

## Chapter 2

### Question 2

In *N v United Kingdom*, Grand Chamber of the Court 27 May 2008, it was noted that the ECHR was primarily concerned with civil and political rights. Social and economic differences between countries meant that the level of medical treatment available in the Contracting State and the country of origin might vary considerably. Article 3 did not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.

## Chapter 3

### Question 1

The European Union member states have expressed a unanimous intention to proceed to accession to the European Convention on Human Rights (Lisbon Agreement). The Member states will co-ordinate with the President of the European Court of Human Rights to implement the decision.

### Question 6

Note the following cases on article 14:

- The Grand Chamber decision in *Burden and Burden v United Kingdom*, confirming that the sisters' relationship could not be equated with married couples and couples within the Civil Partnership Act 2004. That was the case even though member states adopted different rules of succession.
- *EB v France*, 22 January 2008, where the European Court held that there had been a violation of article 14 in conjunction with article 8 of the Convention when the applicant's request for adoption had been turned down on the grounds of the lack of paternal referent – the applicant was a homosexual woman living with another woman.
- *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, the House of Lords held that it was not in breach of article 14 to offer an indefinite leave to stay concession to children who entered the country with their families, but not to those who entered the country without them.
- *Carson v United Kingdom*, 4 November 2008, where the European Court held that the exclusion of pensioners, who were now resident in other countries that did not have arrangements with the UK, from the cost of living increases in pension benefits was within the very wide margin of appreciation of the state and its economic policies and thus objectively justified under article 14.

## Chapter 4

### Question 2

Note *Doherty v Birmingham City Council* [2008] UKHL 57, where it was held that the Mobile Homes Act 1983 clearly gave the local authority the power to evict travellers from

its site. Despite the ruling of the European Court in *McCann v UK* (2008), until the European Court developed principles of general application in English law, the House of Lords must apply the clear provisions of the Act and domestic case law (*Kay v Lambeth LBC* applied).

With respect to proportionality, note *Re E (A Child)* [2008] UKHL 66 where the House of Lords held that although the Court of Appeal had erred in applying the *ex parte Smith* test rather than the heightened test of proportionality, the police had not acted disproportionately in policing a protest because were uniquely placed to make a judgment by reason of their experience and intelligence.

## Chapter 5

### Question 3

Note *Chief Constable of Hertfordshire v Van Colle* [2008] UKHL 50m, where the House of Lords overturned the decision of the Court of Appeal (see page 102) to the effect that there had been a breach of the state's obligation under article 2 of the Convention when a vulnerable witness had been murdered. Their Lordships held that the test in *Osman v United Kingdom* – that the authorities knew at the time of the existence of a real and immediate risk to life - was not present in this case.

### Chapter 5

Questions 1 and 4 – students should note the decision of the European Court in *N v United Kingdom*, 27 May 2008 with respect to the obligation to keep AIDS sufferers in the country, see above chapter 1

### Questions 2 and 4

Continue to follow the proceedings in *Ramzy v Netherlands*

Note the decision in *R (Al-Saadoon and Mufhdi) v Secretary of State for Defence* [2008] EWHC 3098, where it was held that it was not unlawful for British troops to hand over two Iraqis to the Iraqi authorities to face a trial and the death penalty. Although the death penalty was outlawed in the UK it was not in breach of the Convention or international law and thus the UK authorities were obliged to hand over the individuals. (The court stated that had the applicants been able to rely on the Human Rights Act in the normal way then protocol No 13 would have made the transfer unlawful). Earlier the European Court of Human Rights had awarded a temporary injunction to prevent the handover.

## Chapter 6

### Question 1 and Question 2

Note the government's failure to extend the period of detention with respect to terrorist offences under the Counter Terrorism Bill/Act

### Questions 1 and 4

Note *R (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, where the House of Lords held that the test of what constituted inhuman and degrading treatment under article 3 depended on whether the treatment was to take place in the UK or another jurisdiction in the receiving country. In the latter case article 3 only applied in an attenuated form and reliance on it would require a very strong case.

#### Question 4

Note the following cases:

- *Nnyanzi v United Kingdom*, 8 April 2008 - the European Court held that there had been no violation of article 3 (or 8) when the applicant asserted that her deportation back to Uganda would result in ill treatment and persecution on grounds of her father's political beliefs. Although her father had been arrested for his political activities and she had been questioned and arrested briefly on one occasion, there was no evidence of ill treatment and her lack of political activity did not subject her to any enhanced risk.
- *Saadi v Italy*, decision of the European Court 28 February 2008 - there would be a violation of article 3 if the applicant, who was suspected of international terrorism and had been found guilty of such in Tunisia in his absence, was deported by Italy to Tunisia as part of 'urgent measures to combat international terrorism.' The European Court found that there was a real risk of him being subjected to ill treatment in breach of article 3, and that the considerable difficulties facing states with respect to terrorist violence did not call into question the absolute nature of article 3. It was not possible to weigh the risk that a person might be subjected to ill-treatment against his dangerousness to the community if not sent back. Further, the argument that the risk had to be established by solid evidence where the individual was a threat to national security was not consistent with article 3 and its absolute nature. The test was whether there were substantial grounds for believing that there was a real risk and in this case there was strong evidence that those (like *Saadi*) found guilty of terrorist offences had been subjected to torture and that the authorities had failed to investigate relevant allegations of such.
- *N v United Kingdom*, Grand Chamber of the Court 27 May 2008 - there would be no violation of article 3 if the applicant, who was suffering from AIDS, was to be sent back to Uganda; the principle in *D v United Kingdom* was only to be applied in very exceptional circumstances where the humanitarian grounds against removal were compelling.
- *NA v United Kingdom*, 15 July 2008 - there had been a violation of articles 2 and 3 of the Convention when the UK authorities had threatened to deport the applicant to Sri Lanka after his plea for asylum had been refused. In the Court's assessment, considering the recent increased level of violence and the breakdown in security in Sri Lanka, together with the particular circumstances of the applicant – he had been arrested as a Tamil tiger some years ago – there was a real risk of ill treatment at the hands of the authorities who were making strenuous efforts to combat the activities of the Tamil tigers.

## Chapter 7

### Question 1

Note the decisions of the House of Lords in *Re MB* and *JJ v Home Secretary* re control orders, deprivation of liberty, and the right to a fair trial

### Question 2

Note that the Grand Chamber of the European Court held a hearing on 13 May 2008 in the case of *A v United Kingdom* (detention of foreign terrorist suspects). The applicants are claiming a violation of article 3, 5, 6, 13, and 14, alleging that they suffered psychiatric harm from their unlawful detention and they were not allowed to adequately challenge or seek compensation for the detention.

The provision in the Counter Terrorism Bill 2008 allowing detention for up to 42 days was ultimately defeated in the House of Lords and the clause dropped from the bill.

### Question 3

In *R (M) v Lambeth LBC* [2008] EWHC 1364 (Admin) it was held that rights bestowed on asylum seekers under s.20 of the Children Act 1989 if they could prove they were under 18 were not civil rights under article 6. Thus, article 6 was not engaged during the process by which the authorities determined the ages of the claimants.

In *Murungaru v Home Secretary* [2008] EWCA Civ 1015 it was held that although the withdrawal of a visa did not engage the respondent's property rights, he nevertheless had a viable common law claim under judicial review. It was also held that it was not necessary to appoint a special advocate to consider closed evidence.

In *R (Barclay and others) v Secretary of State for Justice* [2008] EWCA Civ the Court of Appeal held that as the principal judicial officer of the island of Sark was linked to the executive and the legislature there was an inconsistency with article 6 of the Convention. (*McGonnell v United Kingdom* applied).

### Question 4

In *Kehoe v United Kingdom*, 18 June 2008, the European Court held that there had been no violation of article 6 when the applicant had been unable to bring a direct action for the enforcement of maintenance payments against the father of her child. In the Court's view, it was not essential to decide whether her claim amounted to a 'civil right' under article 6 and the remedy of judicial review against the CSA provided an adequate remedy for the applicant, despite it not being her preferred option.

In *Grayson and Barnhum v United Kingdom*, 23 September 2008 the European Court held that there had been no violation of article 6 when the burden of proof had been placed on the applicants in confiscation proceedings to show that they did not have any realizable assets equivalent to the calculated benefits from the offences. It was not unreasonable to expect them to show to the prosecution what had happened to all the money which had been proved to be in their possession.

### Question 5

See *Korbely v Hungary*, decision of the Grand Chamber 19 September 2008 – K's conviction for crimes against humanity (for murder) was in breach of article 7 as the domestic courts had not satisfied itself that all the components of the offence had been satisfied in K'S case.

## Chapter 8

### Question 1

In *Savage v South Essex Partnership NHS Trust* [2008] UKHL 74 the House of Lords held that the test in *Osman v UK* under article 2 applied to a health authority's obligation to prevent suicides of mental health patients. Such an obligation involved employing competent staff and adopting a system of work which would protect patients' lives. Article 2 also imposed an 'operational' obligation on health authorities to do all that could reasonably be expected to prevent a risk patient from committing suicide.

In *R (D) v Secretary of State for the Home Department*, 2 May 2008 it was held that prisoners had no general right under article 8 to make telephone calls and that the prisoner's claim that the extortionate rate for such calls infringed his rights under the Convention did not engage articles 8 or 14.

## Chapter 9

### Question 1

In *S and Marper v United Kingdom*, the Grand Chamber held that the blanket and indiscriminate nature of the powers contained in English law on retention of DNA samples as applied in these cases failed to strike a fair balance between the competing public and private interests and thus constituted a disproportionate interference with the applicants article 8 rights. (The Home Secretary responded by detailing plans to amend the relevant codes of practice under the Regulation of Investigatory Powers Act 2000 with respect to the retention and storage of such samples.)

See *McCann v United Kingdom* - the European Court found a violation of article 8 when the applicant had been ejected from his home when the council had persuaded his ex wife (who had formerly occupied the house) to sign a notice to quit. The Court found that that summary procedure which deprived the applicant of his right of residency without arguing the proportionality of that ejection before an independent tribunal constituted a disproportionate interference with the applicant's article 8 rights.

See *Liberty v United Kingdom*, below

### Questions 2 and 4

See *H v Tomlinson*, 13 November 2008 the Court of Appeal held that there was no arguable case that the disclosure by a head teacher of allegedly defamatory comments to a statutory disciplinary panel investigating the exclusion of a child from school for violent conduct was in breach of his article 8 right to private life. The report made to the panel did

not simply discuss the boy's conduct in the home, but his public arrest outside his home for violence. The boy could not reasonably expect that such information would not have been made public to a statutory body set up to consider whether his conduct justified his exclusion, particularly as he had a history of using violence.

See *Mosley v News Group Newspapers* [2008] EWHC 687 (QB), it was held that Mosley had a reasonable expectation of privacy in those sexual activities, despite them being unconventional. In the absence of evidence that the activities had a Nazi theme there was no public interest in the disclosure of those details in the national newspapers. The court awarded £60,000 in damages but declined to award exemplary damages against the newspaper.

See also *Murray v Big Pictures Ltd v Big Pictures* [2008] EWCA Civ 446 the Court of Appeal held that the High Court had been wrong to strike out the claimant's case against Express Newspapers when a photograph had been taken of JK Rowling's young son. Whether there was a reasonable expectation of privacy depended on all the circumstances of the specific case, including the attributes of the claimant and the activity in which they were engaged, the place at which it happened, the nature and purpose of the intrusion, *the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which, the information reached the hands of the publisher.* Once that test was satisfied the court would then have to consider how the balance should be struck between the claim in privacy and the right to publish; the question whether the publication of those facts. Applying those tests, the Court of Appeal stated that it was at least arguable that the appellants had a reasonable expectation of privacy; in particular the fact that the photographed appellant was a child was relevant and of greater significance than the judge at first instance recognized.

### Question 3

In *Liberty v United Kingdom*, 1 July 2008 it was held that there had been a violation of article 8 when Liberty and other human rights' groups had had their telephone calls and other communications, including privileged legal correspondence, intercepted by an Electronic Teat Facility operated by the MOD. The Court found that the power to intercept and read communications, under s.3(2) of the Interception of Communications Act 1985, was not in accordance with law because it gave an unlimited discretion and any safeguards against abuse were not made public or accessible.

## Chapter 10

### Question 1

In *Demirel and Ates v Turkey*, 9 December 2008, the European Court held that there had been a violation of article 10 when the owner and editor of a newspaper had been prosecuted for publishing declarations of an illegal organisation (the PKK). In the Court's view the article – stating the response of a member of the PKK to government accusations – did not contain material that was likely to incite violence. The prosecution, fine and closure of the paper were instigated purely because the article contained a statement of the organisation's views and was thus a disproportionate interference with press freedom and article 10.

### Question 3

In *Westcott v Westcott* [2008] EWCA Civ 818 the Court of Appeal dismissed an appeal against a finding of the High Court that absolute privilege applied to a complaint made to the police, which instigated a criminal prosecution but which did not result in a prosecution. In the Court's view there was no logic in conferring immunity at the end of the process but not from its beginning.

In *Curistan v Times Newspapers* [2008] EWCA Civ 432, the Court of Appeal upheld the High Court ruling to the effect that an article linking the claimant with money-laundering for the IRA was a fair and accurate report of what had been alleged in parliament by an MP. The newspaper's liability for the additional comments was to be judged in the context of what the MP had said. Further the Court of Appeal held that the article had merely indicated that there were grounds for suspecting that the allegations against the claimant were true, not that they were true.

In *Malik v Newpost Ltd and others* [2008] EWHC 3063 it was held that the defence of qualified privilege was not available to a person who had sent in unsubstantiated allegations of fact to a newspaper which were seriously defamatory of an MP. Normally the *Reynold's* defence would apply to journalists and journalism although it could apply outside that context.

### Question 6

In *Malik v Manchester Crown Court* [2008] EWHC 1362 it was held that a production order made against a journalist under Schedule 5 of the Terrorism Act 2000, requiring him to disclose material relating to a book he was writing on terrorist activities of certain individuals on the basis of information provided by someone (H) who had committed acts of terrorism was unlawful. Quashing that specific order, the High Court held that its terms were too wide because it was drafted in such a way that would lead to the disclosure of M's sources other than H. Orders could be made under schedule 5 when it was likely that the material would be of substantial value; that is when it was probable to be of a value that was more than minimal.

### Question 7

The Criminal Justice and Immigration Act 2008 creates the offence of possession of extreme pornographic image; it also extends the Protection of Children Act 1978 to photographs which consist of a tracing or other image, whether made by electronic or other means

## Chapter 11

### Question 1

In *Religiongemeinschaft Zeugen Jehovas v Austria*, 31 July 2008, the European Court found a violation of articles 9 and 14 of the Convention when the Austrian authorities had refused to recognize the applicant's sect and then granted them inferior legal status in comparison with other religious groups.

See also *R (Watkins Singh) v Aberdare Girls' High School Governors* [2008] EWHC 1865, where it was held that the refusal of a school to allow a girl to wear a 'Kara' – a slim bracelet expected to be worn by Sikhs at all times was contrary to the Race Relations Act 1976 and the Equality Act 2006. The school had failed to justify the prohibition and exclusion on objective grounds; as opposed to cases involving religious dress (*Begum*) the Kara was less visible and ostentatious and did not interfere with the general uniform policy.

#### Question 2

Note the abolition of the offence of blasphemy and blasphemous libel under s.69 of the Criminal Justice and Immigration Act 2008

#### Question 3

See the following cases re the right to association:

- *R v Zafar and others, The Times*, February 15 2008 - for an offence under s.57 of the Terrorism Act 2000 of possessing an article for a purpose connected with the commission, preparation or instigation of terrorism, there had to be a direct connection between the possession of the article and the act of terrorism with which the article was alleged to be connected.
- *Home Secretary v Lord Alton of Liverpool* [2008] EWCA Civ 443 - an organisation was not one 'concerned in terrorism' for the purposes of s.3 of the Terrorism Act 2000 if it had decided to attempt to achieve its purposes by means other than violence, even if the possibility existed that it might decide to revert to terrorism in the future. Such an organisation should be contrasted with one which had temporarily ceased its terrorist activities for tactical reasons.

#### Question 4

See *Kay v Commissioner of Police of the Metropolis* [2008] UKHL 69 - a mass cycle ride starting from the same location was a procession 'commonly or customarily held' despite the fact that it followed a different route on each occasion. It was thus exempt from the notice provisions in s.11 of the Public Order Act 1986.

The government has issued a Green Paper on The Governance of Britain (Cm 7170) and paras.164-6 seeks views on the framework governing the right to protest around Parliament and the general legislation on protests and demonstrations. See now the Governance of Britain Draft Constitutional Renewal Bill and White Paper:

[www.justice.gov.uk/whatwedo/governance.htm](http://www.justice.gov.uk/whatwedo/governance.htm)