . . . (and in) their own interests."[53] The test of proportionality would seem to require a high standard of justification on the basis of something more than status alone, before such people can be compulsorily detained. In the case of those of unsound mind, objective medical evidence showing a medical disorder of a kind warranting compulsory confinement is required.[54] The conditions of confinement and the provision of suitable treatment are governed by Article 3 E.C.H.R.

Various statutes authorise the detention of individuals on medical grounds whether in their own interests or those of the community at large. The National Assistance Act 1948, s.47 empowers a court to order, on the report of a designated medical officer, the compulsory removal to hospital or other place of persons who (a) are suffering from grave chronic disease or being aged, infirm or physically incapacitated are living in insanitary conditions, and (b) are unable to devote to themselves and are not receiving from other persons proper care and attention.

24–029 The Public Health (Control of Disease) Act 1984 provides for the compulsory removal to, and detention in, hospital of any person suffering from a notifiable disease (that is cholera, plague, relapsing fever, small-pox and typhus—section 10) by order of a justice of the peace (sections 37 and 38). The Secretary of State (by section 13) and local authorities (by section 16) have power to extend the compulsory detention provisions of the Act to other diseases.

[51] (2000) 30 E.H.R.R. 241.
[52] Magistrates' Courts (Appeals from Binding-Over Orders) Act 1956.
[53] *Guzzardi v. Italy* (1980) 13 E.H.R.R. 333
[54] *Winterwerp v. The Netherlands* [1979] 2 E.H.R.R. 387.

The provisions which occasion most controversy, however, are those relating to the detention[55] and treatment of people suffering from mental ill-health currently to be found in the Mental Health Act 1983.[56] These affect large numbers of individuals; involve, in many cases, prolonged periods of incarceration and the administration of treatments, to which the recipients may not have consented, which in some cases may have the most far reaching and irreversible mental and physical effects, without any guarantee of achieving their desired aims. The patient may, moreover, dispute that he or she is mentally ill or that compulsory detention or treatment is necessary. The Mental Health Act 1983 authorises admission for assessment and detention for treatment, in a mental hospital, against the wishes of a patient, where two registered medical practitioners so recommend (sections 2 and 3).

An accused person may be remanded to a hospital by order of the Crown Court or a magistrates' court for a report on his mental condition (section 35). The Crown Court, on the evidence of two registered medical practitioners, may remand an accused person to hospital for treatment (section 36). On conviction the Crown Court and magistrates' courts have power to commit the prisoner to a hospital (section 38) and in the case of the Crown Court to make a restriction order which prevents the prisoner (or patient) from being released except after an order of a Mental Health Review Tribunal or the Secretary of State (section 41). A restriction order can only be made where it appears to the Court that it is necessary for the protection of the public from serious harm in the light of the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large. In the case of a prisoner serving a sentence of imprisonment the Secretary of State may on the advice of two registered medical practitioners direct that he be removed to a hospital (section 47).

24–030 A patient who believes that he is entitled to be discharged from a hospital where he is being detained may apply to a Mental Health Review Tribunal which has powers to order conditional or unconditional discharges of patients (sections 73 and 74 (restricted patients)).[57] The right of persons detained under the Mental Health Act 1983 to bring proceedings in relation to acts done under the legislation is curtailed by section 139. Subsection (1) provides that no one shall be liable for acts done under the Act on the ground of want of jurisdiction or any other ground unless the act was done in bad faith or without reasonable care. Any civil proceedings in relation to acts done under the mental health legislation require the leave of the High Court and criminal proceedings require the consent

[55] In *R. v. Broadmoor Special Hospital Authority, ex p. S and others*, DC, *The Times* November 5, 1997, it was accepted that a general power to conduct routine and random searches without consent of patients detained under the 1983 Act, was implied by the duty to maintain a safe and therapeutic environment. The precise policy had to satisfy the *Wednesbury* reasonableness test in each institution; it will also now have to satisfy in particular Article 5 E.C.H.R.

[56] Brenda M. Hoggett, *Mental Health Law* (4th ed., 1996). See *Reform of the Mental Health Act 1983*, Cm. 4480 (2000).

[57] The continued detention of a person found to be no longer suffering from mental illness, pending placement in a hostel, was held in *Johnson v. United Kingdom* (1999) 27 E.H.R.R. 296 to be a breach of Art. 5 E.C.H.R. See *R. (H) v. Mental Health Review Tribunal, North and East London Division* [2001] H.R.L.R. 752, where it was held that to require a patient to prove that he should no longer be detained was incompatible with Art. 5. A remedial order under the HRA (see para. 22–050) was made.

of the Director of Public Prosecutions except in the case of proceedings against the Secretary of State or a health authority.

The legality of detention under these sections is open to challenge by an application for a writ of habeas corpus or by an application for judicial review.

Detention following conviction[58]

"A convicted prisoner . . . retains all civil rights which are not taken away expressly or by necessary implication": *Raymond v. Honey*.[59] Examples of rights being taken away expressly are the right to vote (Representation of the People Act 1983, s.3(1)), disqualification of those imprisoned indefinitely or for more that one year from membership of the House of Commons (Representation of the People Act 1981, s.1), and those with recent or serious criminal convictions are disqualification from jury service (Juries Act 1974, s.1, Sched. 1, Part II). **24–031**

A prisoner may be released before the end of the sentence laid down by the court which convicted him if the requirements of the Criminal Justice Act 1991, which provides arrangements for Parole Boards and the early release of prisoners, are satisfied.[60]

The right of which a prisoner is most obviously deprived is that of freedom of movement. Once sentenced he is liable to be detained in prison until the expiration of his sentence, subject to the control of the Secretary of State within the limits laid down by the Prison Act 1952 and the Prison Rules made under that Act. Section 12 gives the Secretary wide powers to commit prisoners to, and remove them from, such prisons as he may direct. Attempts to question the Home Secretary's wide powers of control with regard to the place of detention initially met with little success. An action claiming that the conditions of detention constituted false imprisonment failed in *Williams v. Home Office (No. 2)*[61] where Tudor Evans J. and, on appeal, Brightman L.J. expressed the view that, even if the detention were in breach of Prison Rules that would not in itself give rise to a cause of action. In *R. v. Secretary of State for the Home Department, ex p. McAvoy*,[62] Webster J. refused to interfere with a decision of the Home Secretary to remove the applicant, who was detained in custody pending trial, from one prison to another. The learned judge noted that although the power granted under section 12 was very wide, decisions under the section were "reviewable in principle" and the court could interfere if the Secretary of State could be shown to have misdirected himself in law. In *R. v. Deputy Governor of Parkhurst Prison ex p. Hague*[63] it was accepted that operational or managerial decisions affecting the transfer and segregation of prisoners were amenable to judicial review. It was also accepted that the broad terms of section 12 would always provide a complete answer to any claim for false imprisonment against the governor or anyone acting on his authority.

[58] See Livingstone and Owen, *Prison Law* (2nd ed., 1998).

[59] [1983] A.C. 1, 10, *per* Lord Wilberforce.

[60] The Crime (Sentences) Act 1997 makes changes to the early release provisions of the 1991 Act, but only a few of its provisions (those on prisoners sentenced to life imprisonment) have been brought into effect.

[61] [1981] 1 All E.R. 1211; [1982] 2 All E.R. 564, CA.

[62] [1984] 1 W.L.R. 1408.

[63] [1992] 1 A.C. 58, HL, 102, CA; see also *R. v. Home Secretary, ex p. Leech* [1994] Q.B. 198, CA.

24–032 Section 47 authorises the Secretary of State to make rules for "the classification, treatment, employment, discipline and control of" prisoners. The validity of such rules is open to challenge on the ground that they are *ultra vires*, *i.e.* beyond the limits of the power delegated to the minister by Parliament.[94] In *R. v. Secretary of State for the Home Department, ex p. Anderson*[95] a restriction on visits by a legal adviser to a prisoner contemplating legal proceedings in respect of complaints about treatment in prison which he had not also made through the internal prison procedure was held to be *ultra vires* because it conflicted with the right of unimpeded access to the courts, a right so fundamental that it could only be taken away by express language. As a result of this decision[96] and several decisions by the E.Ct.H.R.[97] the rules on prisoners' correspondence, lawyers' visits and written access to the courts were modified. In *R. v. Secretary of State for the Home Department ex p. Simms*[98] the House of Lords held that the Home Secretary's policy which indiscriminately banned oral interviews between prisoners and journalists was unlawful in so far as it undermined a prisoner's right of free speech. The Human Rights Act 1998 will enable the courts to consider a new ground of challenge to prison rules and administrative orders: incompatibility with the E.C.H.R.

The above are examples of how a change in judicial attitudes in the last 20 years,[99] both in the United Kingdom and in Strasburg, has had an effect on prison life. Further examples can be seen in the area of prison discipline[70] and the procedures for deciding on the release of mandatory and discretionary life sentence prisoners.[71] In other areas such as administration and prison management the courts have not intervened,[72] but changes have been made as a result of reports such as that by Lord Woolf. One of these was the establishment of the office of a Prisons Ombudsman in 1994. This officer is independent of the Prison Service and reports directly to the Home Secretary. His function is to investigate

[94] *post*, Chap. 32.

[95] [1984] Q.B. 778, DC.

[96] See too *R. v. Secretary of State for the Home Department, ex p. Leech* [1994] Q.B. 198, C.A.

[97] *Golder v. UK* (1975) 1 E.H.R.R. 524; *Silver v. UK* (1980) 3 E.H.R.R. 475; *Campbell and Fell v. UK* (1985) 7 E.H.R.R. 165; [1984] P.L. 341; *Campbell v. UK* (1993) 15 E.H.R.R. 137.

[98] [2000] 2 A.C. 115. See also *R. v. Secretary of State for the Home Department, ex p. Daley* [2001] 2 W.L.R 1622, where the House of Lords held that a policy of examining prisoners' correspondence was in breach of Art. 8.

[99] Richardson and Sunkin, "Judicial Review: Questions of Impact" [1996] P.L. 79.

[70] In *R. v. Board of Visitors of Hull Prison, ex p. St Germain* [1979] Q.B. 425, C.A. the Court of Appeal allowed judicial review of the disciplinary functions of the Board of Visitors (abolished in 1992). In *Leech v. Deputy Governor, Parkhurst Prison* [1988] 1 A.C. 533 the House of Lords accepted that judicial review could also apply to governor's disciplinary hearings. Partly as a consequence of these decisions, procedural changes were made to disciplinary hearings. The Woolf Report, *Prison Disturbances: April 1990*, Cm. 1456 (1991) resulted in further changes to prison discipline.

[71] *Weeks v. United Kingdom* (1988) 10 E.H.R.R. 293; *Thynne, Wilson and Gunnell v. United Kingdom* (1991) 13 E.H.R.R. 666; *Hussain v. United Kingdom (1996)* (1996) 22 E.H.R.R. 1. These decisions on the treatment of those subjects to a discretionary life sentence resulted in the Criminal Justice Act 1991. Decision of English courts in *R. v. Home Secretary, ex p. Doody and others* [1993] 1 All E.R. 577; *R. v. Home Secretary ex p. Pierson* [1997] 3 All E.R. 577; and *R. v. Home Secretary ex p. Thompson and Venables* [1997] 2 All E.R. 97 have had a similar result for those subject to a mandatory life sentence; see Crime (Sentences) Act 1997.

[72] It may be in the light of the Human Rights Act that judges will have to rethink this and be willing to undertake "a more searching judicial examination of the validity of prison regulations and practices." Livingstone and Owen, *Prison Law*, at p. 469.

complaints from prisoners and make recommendations to the Director General of the Prison Service.

Detention under the Immigration Act 1971[73]

The majority of those so detained are held in Immigration Detention Centres, but a substantial minority, mainly asylum seekers are in prison service establishments. The powers to detain apply both on arrival in the United Kingdom and after a person has spent some time there. The 1971 Act does not provide any time limit for detention, but it was said in *R. v. Governor of Durham Prison, ex p. Singh*[74] to be limited to the period reasonably necessary for the purpose for which it is given. Prolonged detention could be in breach of Article 5(1)(f) of which the E.C.H.R. The procedure for review of detention is complex, and it has been doubted whether the law conforms with Article 5(4) of the E.C.H.R.[75] **24–033**

Writ of habeas corpus[76]

The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. In origin this writ, which is found in Edward I's reign, was merely a command by the court to someone to bring before itself persons whose presence was necessary to some judicial proceedings. In other words, it was "originally intended not to get people out of prison but to put them in it."[77] Habeas corpus[78] was a "prerogative" writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. In the form habeas corpus *ad subjiciendum* (the form now commonly used)[79] it came to be available, under certain conditions, to private individuals. In the seventeenth century members of the parliamentary opposition imprisoned by command of the King availed themselves of the writ to seek release (*e.g.* Darnel's Case),[80] and it is from this application that originated its constitutional importance as the classic common law guarantee of personal liberty. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim to freedom has been asserted frequently by judges and writers.[81] Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the courts to examine the legality of decisions made in reliance on wide-ranging statutory provisions.[82] It has been **24–034**

[73] As amended by the Immigration and Asylum Act 1999.

[74] [1984] 1 W.L.R. 704.

[75] Livingstone and Owen, *op. cit.* at p. 442. This remains the case even after the reform of the appeals system by Part IV of the Immigration and Asylum Act 1999.

[76] See R. J. Sharpe, *The Law of Habeas Corpus* (Oxford, 1976). William F. Duker, *A Constitutional History of Habeas Corpus* (1982); D. Clark and G. McCoy, *The Most Fundamental Right* (2000).

[77] Jenks, "The Story of Habeas Corpus," (1902) 18 L.Q.R. 64, 65.

[78] Habeas corpus = have (*i.e.* bring) the body [of X before the court].

[79] For a decision on the form *ad respondendum* see *R. v. Governor of Brixton Prison, ex p. Walsh* [1985] A.C. 154, HL.

[80] (1627) *The Five Knights' Case*, 3 St.Tr. 1; Holdsworth, *History of English Law*, Vol. VI, pp. 32–37. The Petition of Right 1627 declared that the orders of the Sovereign were not to be sufficient justification for the imprisonment of his subjects.

[81] *Greene v. Secretary of State for Home Affairs* [1942] A.C. 284, 302 *per* Lord Wright, quoted in *Phillip v. D.P.P. of Trinidad and Tobago* [1992] 1 A.C. 545 at PC 558 *per* Lord Ackner; Dicey, *The Law and the Constitution*, p. 199. "Probably the most sacred cow in the British Constitution": *Linnet v. Coles* [1987] Q.B. 555 at 561 *per* Lawton L.J.

[82] De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed. 1995) p. 248. For the future, the courts' powers of intervention may be increased by reliance on Art. 5 of the E.C.H.R

suggested that the need for the "blunter remedy" of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction.[83] Procedural reform of the writ may be appropriate[84] but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds[85]: habeas corpus is a writ of right, granted *ex debito justitiae*.[86]

Habeas corpus is available against any person who is suspected of detaining another unlawfully, and not merely against prison governors, the police or other public officers whose duties normally include arrest and detention. Habeas corpus was used in the eighteenth and early nineteenth centuries to set free slaves brought into this country by their owners, or who had escaped for protection to British warships, during the period when slavery was still lawful in parts of the British Empire and in other countries.[87] Habeas corpus is available to question detention by the police,[88] detention pending deportation[89] and for breach of immigration regulations,[90] and also during proceedings under legislation relating to extradition[91] and fugitive offenders.[92] It is also available to challenge the legality of detention under Mental Health legislation.[93] Two areas of uncertainty are detention by order of the House of Commons,[94] and decisions of military courts in times of martial law.[95]

For constitutional purposes the special significance of this remedy is that it is available against Crown servants acting in the name of the Crown.[96] Thus in *Home Secretary v. O'Brien*[97] the writ was issued against the Home Secretary.

[83] *R. v. Oldham Justices ex p. Cawley* [1997] Q.B. 1 at 16 DC *per* Simon Brown L.J. See too *R. v. Secretary of State for the Home Department ex p. Cheblak* [1991] 1 W.L.R. 890, CA; *R. v. Secretary of State for the Home Department ex p. Muboyayi* [1992] Q.B. 244; A. P. Le Sueur, "Should the Writ of Habeas Corpus be Abolished?" [1992] P.L. 13; M. Shrimpton, "In Defence of Habeas Corpus" [1993] P.L. 24; Simon Brown L.J., "Habeas Corpus—A New Chapter" [2000] P.L. 31.

[84] Law. Com. No. 226 (1994) Part XI.

[85] See Chap. 32.

[86] *Phillip v. D.P.P. of Trinidad and Tobago* [1992] 1 A.C. 545, PC.

[87] *Somersett v. Steuart* (1772) 20 St.Tr. 1 (Lord Mansfield C.J.); Somersett was later appointed wharfmaster of the new settlement of Sierra Leone (E. Fiddes in (1934) 50 L.Q.R. 1, 459); *Forbes v. Cochrane* (1824) 2 B. & C. 448; *The Slave Grace* (1827) 2 Hag.Adm. 94 (Lord Stowell); *cf. Hottentot Venus' Case* (1810) 13 East 195.

[88] *R. v. Holmes, ex p. Sherman* [1981] 2 All E.R. 612.

[89] *R. v. Home Secretary, ex p. Soblen* [1963] 1 Q.B. 829, CA; *R. v. Durham Prison Governor, ex p. Singh*, [1984] 1 W.L.R. 704; *R. v. Secretary of State for the Home Department ex p. Cheblak* [191] 1 W.L.R. 890.

[90] *R. v. Governor of Brixton Prison, ex p. Ahsan* [1969] 2 Q.B. 222, DC; *R. v. Governor of Richmond Remand Centre, ex p. Ashgar* [1971] 1 W.L.R. 129, DC; *R. v. Governor of Risley Remand Centre, ex p. Hassan* [1976] 1 W.L.R. 971, DC.

[91] *Re Castioni* [1891] 1 Q.B. 149; *R. v. Governor of Brixton Prison, ex p. Cabon-Waterfield* [1960] 2 Q.B. 498, DC; *Re Schmidt* [1995] 1 A.C. 339, HL.

[92] *R. v. Brixton Prison Governor, ex p. Naranjan Singh* [1962] 1 Q.B. 211, DC; *R. v. Brixton Prison Governor, ex p. Sadri* [1962] 1 W.L.R. 1304, DC; *Zacharia v. Republic of Cyprus* [1963] A.C. 634, HL; *R. v. Governor of Pentonville Prison ex p. Osman (No. 3)* [1990] 1 All E.R. 999.

[93] *R. v. Board of Control, ex p. Rutty* [1956] 2 Q.B. 109; *R. v. Managers of South Western Hospital ex p. M* [1993] Q.B. 683; *Re S.-C. (Mental Patient: Habeas Corpus)* [1996] Q.B. 599, CA; *R. v. Bournwood Community and Mental Health N.H.S. Trust ex p. L.* [1999] 1 A.C. 458, HL.

[94] *ante* Chap. 13.

[95] *ante*, para. 19–033.

[96] *cf.* Mandamus which is not available against the Crown or a servant of the Crown to enforce a duty owed to the Crown: *post* para. 32–008; injunction and specific performance not available: Crown Proceedings Act 1947, s.21(1); *post*, para. 33–017.

[97] [1923] A.C. 603, HL.

who had ordered the detention of an Irishman in England during the Irish "troubles."

Habeas corpus cannot be granted to a person who is serving a sentence passed by a court of competent jurisdiction,[98] unless, probably, the Divisional Court is satisfied that the prisoner is being detained after the term of his sentence has expired.[99] The Divisional Court does not sit as a court of appeal on an application for habeas corpus, and it will not rehear matters decided by the judicial authority,[1] but it may consider whether that judicial authority had any evidence which would justify its assumption of jurisdiction.[2]

Habeas Corpus Act 1679

24–035 The passing of this Act, followed the case of Jenkes[3] who, after being arrested for delivering a speech urging the summoning of Parliament, was kept in prison for several months without bail. The Act applied only to persons imprisoned (not after conviction by a court) for "criminal or supposed criminal matters". If the applicant showed that there was any ground for supposing that the prisoner was wrongfully imprisoned, the writ would be issued requiring the person detaining the prisoner to bring him before the court and to inform it of the grounds of his detention. If it is appeared that the prisoner was confined without lawful authority, the court would release him; otherwise it would release him on bail, or make provision for his speedy trial.

The Habeas Corpus Act 1679 imposed heavy penalties for not making due returns to the writ, not delivering to the prisoner promptly a true copy of the warrant of commitment, or shifting the custody of the prisoner from one place to another, or sending prisoners out of England. The obligation to hear applications for habeas corpus was laid on the Lord Chancellor and judges of the King's Bench, Common Pleas, Exchequer and Chancery. It appears that under section 9, judges of the Supreme Court are still liable to a penalty of £500 for wrongfully refusing to issue a writ of habeas corpus in the case of a person in custody on a criminal charge, but it is uncertain whether this applies only in vacation.

Habeas Corpus Act 1816

24–036 This Act provided that the Act of 1679 (with certain improvements) should extend to detention otherwise than on a charge of crime.[4] The judges were required, on complaint made to them by or on behalf of the person in custody showing a prima facie ground for the complaint, to issue a writ of habeas corpus *ad subjiciendum*; and in cases to which the Act applied they might inquire into the truth of the return to the writ. Any person disobeying a writ sued out under this Act is guilty of contempt of court and becomes liable to imprisonment.

[98] *Re Wring, Re Cook* (Practice Note) [1960] 1 W.L.R. 138, DC. For a recent illustration see *R. v. Oldham Justices ex p. Cawley* [1997] Q.B. 1, DC.

[99] *Re Featherstone* (1953) 37 Cr.App.R. 146, *per* Lord Goddard C.J.

[1] *Ex p. Hinds* [1961] 1 W.L.R. 325, DC; affirmed by the House of Lords in *Re Hinds, The Times*, February 15, 1961.

[2] *R. v. Board of Control, ex p. Rutty* [1956] 2 Q.B. 109.

[3] (1676) 6 St.Tr. 1190. For an account of the passing of this Act, see Holdsworth, *History of English Law*, Vol. IX, pp. 112–117. The Bill is said by Bishop Burnett to have been saved at one stage by a teller counting one fat peer as ten.

[4] Except in the case of persons imprisoned for debt or on process in a civil action. These kinds of imprisonment (except for certain debts due to the Crown and judgment debts where the debtor has had the money to pay) were abolished by the Debtors Act 1869.

Lord Scarman, in *R. v. Home Secretary, ex p. Khawaja*[5] referred to "The great statute of 1816" which, he said, was "the beginning of the modern jurisprudence the effect of which" is that the courts will determine for themselves the existence of the facts which the executive cites as justifying its decision, for example that a person detained is an illegal immigrant.

Modern procedure on habeas corpus

24–037 Habeas corpus is a writ of right, but not of course, that is a prima facie case must be shown before it will issue. Otherwise as Lord Goddard C.J. said, all the prisoners of England could delay or even defeat justice.[6] It will not be refused *merely* because another remedy is available.[7] No application will be heard in person save for some exceptional reason.[8] The procedure is governed by schedule 1 of the Civil Procedure Rules which gives continuing effect to the provisions of the former Order 54 of the Rules of the Supreme Court.

Proceedings in criminal causes or matters are generally heard by a Divisional Court of the Queen's Bench Division; in civil cases by a single judge. Exceptionally, application may be made to a single judge of any division in court. In vacation, or at any time when no judge is sitting in court (*e.g.* at weekends or at night), application may be made to a judge sitting otherwise than in court, *e.g.* in vacation to a judge in chambers; at other times in an emergency, anywhere.[9] Application is to be *ex parte* (*i.e.* without notice to the other side) in the first instance, and on affidavit. The affidavit is made by the person restrained, or by someone on his behalf if he is incapable, setting out the nature of the restraint. The application is usually adjourned in order that notice may be given to the respondent. On the hearing of the application the court or judge may order that the person restrained be released. Such order is a sufficient warrant for his release, so that there is no need to issue the actual writ.

There is still power to order the immediate issue of the writ,[10] though this is rarely done. Where the writ is issued it is accompanied by a notice that in default of obedience proceedings for contempt of court against the party disobeying will be taken. The return to the writ must contain a copy of all the causes of the prisoner's detention. Argument then takes place on the return to the writ.

The Administration of Justice Act 1960, s.14, provides that on a criminal application for habeas corpus an order for release may be refused only by a Divisional Court of the Queen's Bench Division, even where the original application is made to a single judge, *e.g.* in vacation.

Habeas corpus is a remedy designed to facilitate the release of persons detained unlawfully, not to punish the person detaining and it is not, therefore,

[5] [1984] A.C. 74, HL. See *R. v. Brixton Prison Governor, ex p. Ahsan* [1969] 2 Q.B. 222, DC; *Re Shahid Iqbal* [1979] Q.B. 264, DC; [1979] 1 W.L.R. 425, CA; *Re Quigley* [1983] N.I. 245.

[6] *Re Corke* [1954] 1 W.L.R. 899.

[7] *Quigley v. Chief Constable, Royal Ulster Constabulary* [1983] N.I. 238, 239, *per* Lord Lowry, L.C.J. Dicta suggesting a discretion in the court to refuse the writ are to be found in *Re Keenan* [1972] 1 Q.B. 533, CA.

[8] *Re Greene* (1941) 57 T.L.R. 533. For informal applications by prisoners, see *Re Wring, Re Cook* [1960] 1 All E.R. 536 *per* Lord Parker C.J.; C. Drewry, S. Hughes and A. Shaw, "Informal Applications for the Writ of Habeas Corpus" [1977] P.L. 149.

[9] In the *Soblen* case, application was made to the chambers judge at his home in the middle of the night, and the order signed on the dining-room table: *R. v. Home Secretary, ex p. Soblen, The Times*, July 27, 1962.

[10] Even on an *ex parte* application.

issued after the detention complained of has come to an end: *Barnardo v. Ford*.[11]

Usually the question at issue is the legality of an admitted detention but the writ is available where it is the fact of detention that is in dispute: *Quigley v. Chief Constable, Royal Ulster Constabulary*.[12]

Successive applications

24–038 Before 1876 an application for habeas corpus could be made to each of the Courts of Queen's Bench, Common Pleas, Exchequer and Chancery.[13] After the Judicature Acts 1873–75 had amalgamated these courts into one High Court, there were dicta in the House of Lords and the Privy Council to the effect that Parliament could not have intended impliedly to restrict the rights of the subject in the vital matter of personal liberty, and that there was therefore a right to apply not only to each Division of the High Court but to each High Court judge individually.[14] In *Re Hastings*,[15] however, a series of decisions showed that two differently constituted Queen's Bench Divisional Courts, as well as the Chancery Division, were all parts of the same High Court for this as for other purposes, and therefore the decision of any one Division was the decision of the whole court.

The Administration of Justice Act 1960, s.14, now provides that no second criminal or civil application may be made on the same grounds, whether to the same or any other court or judge, unless fresh evidence is adduced[16]; and no such application may be made in any case to the Lord Chancellor. Whether successive applications may be made in vacation is still not certain.[17]

Appeal

24–039 An incidental effect of the Judicature Acts 1873–75 was that in non-criminal matters the persons detained might appeal to the Court of Appeal and thence to the House of Lords against a refusal to issue the writ or to discharge him under the writ.[18] On the other hand, a prisoner had no appeal against refusal to issue the writ in a criminal cause or matter, *i.e.* a matter of which the direct outcome might be his trial and possible punishment for an illegal act by a court claiming jurisdiction in that regard (*Amand v. Home Secretary and Minister of Defence of the Royal Netherlands Government*[19]). The person detaining had no appeal

[11] [1892] A.C. 326, HL; *Re Nicola Raine, The Times*, May 5, 1982, DC.

[12] [1983] N.I. 238. See subsequently, *Re Quigley* [1983] N.I. 245. (Was Mrs Quigley detained at a secret address against her will by the R.U.C., or was she willingly living under police protection to avoid intimidation by terrorists).

[13] Lord Goddard, "A Note on Habeas Corpus", (1949) 65 L.Q.R. 30; *cf.* D. M. Gordon, "The Unruly Writ of Habeas Corpus", (1963) 26 M.L.R. 520.

[14] *Cox v. Hakes* (1890) 15 App.Cas. 506, HL, *per* Lord Halsbury L.C.; *Eshugbayi (Eleko) v. Government of Nigeria (Officer Administering)* [1928] A.C. 459, PC, *per* Lord Hailsham L.C.; and see [1931] A.C. 662; *Home Secretary v. O'Brien* [1923] A.C. 603, HL, *per* Lord Birkenhead L.C. These dicta were disapproved *obiter* by the Irish Supreme Court in *The State (Dowling) v. Kingston (No. 2)* [1937] I.R. 699; see R. F. V. Heuston, "Habeas Corpus Procedure" (1950) 66 L.Q.R. 79.

[15] *Re Hastings (No. 1)* [1958] 1 W.L.R. 372, DC; *(No. 2)* [1959] 1 Q.B. 358, DC; *(No. 3)* [1959] 1 All E.R. 698, DC; [1959] Ch. 368, CA.

[16] The ingenuity of Mr Osman, detained under the Fugitive Offenders Act 1967, enabled him nonetheless to bring nine applications for the writ.

[17] Heuston, *Essays in Constitutional Law* (2nd ed. 1964), p. 127.

[18] *ex p. Woodhall* (1888) 20 Q.B.D. 832, CA; see *per* Lindley L.J. at p. 838.

[19] [1943] A.C. 147, HL, *per* Viscount Simon L.C.

against an order of the High Court discharging a prisoner from custody under the writ of habeas corpus (*Cox v. Hakes*[20]).

The Administration of Justice Act 1960, s.15, provides that an appeal shall lie in criminal as well as civil applications for habeas corpus, and that the appeal may be brought against an order for release as well as against the refusal of such an order.[21] In civil cases appeal lies through the Court of Appeal to the House of Lords. In criminal cases the appeal lies direct from the Divisional Court to the House of Lords.[22]

A Divisional Court which has granted an application for habeas corpus in a criminal case can order the applicant's detention or release on bail pending an appeal; but if no such order is made (*i.e.* if he has been released without bail) he may not be detained again if the appeal in the House of Lords goes against him. Where an application for habeas corpus has been granted in a civil case, the applicant may not in any event be detained again if the appeal goes against him, the right of appeal in such cases being to enable questions of law to be settled by the House of Lords.

Habeas Corpus to places overseas

24–040 The old rule, as stated by Lord Mansfield, was that a writ of habeas corpus could be issued out of England to any part of the dominions of the King of England. The writ did not lie to Scotland or the Electorate of Hanover.[23] It did, however, lie to the Isle of Man[24] and the Channel Islands.[25]

The Habeas Corpus Act 1862,[26] provides that no writ of habeas corpus shall issue out of England into any "colony or foreign dominion of the Crown" where a court has been established with authority to issue the writ and to ensure due execution thereof.[27] English Courts have no jurisdiction to issue habeas corpus on behalf of persons detained in Northern Ireland. In *Re Keenan*[28] the Court of Appeal held that the effect of the Habeas Corpus Act (Ireland) 1782 was to confer exclusive jurisdiction on the Irish Courts and nothing in the subsequent constitutional history of Ireland had affected that position.

It is doubtful whether habeas corpus can be issued to bring before the Queen's Bench Division an alien in a British ship on the high seas.[29]

[20] (1890) 15 App.Cas. 506, HL.

[21] See *e.g. R. v. Metropolitan Police Commissioner, ex p. Hammond* [1965] A.C. 310, HL.

[22] Administration of Justice Act 1960, s.1.

[23] *R. v. Cowle* (1759) 2 Burr., 834, 855–856.

[24] *Re Crawford* (1849) 13 Q.B. 613.

[25] *Caius Wilson's Case* (1845) 7 Q.B. 984.

[26] The Act was passed as a result of the case of *ex p. Anderson* (1861) 3 El & El 487 in which the British and Foreign Anti-Slavery Committee successfully applied to the Court of Queen's Bench for habeas corpus on behalf of Anderson, a negro slave who, after killing Seneca T. P. Diggs in defence of his freedom, had escaped from the United States into the colony of Upper Canada where he was arrested. The court, however, indicated that it thought the issue of the writ to a self-governing colony was inconvenient, unnecessary and *infra dignitatem*. (In subsequent proceedings in Canada it was held that there was no evidence for a charge of murder according to the law of Canada; hence the attempt to extradite him to the United States failed.) For a full account of the facts see Annual Register, 1861, pp. 520–528.

[27] The meaning of the Act is far from clear; see, for example, *ex parte Mwenya* [1960] 1 Q.B. 214 and notes in (1960) 76 L.Q.R. 25; (1960) 76 L.Q.R. 211.

[28] [1972] 1 Q.B. 533. *cf.* D. E. C. Yale, "Habeas Corpus—Ireland—Jurisdiction," (1972) 30 C.L.J. 4.

[29] *R. v. Secretary of State for Foreign Affairs, ex p. Greenberg* [1947] 2 All E.R. 550.

II. Freedom of Property

The Englishman's castle

24–041 In the absence of a legal right to privacy in British law, the prevention and regulation of state interference with a person's possessions and private life at common law has been on the basis of the protection of property rights; the Human Rights Act 1998 will cause this to change. "The house of every one is to him as is his castle and fortress, as well for his defence against injury and violence, as for his repose," it was said in *Seymayne's Case*[30]; "if thieves come to a man's house to rob him, or murder him, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing. So it is held every one may assemble his friends and neighbours to defend his house against violence . . . because *domus sua cuique est tutissimum refugium*." "By the laws of England," said Lord Camden C.J. in *Entick v. Carrington*,[31] "every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence. . . . If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him." More recently Donaldson L.J. has said, "That 'An Englishman's home is his castle' is one of the few principles of law known to every citizen and was affirmed as early as 1604 in *Seymayne's Case* . . . and reaffirmed as recently as 1980 in *Morris v. Beardmore* [1981] A.C. 446. The rule is, of course, subject to exceptions, but they are few and it is for the police to justify a forcible entry."[32] In *O'Loughlin v. Chief Constable of Essex*[33] the Court of Appeal stated that the principle required police officers who wished to *use to* enter premises by virtue of section 17 of the PACE Act. to first inform the occupier of the correct legal reason why entry was required, before being entitled to use force to obtain entry.[34]

Prior to the Human Rights Act, an action for trespass was the remedy for unlawful police interference: the police had to justify the entry after the event. The Human Rights Act will in effect require the police before entry to be satisfied that there is a legal power to do so. In *R. v. Khan*[35] the House of Lords accepted that police had trespassed to enable them to install a listening devise to record a conversation between the defendant and another person. In installing such a devise the police had complied with non-statutory Home Office guidelines, and the House of Lords accepted that the trial judge had been right not to exclude the evidence so obtained, despite probable breaches of Article 8. The E.Ct.H.R. found that Article 8 had been breached, since in the absence of a statutory scheme to regulate such activities, the interference with the applicant's right to respect for his private life was not in accordance with the law; however he had not been deprived of his right to a fair trial.[36] In anticipation of this decision, the

[30] (1603) 5 Co.Rep. 91, 91b. The maximum was anticipated by Staunford, Plees del Coron (1567) "ma meason est a moy come mon castel." *Cf.* D.2.4.21: *de domo sua nemo extrahi debet*. "A man's home is looked upon as his castle": Hawkins, *Pleas of the Crown*, Bk 1, C. 28, s.10; quoted by Cave J. in *Beatty v. Gillbanks* (1882) 15 Cox C.C. 138.

[31] (1765) 19 St.Tr. 1029, 1066.

[32] *McLorie v. Oxford* [1982] Q.B. 1290.

[33] [1998] 1 W.L.R. 374.

[34] Unless the circumstances made this impossible, impracticable or undesirable.

[35] [1997] A.C. 558.

[36] [2000] Crim.L.R. 684. This aspect of the decision was surprising since the evidence obtained through the listening devise was the sole or main evidence against the applicant.

Police Act 1997 Part III[37] established a statutory system with respect to types of police surveillance involving unlawful conduct. Judicial supervision is required before warrants in respect of certain categories of crime only (sections 91 and 97); the absence of such supervision for all categories of crime could amount to a breach of Article 8 E.C.H.R.

24–042 Article 8 is of particular application to powers of entry, search and seizure. However, the lengthy list of limitations to this right in Article 8(2) means that a challenge to such powers will be difficult, provided that the exercise of a power is proportionate to its purpose.

Trespass, even to a dwelling house, is not a crime at common law; however by statute it may be a crime in certain circumstances.[38] The Criminal Law Act 1977[39] makes it an offence for a person (not being a displaced residential occupier or a protected intending occupier[40]) without lawful authority to use or threaten violence for the purpose of securing entry into premises on which to his knowledge someone is present who is opposed to the entry (section 6). Section 7, dealing with adverse occupation of residential premises, affects squatters. A person who is on premises as a trespasser, after having entered as a trespasser, is guilty of an offence if he fails to leave the premises on being required to do so by or on behalf of a displaced residential occupier or a protected intending occupier. The purpose of section 7 is to give a residential occupier or an intended residential occupier a faster means of recovering his premises from trespassers than by the use of a civil remedy. It is also an offence to trespass on premises with a weapon of offence (section 8) and to enter or to be on premises of a diplomatic or consular mission as a trespasser (section 9).

Police Powers of entry and search[41]

24–043 The powers of police officers to enter premises to arrest or search are governed by statute. Part II of the PACE Act lays down general rules while various statutes confer specific powers in particular circumstances. Code of Practice B provides additional guidance on search and seizure. There is no COP governing the entry of premises by police, but the Court of Appeal has applied, by analogy, COP B to entry.[42]

The PACE Act abolished common law powers to enter premises without a warrant with the exception of any power of entry to deal with or prevent a breach of peace (section 17(5) and (6)). Before exercising this power of entry the police must have a genuine belief that there is a "real and imminent risk of a breach of the peace occurring", but the breach need not be of a particular type.[43] The power

[37] As amended by the Regulation of Investigatory Powers Act 2000 *post*, Chap. 26.

[38] See *post* para. 27–014 for discussion of s.61 of the Criminal Justice and Public Order Act 1994. Trespass may also be a criminal offence by virtue of byelaws made, for example, by the British Railways Board: Transport Act 1962, s.67 (as amended).

[39] As amended or substituted by ss.72–74 of the CJPO Act 1994.

[40] As defined by s.12A of the 1977 Act, which includes an owner or tenant who requires the premises for his own residential occupation, *e.g.* a recent purchaser, a person who has been authorised to occupy a council house, or a returning holiday-maker.

[41] R. Stone, *Entry, Search and Seizure* (3rd ed., 1997).

[42] *O'Loughlin v. Chief Constable of Essex* [1998] 1 W.L.R. 374.

[43] *McLeod v. Metropolitan Police Commissioner* [1994] 4 All E.R. 553, CA. In *McLeod v. United Kingdom* (1999) 27 E.H.R.R. the E.Ct.H.R. accepted that the power to enter to prevent a breach of the peace was sufficiently accessible and foreseeable in English law but, on the facts, the actions of the police were disproportionate to the legitimate aim of keeping the peace and therefore there was a breach of Art. 8.

of entry applies not only to public meetings on private premises, as established in *Thomas v. Sawkins*,[44] but also to private residences.[45]

Section 17 of the PACE Act authorises a constable to enter (if necessary using reasonable force, section 117) and search any premises for the purpose of (i) executing a warrant of arrest issued in connection with or arising out of criminal proceedings; (ii) arresting a person for an arrestable offence; (iii) arresting a person for certain statutory public order offences or sections 6 to 8 or 10 of the Criminal Law Act 1977; (iv) recapturing a person unlawfully at large whom he is pursuing[46]; or (v) saving life or limb or preventing serious damage to property. Except in the case of (v) the constable must have reasonable grounds for believing that the person he is seeking is on the premises. The power of search conferred by section 17 is only a power to the extent that is reasonably required for the purpose for which the power of entry is exercised (section 17(4)).

The powers conferred by the section are without prejudice to any existing under other statutes. Various Acts confer specific powers of entry to ensure that their terms are being complied with. The Misuse of Drugs Act 1971, s.23(1) for example empowers police to enter the premises of producers and suppliers of controlled drugs and examine books and documents relating to dealings in such drugs and inspect stocks of such drugs.[47]

Entry and search after arrest

Where a person has been arrested for an arrestable offence away from his own premises, then section 18(1)(a) allows a constable to enter and search any premises[48] occupied by or controlled by the person arrested.[49] The constable must have reasonable grounds for suspecting that there is on the premises evidence other than items subject to legal privilege[50] that relates to the offence for which the person has been arrested or to some other arrestable offence "connected with or similar to that offence" (section 18(8)(b). Anything which the constable is entitled to search for may, if found, be seized and retained. The power (as in section 17) is exercisable only to the extent reasonably required for the purpose of the section. As a general rule a search under section 18 must be authorised in writing by an officer of the rank of inspector or above. A constable may, however, search without authorisation before taking a person to a police station "if the presence of that person at a place other than a police station is necessary for the effective investigation of the offence" (section 18(5)(b). Whatever the exact meaning of these words they seem to confer a power to search if the constable thinks it necessary. **24–044**

Section 32 deals with the power to search the premises which were either the venue of the arrest or from where the suspect had left shortly before being

[44] [1935] 2 K.B. 249.

[45] *McLeod v. M.P.C. op. cit.*

[46] In *D'Souza v. D.P.P.* [1992] 4 All E.R. 545, the House of Lords held that there had to be evidence of actual pursuit by the police of a person unlawfully at large before they could enter premises under s.17(1)(b). In this case the person concerned had left a psychiatric hospital; in the case of escaped convicts it is arguable that they are regarded as being pursued at all times.

[47] See also Gaming Act 1968, s.43(2); Road Traffic Act 1988, s.6; Deer Act 1991 s.12.

[48] Defined in s.23 to include "any place".

[49] This is in addition to the common law powers to enter and search: *Cowan v. Condon* [2000] 1 W.L.R. 254, CA.

[50] Defined in s.10 to mean communications between a professional legal adviser and his client and items enclosed with or referred to in such communications when in the possession of a person entitled to possession of them but not including items held with the intention of furthering a criminal purpose.

arrested. A search may only be made for evidence relating to the offence for which the suspect was arrested (section 32(2)(b)), and only to the "extent that it is reasonably required for the purpose of discovering . . . such evidence" (section 32(3)), and the police officer must have reasonable grounds for believing that there is relevant evidence on the premises (section 32(6)).[51]

Seizure of articles[52]

24–045 Section 18(2) allows the police to seize anything for which they are entitled to search under that section. Section 19 confers a wide power to seize articles found by a constable who is lawfully on premises.[53] It is not necessary that they relate to the offences for which the owner or occupier has been arrested, or other or similar offences committed by the owner or occupier or that they implicate third parties in the offence for which the search was being conducted. Any article (other than one protected by legal privilege, section 19(6)) may be seized if the constable has reasonable grounds for believing that it has been obtained in consequence of the commission of an offence or that it is evidence in relation to an offence which he is investigating or any other offence. In both cases the right to seize is conditional on a belief that seizure is necessary to prevent the item being concealed, lost, altered or destroyed or (in the case of articles in the first category) damaged.

Section 21 provides in the case of articles seized under any of the provisions of the PACE Act or any other enactment, the right to be furnished with details of articles seized and subsequent access to them, under police supervision, and/or photocopies or copies of the article. Section 22 recognises and regulates the right of police to retain for as long as necessary articles which they have seized.

Search Warrants

24–046 It is a principle of the common law that a general warrant to search premises, *i.e.* one in which either the person or the property is not specified is illegal; any invasion of property without a legal power is trespass.[54] At common law the only type of warrant that could be issued was to search for stolen goods. Gradually there was a piecemeal development of statutory warrant powers to allow for warrants to be obtained from magistrates to search for prohibited goods such as dangerous drugs, stolen goods, forged documents, firearms, etc., and to search for evidence of specific statutory offences such as criminal damage, breaches of the Official Secrets Act and illegal gaming. However before the PACE Act there were no general statutory provisions governing the grant of search warrants.

The pre-existing statutory powers to obtain a search warrant remain *post* the PACE Act. Section 8 of the PACE Act entitles a justice of the peace to grant a

[51] Further requirements for a search under s.32 are found in COP B, para. 5. Despite the wide statutory powers to search it has been estimated that more that half of all searches are conducted by the police with the consent of the person entitled to grant entry to the premises: COP B, para. 4 provides guidance on this. Where entry is by consent the legal controls laid down by PACE can be by-passed.

[52] See also COP B, para. 6, and s.51 CJP Act 2001: see below para. 24–046.

[53] Even if the search and therefore the seizure is unlawful, the articles may still be admissible in evidence, subject to s.78 PACE. See below para. 24–046 for additional powers to seize provided by the CJP Act 2001.

[54] *Wilkes v. Wood* (1763) 19 St.Tr. 1153, where John Wilkes recovered £1,000 damages for trespass against Wood, an Under-Secretary of State, for entering his house and seizing his papers under a warrant to arrest the (unnamed) authors, printers and publishers of No. 45 of the North Briton. See also *Entick v. Carrington* (1765) 19 St.Tr. 1029 where Lord Camden L.J. delivered a powerful judgment against the legality of general warrants.

search warrant on the application of a constable when the justice is satisfied that there are reasonable grounds for believing that a serious arrestable offence[55] has been committed and that there is material on the premises described in the application which is likely to be of substantial value to the investigation of the offence. The material must be likely to be relevant evidence (*i.e.* legally admissible) and not consist of items subject to legal privilege, excluded materials or special procedure material. The magistrate must also be satisfied that it is not practicable to communicate with any person entitled to grant entry to the premises; or that, if practicable it is not practicable to communicate with any person entitled to grant access to evidence; or that entry to the premises will not be granted unless a warrant is produced; or that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry.[56] It is important that the magistrate is satisfied that the requirements of section 8 have been fulfilled, if not he should not issue the warrant.[57] A constable may seize and retain anything for which a search has been authorised under section 8. In *R. v. Chesterfield Justices ex p. Bramley*[58] it was held that the police could not seize a large collection of material to sift through it elsewhere to decide if some material within that collection came within the scope of the search warrant.[59] The law was changed by the CJP Act 2001. This allows the police, and other law enforcement agencies, to remove material from premises when it is not "reasonable practicable" to determine on the premises whether the material concerned could lawfully be seized. The power extends to the seizure and removal of computer discs and hard drives.

Three types of materials are expressly excluded from the power to obtain a search warrant under section 8. The scope of items subject to legal privilege is defined in section 10.[60] Items held with the intention of furthering a criminal purpose are not subject to legal privilege (section 10(2)), the "intention" can be that of a client or a third party.[61] Excluded material is defined in section 11. It includes personal records acquired in the course of any business or occupation which are held in confidence, medical samples taken for medical purposes held in confidence and journalistic materials held in confidence. Special procedure material is, in effect, confidential papers which fall outside the scope of excluded materials because they are not personal records as defined in section 12 and journalistic material not held in confidence. Into the latter category would fall, for example, photographs taken by newspaper photographers during riots. Section 9 and schedule 1 allow the police to apply to a circuit judge to authorise access to

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[55] s.116.

[56] s.8(3) of PACE Act.

[57] In *R. v. Guildhall Magistrates' Court, ex p. Primlaks Holding Co* [1989] 2 W.L.R. 841, the Divisional Court quashed two warrants on the basis that there were no grounds upon which the magistrate, properly directing himself, could reasonably have believed that the correspondence cited in the warrant, was neither subject to legal privilege nor special procedure material.

[58] [2000] Q.B. 576.

[59] Pt 2 and Scheds. 1 and 2. Provision is made for the retention and return of such property, and for a procedure whereby anyone with a relevant interest in the seized property can apply to the "appropriate judicial authority" for its return.

[60] In *R. v. Chesterfield Justices, ex p. Bramley* [2000] Q.B. 576, the DC laid down guidelines for cases where legal privilege was at risk.

[61] *R. v. Central Criminal Court, ex p. Francis and Francis* [1989] A.C. 346, where the "intention" was that of a relative of the solicitor's client. The case was on the powers under the Drug Trafficking Offences Act 1986, but the definition of items subject to legal privilege is the same as in PACE.

special procedure materials, and (in more limited circumstances) excluded materials.[92] The type of material to which the police require access is often of evidential value and held by third parties on a confidential basis.[93] This type of information is of particular importance in relation to fraud, terrorism, and drug offences: it may also be relevant in respect of the recent powers of the courts to confiscate from convicted defendants the proceeds of certain offences. In addition to section 9 of the PACE Act, several subsequent statutes[94] have created broadly similar powers to enable the police (or in certain circumstances customs and excise officials) to gain access to certain types of confidential materials. In all cases there are rules and safeguards laid down by statute, and a failure to observe these can result in the quashing of the order.[95]

General provisions, applicable to the enforcement of search warrants under any enactment are contained in sections 15 and 16 and COP B.[96] Section 15 requires a degree of particularity in specifying the grounds on which an application is made, the premises to be entered and the articles or persons to be sought.[97] A warrant shall authorise entry on one occasion only and which has to be made within one month from the date of issue of the warrant (section 16). Entry must be at a reasonable hour, unless it appears to the constable executing the warrant that the purpose of the search would be frustrated by an entry at a reasonable hour.

24–048 The variety of statutory provisions enabling the police to obtain permission to enter private premises have altered the law in favour of the public interest in crime detection and away from the common law notion of protection for private property. It is important that the police and the courts observe the safeguards provided in these enactments, and by the E.C.H.R. The courts should not be too easily persuaded by police claims that the requirements of the statutes are satisfied. The E.C.H.R. requires that any interference with an individual's private life (Article 8) or an individual's freedom of association (Article 11) has to be "necessary in a democratic society in the interests of public safety . . . or the protection of the rights and freedoms of others." This means that the interference has to be proportionate to the legitimate aim which the authority is seeking to enforce. The E.C.t.H.R. has said that it is not enough that search warrants have prior judicial authority; the warrant must not be too broad and should be

[92] s.9 cannot be used for items subject to legal professional privilege, but statutes passed since PACE do not necessarily have this limitation, *cf.* s.24 of the Public Order Act 1986.

[93] s.9(1) also entitles a police officer to ask the holder of such material to produce it, if he does there is no need to use Sched. 1: *R. v. Singleton* [1995] 1 Cr.App.R. 431, where as part of a murder investigation a dentist had voluntarily handed over the accused's dental records.

[94] Powers are to found in: Criminal Justice Act 1988 (as amended by the Proceeds of Crime Act 1995), Terrorism Act 2000 and the Drug Trafficking Act 1994.

[95] *R. v. Southwark Crown Court, ex p. Bowles* [1998] 2 W.L.R. 71, HL: an order for the production of documents made under s.93H of the Criminal Justice Act 1988 could only be granted if the "dominant purpose" of the application was to assist in the recovery of the proceeds of the conduct of crime, and not to investigate criminal offences; *R. v. Central Criminal Court, ex p. Adegbesan* [1986] 1 W.L.R. 1292, DC. Order under s.9 of PACE quashed on the basis of insufficient detail of the relevant special procedure material.

[96] *R. v. Chief Constable of the Warwickshire Constabulary and another, ex p. Fitzpatrick and others* [1998] 2 All E.R. 65, on the relationship between s.8 and ss.15, 16.

[97] *R. v. Reading Justices, ex p. South Western Meat Ltd* [1992] Crim.L.R. 672, where it was held that since a defective warrant was invalid under s.15(1), the entry and search were unlawful and the court ordered the return of the documents which had been seized.

proportionate to the purpose of preventing crime and protecting the rights of others.[68]

Special powers of entry without a search warrant

The Terrorism Act 2000,[69] allows a senior police officer in specified circumstances to establish a police cordon around an area in connection with a terrorism investigation. Where such a cordon is in place, the police can search premises within the cordon without a warrant for materials connected with that investigation. A more extensive power to enter without a warrant to carry out installations for surveillance is found in Part III of the Police Act 1997.[70] Authorisation for such activities lies with the chief officer of police, and the Directors General of the National Crime Squad and the National Criminal Intelligence Service. Section 93 provides the criteria for granting such authorisation. The exercise of these powers is subject to the supervision, and to some extent control, of special Commissioners who are appointed from the ranks of senior judges (section 91). The width of these powers and the limitations in judicial supervision are likely to give rise to an early challenge under Article 8 E.C.H.R. **24–049**

Customs, revenue and other officials

The powers of entry and seizure provided in Part II of the PACE Act relate only to the police. Other officials such as the Commissioners of Customs and Excise, the Inland Revenue and a wide range of inspectors and officers employed by local authorities, public utilities and government departments, have specific statutory power to enter and to inspect or search. These powers are governed by the terms of the empowering statute, but if such an entry is a search, then it appears that COP B has to be applied.[71] **24–050**

The Customs and Excise Management Act 1979 confers power to board ships, aircraft and vehicles to "rummage and search" in connection with the preventing of smuggling (section 27). Officers may require information about goods being imported or exported and inspect documents relating to such goods (section 77). A right of entry on premises concerned with trading in alcohol is conferred by section 112 and a power to break open any part of such premises in order to look for any "secret pipe or other means of conveyance, cock vessel or utensil" (section 113). Without prejudice to specific powers, section 161 confers a general power to search in connection with offences against the law relating to Customs and Excise on any customs officer having with him a writ of assistance. Such a writ, which is issued by the High Court, has been described as, in effect, a general search warrant. Writs of assistance are made out at the beginning of each reign and are effective throughout the reign and for six months thereafter. It is questionable whether such writs are compatible with the E.C.H.R. By virtue of regulations made under section 114 of the PACE Act, Customs and Excise officers have the same power as the police to obtain a search warrant to search for evidence of a serious arrestable offence. All powers of entry under a search

[68] *Funcke v. France* A 256–A (1993); *Niemietz v. Germany* A 251–B (1992) 16 E.H.R.R. 97, where there was a warrant, but there was no special procedure safeguards for the searching of lawyers' premises.

[69] ss.33–36 and Sched. 5 para. 3, re-enacting the powers given to the police by the CJPO Act 1994.

[70] Prior to the enactment of Part III such activities were carried out under Home Office guidelines, an inadequate legal basis under the E.C.H.R. (see *post*, paras 26–017 to 26–018). Since 1994 MI 5 and MI 6 have such powers by statute, but only in furtherance of a warrant issued by the Home Secretary.

[71] *Dudley Metropolitan Borough Council v. Debenhams plc* (1994) 159 J.P. 18, DC.

warrant are subject to the PACE Act. ss.9. 15 and 16. Powers of entry without a warrant under the PACE Act. ss.17. 18. and 32 also apply to the Customs and Excise.

Under Schedule 11 of the Value Added Tax Act 1994 the Commissioners have further powers to enter premises. seize documents or other articles and search persons. The rules in relation to these powers are closer to those of the Inland Revenue that to other customs and excise powers.

24–051 The Inland Revenue has extensive powers to enter and search premises under section 20C of the Taxes Management Act 1970. which allows a circuit court judge to issue a warrant for the search and seizure of documents. Concern about the width of this power as highlighted in the case of *R. v. Inland Revenue Commissioners, ex p. Rossminster Ltd*[72] led to a minor amendment in 1989 which requires the judge to be satisfied that there are reasonable grounds for suspecting the commission of a *serious* offence involving fraud relating to tax matters and that evidence of the offence is to be found on premises specified. In addition the judge must now be satisfied that the issue of the warrant is compatible with the E.C.H.R. On entering premises with a warrant the officer may seize and remove anything whatsoever which he has reasonable cause to believe may be required as evidence for the purpose of proceedings in connection with the suspected offence of *serious* fraud. The appropriate procedure to challenge the legality of the seizure of documents by the Revenue is by means of an action for damages for trespass. This requires the Revenue to establish reasonable cause for believing that the documents which they removed constituted evidence of serious fraud. Sections 149. 150 of the Finance Act 2000 provide new powers to enable the Inland Revenue when conducting a criminal investigation to obtain access to documents held by a third party. such as a solicitor. An application for a production order has to be made to a judge: the third party may appear at the hearing.

Many statutes confer powers of entry and search on public officials. attached to various government departments. public utilities. regulatory bodies and local authorities. There is no consistency with regard to the persons authorised. the nature of the authorising document. length of notice. or whether notice is to be given to the owner or the occupier. The statute usually prescribes that the official must produce his written authority to any person who reasonably requires to see it.[73] If the conditions of entry prescribed by statute are not strictly fulfilled the owner is entitled to oppose entry. "When the sanitary inspector of the council arrived," said Lord Goddard C.J. in *Stroud v. Bradbury*,[74]—"the appellant obstructed him with all the rights of a free-born Englishman whose premises are being invaded and defied him with a clothes prop and a spade. He was entitled to do that unless the sanitary inspector had a right to enter."

Examples of statutory powers of entry are afforded by the Building Act 1984. s.95 (authorised officer of local authority entitled to enter any premises at all reasonable hours to ascertain whether there has been any breach of building

[72] [1980] A.C. 952. HL. Partly because of concern at the powers of the Revenue Departments. the Committee on Enforcement Powers of the Revenue Departments. chaired by Lord Keith of Kinkel was established. It produced four volumes of reports: (1983) Cmnd. 8822 (2 vols.); (1984) Cmnd. 9120; (1985) Cmnd. 9440.

[73] *Grove v. Eastern Gas Board* [1952] 1 K.B. 77. CA. *Re* Gas Act 1948. Rights of entry for gas and electricity suppliers are regulated by the Rights of Entry (Gas and Electricity Boards) Act 1954. as amended by the Gas Act 1972. 1986. 1995 and the Electricity Act 1989.

[74] [1952] 2 All E.R. 76. DC (Public Health Act 1936).

regulations: access to premises other than factories or workplaces requires 24 hours' notice); the Health and Safety at Work etc. Act 1974, s.20 (inspectors entitled to enter premises to ensure compliance with the provisions of the Act); the Milk (Cessation of Production) Act 1985, s.2 (authorised official of Ministry of Agriculture entitled to enter land to establish whether a person has ceased to produce milk after receipt of a cessation payment under the Act) and the Local Government (Miscellaneous Provisions) Act 1982, s.17 (authorised officer of local authority entitled to enter premises if he has reason to suspect that unregistered person is engaging in acupuncture, tattooing, ear-piercing or electrolysis) and s.27 (power to enter to repair drains).

Search orders[75]

24–052 The Courts themselves have added to the number of persons entitled to enter premises and search for and seize items by the introduction of what was originally known as an Anton Piller order, after the leading case of *Anton Piller K.G. v. Manufacturing Process Ltd*[76] Further decisions have refined the principle which in that case received the approval of the Court of Appeal. In particular *Universal Thermosensors Ltd v. Hibben*[77] reviewed and tightened the procedures for these orders. In theory a defendant is requested to consent to admit the plaintiff to his premises to conduct a search: to refuse consent would, however, be contempt of court. The order, which is like a civil search warrant, is made without warning to the defendant, where the plaintiff can satisfy the court that he has a strong prima facie case, that there is a risk of serious damage to him from the alleged wrongdoing, that the defendants have possession of incriminating documents or other items of evidential value and there is a real possibility that they may be destroyed before proceedings *inter partes* can take place. The jurisdiction originated in the field of intellectual property law but is not confined to that area of the law. Uncertainty concerning the powers of a court to make such orders has been resolved by section 7 of the Civil Procedure Act 1997.[78]

Liability to taxation

24–053 Since the Bill of Rights (1688) it has been firmly established that taxation may only be imposed by authority of an Act of Parliament (*Att.-Gen. v. Wilts United Dairies*).[79] This is done by Parliament either directly, as in the case of income tax, customs and excise duties, capital gains and transfer taxes, or indirectly through the delegation of power to local authorities to levy council tax. Inland Revenue officials have an extensive power to "discover" what is not there and to assess taxpayers on that, in order to induce the latter to disclose what is there. The European Commission on Human Rights has accepted that ordinary measures to enforce tax payments do not involve the determination of a criminal charge within Article 6: the result may be different if heavy penalties could be imposed.[80]

[75] See Stone *op. cit.* Chap. 10.

[76] [1976] Ch. 55. For a consideration of the constitutional implications see M. Dockray, "Liberty to Rummage—A Search Warrant in Civil Proceedings?", [1977] P.L. 369. See also A. Staines, "Protection of Intellectual Property Rights", (1983) 46 M.L.R. 274.

[77] [1992] 3 All E.R. 257, and see Practice Direction [1996] 1 W.L.R. 552, which governs the proper manner for the execution of the order.

[78] In *Chappell v. United Kingdom* (1989) 12 E.H.R.R. 1 the E.Ct.H.R. held that the exercise of an *Anton Piller* order did not infringe Art. 8.

[79] (1921) 91 L.J.K.B. 897; (1921) 37 T.L.R. 844.

[80] *Abas v. the Netherlands* [1997] E.H.R.L.R. 418; *Bendenoun v. France* (1994) 18 E.H.R.R. 54.

Statutory restrictions on freedom of property

24–054 Parliament authorises and controls the compulsory acquisition of land by the Crown for defence purposes[81]: and by various Ministers, local authorities and public corporations under a great variety of statutes. A compulsory purchase by a local authority or public corporation must be confirmed by a Minister.[82] Statutes prescribe both the procedure of compulsory acquisition and the method of assessing compensation. There is no right to compensation except by statute[83]: but there is a strong presumption that if a statute authorises the compulsory acquisition of property, the owner is entitled to reasonable compensation: *Newcastle Breweries v. The King*.[84]

Article 1 of the First Protocol to the E.C.H.R. recognises the right to peaceful enjoyment of property and the right not to be deprived of it except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[85] This right and those found in Articles 6, 7, and 8, could be relied on in challenging aspects of the various statutory proceeds of crime provisions which provide for the making of restraint, forfeiture or confiscations orders against defendants.[86] Far reaching proposals have been made which, if implemented, would extend the existing powers of the state to confiscate proceeds of crime, provide for civil forfeiture and for the taxation of unspecified profit.[87]

[81] *cf. Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, HL.

[82] The powers of Ministers to approve a compulsory purchase or to decide an appeal on a controversial planning appeal were challenged as a breach of Art. 6 E.C.H.R.: in *R. (Alconbury Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] W.L.R. 1389, HL, it was held that decisions taken by the Minister were not incompatible with Art. 6 provided (as was the case) that they were subject to review by an independent tribunal.

[83] *Sisters of Charity of Rockingham v. The King* [1922] 2 A.C. 315, 322, PC, *per* Lord Parmoor.

[84] [1920] 1 K.B. 584; *Att.-Gen. v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, HL; *Manitoba Fisheries Ltd v. The Queen* (1978) 88 D.L.R. (3d) 462.

[85] This article has been unsuccessfully used to challenge the adequacy of statutory compensation in *Lithgow v. UK* (1986) 8 E.H.R.R. 329, *James v. UK* (1986) 8 E.H.R.R. 123.

[86] *e.g.* under the Drug Trafficking Act 1994, the Criminal Justice Act 1988, and the Terrorism Act 2000. See Evan Bell, "The E.C.H.R. and the Proceeds of Crime Legislation", [2000] Crim.L.R. 783.

[87] *Recovering the Proceeds of Crime*, Home Office (2000).