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The European Convention on Human Rights

Introduction

The European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) is at the centre of most modern human rights courses for two principal reasons. First, the European Court (and the now defunct Commission) of Human Rights has generated an enormous amount of case law that has informed international human rights law and has resulted in numerous legal and other changes in the United Kingdom as a result of actions brought against the government by aggrieved individuals. Secondly, the European Convention has now been 'incorporated' into (more properly, given effect to) domestic law by the Human Rights Act 1998 and as a consequence the Convention rights are the central basis of human rights protection in domestic law.

As a consequence most exam papers will contain questions on the European Convention, including its substantive rights and the machinery for enforcement, and all students will be expected to have a sound knowledge of the Convention's content and its influence on human rights protection. In particular, students need to be conversant with the background to the Convention, its machinery for enforcement, the substantive rights contained in the Convention and their different status, and the various principles underpinning those Convention rights, such as legality, necessity, and proportionality. This chapter contains questions on the machinery for enforcement and the principles of human rights adjudication emanating from that machinery. The substantive rights under the Convention will be dealt with in subsequent chapters on the right to life, freedom from torture, due process, the right to private life, freedom of expression, and freedom of religion, association, and assembly.

Question 1

Why was the European Convention on Human Rights drafted and ratified? What machinery did the Convention establish for the enforcement of human rights and how effective has the Convention and that machinery been in protecting human rights?

Commentary

The first part of this question asks for a reasonably descriptive account of the history of the Convention and its ratification, requiring an historical appreciation of the Council of Europe and the drafting of the Convention. The student should also appreciate the dual role of the Convention: to establish machinery for the enforcement of human rights and the resolution of human rights disputes, and to ensure that the standards laid down in the Convention were applied in the domestic law of each state.

The real crux of the question lies in the second part and the student should not only be able to fully explain the relevant procedures and mechanisms provided for under the Convention, but also show an appreciation of the system's novelty in allowing individual petition and accepting the compulsory jurisdiction of the European Court of Human Rights. This obviously requires the student to be aware of the more traditional and limited mechanisms of international human rights enforcement.

Answer plan

- Explanation of the history of the setting up of the Council of Europe and the drafting of the European Convention
- Analysis of the aims and objectives of the European Convention
- Explanation of the machinery established under the Convention for protecting human rights, notably the role of the European Court of Human Rights
- Examination of the effectiveness of that machinery, and especially the decisions of the European Court, in protecting human rights within the Council of Europe

Suggested answer

The European Convention on Human Rights and Fundamental Freedoms (1950) was drafted by the Council of Europe, a body set up after the Second World War to achieve unity among its members in matters such as the protection of fundamental human rights. It was drafted in the light of the atrocities that took place before and during the Second World War and in its preamble the Convention reminds the 'High Contracting

Parties' of the common heritage of political traditions, ideals, freedom, and the rule of law shared by their governments. Further, the preamble states that the Contracting Parties should resolve to take steps for the collective enforcement of certain of the rights contained in the Universal Declaration of Human Rights 1948, this being one effective way of ensuring future peace and stability. The Convention was signed by the High Contracting Parties in 1950, and entered into force in 1953 (it was ratified by the United Kingdom in 1957).

The aims of the Convention were, therefore, three-fold. First, Part One of the Convention identified a number of (mainly) civil and political rights that were felt central to any democratic and civilized society, and which required protection from arbitrary and despotic governments. Thus Part One refers to rights such as the right to life (article 2), freedom from torture and inhuman and degrading treatment (article 3), freedom from slavery (article 4), and liberty and security of the person (article 5). Further, the Convention refers to a number of due process rights, such as the right to a fair trial (article 6) and freedom from retrospective criminal law (article 7). In particular, the Convention identifies a number of democratic rights such as the right to religion (article 9), free speech (article 10), and the right to peaceful assembly (article 11), such rights being regarded as the bedrock of a democratic and tolerant society.

Secondly, the Convention imposed an obligation on each Contracting Party to secure those rights within their own jurisdiction (article 1). In this sense, therefore, the Convention attempted to create within each state a culture of human rights protection that is consistent with both the ideals contained in the preamble and the specific rights laid out in the Convention. This aim is supplemented by article 13 of the Convention, which guarantees the right to an effective remedy in domestic law for violation of Convention rights. Thirdly, and most controversially, the Convention established its own machinery for the enforcement of these rights, including the power to receive individual and state applications and the establishment of a Court of Human Rights, empowered to make judicial decisions that would be enforceable on the offending member state. This adjudication process was novel in international human rights law and it was obviously the intention of the Convention that states would not be left entirely to their own devices in securing these basic rights and freedoms, but would rather be subject to a degree of international judicial control.

Turning to the machinery for enforcement, the Convention established three enforcement bodies. First, the European Commission of Human Rights would consider the admissibility and merits of any application made to it, a task now carried out by the European Court, below. Secondly, the Committee of Ministers, consisting of politicians of each state, is charged under article 46 with supervising the execution of the European Court's judgments. Most recently, the proposed Protocol 14 will enable the Committee to bring proceedings before the Court where a state refuses to comply with the judgment. Thirdly, article 19 of the European Convention gives the European Court a judicial role

to 'ensure observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols'. Thus the European Court interprets and applies the European Convention, deciding whether there has been a violation of one of its substantive rights and whether any and sufficient justification existed for any violation. The Court now functions on a permanent basis and is the sole body responsible for deciding the admissibility and merits of both inter-state and individual application made under the Convention.

The Court lies at the heart of the enforcement of the Convention and comprises of Committees, who consider the initial admissibility of applications and have the power (under article 28) to strike out cases from its list, and Chambers of the Court, who decide on the admissibility and merits of the application. In addition the Convention has now established the Grand Chamber of the Court, which has the power to determine applications relinquished to it by a Chamber of the Court (article 31). This will occur where the case raises a serious question affecting the interpretation or application of the Convention or a serious issue of general importance. Thus in *Goodwin v United Kingdom* (2002) 35 EHRR 18 the European Court referred the issue of transsexual rights to the Grand Chamber. Further, under article 43 the Grand Chamber acts as an appeal court by considering requests by the parties to a case for referral within three months of the decision, as in *Hatton v United Kingdom* (2003) 37 EHRR 28 on the issue of airport noise and home life. It may also consider requests for advisory opinions under article 47.

Applications can either be brought by member states on behalf of individual victims of breaches by another High Contracting Party (article 33), or from individual applicants claiming to be victims of a violation of the Convention (article 34). With respect to state applications, a member state may bring an application against another state in relation to individual victims, either its own citizens or those of another state. For example, in *Ireland v United Kingdom* (1978) 2 EHRR 25 an application was brought by the Irish government in relation to the treatment of suspected terrorists by British authorities in army barracks in Northern Ireland, claiming that such treatment constituted a violation of articles 3 and 5 of the European Convention. State applications must comply with some of the admissibility criteria in article 35 in that states must exhaust all domestic remedies and applications must be made within 6 months of the last decision, unless there is a continuing breach (*De Becker v Belgium* (1979–80) 1 EHRR 43).

Article 34 of the Convention provides that the Court may receive applications from any person, non-governmental organization, or group of individuals claiming to be a victim of a violation by one of the High Contracting Parties. A person includes both natural and legal persons, such as companies, but does not include an unborn child (*Vo v France* (2005) 40 EHRR 12). The applicant must be a 'victim' of a breach of the Convention, meaning normally that he or she must be affected by the alleged violation (*Klass v Germany* (1978) 2 EHRR 214), although an individual might be directly affected by a provision even where it has not been specifically implemented or applied against that person (*Dudgeon v United Kingdom* (1982) 4 EHRR 149) and it is

possible for family and other representatives of the victim to bring proceedings (*Keenan v United Kingdom* (2001) 33 EHRR 38). To ensure that the Convention machinery co-exists with the domestic enforcement of human rights, article 34 allows the Court to declare an application inadmissible on a number of grounds. In addition to the requirement to exhaust all effective remedies and to bring the case within 6 months, a case can be declared inadmissible if it is anonymous, an abuse of the right of petition, substantially the same as one already investigated under the Convention or other international machinery or 'manifestly ill founded', in other words where the alleged violation is clearly lawful under the Convention. Further, article 38 allows the European Court of Human Rights to effect a friendly settlement between the applicant and the defendant state and to strike the case out on that basis. Some settlements are secured on the basis that the state agrees to amend the relevant law or practice (*Sutherland v United Kingdom, The Times*, April 13 2001), although some can be effected without any admission of liability (*Amekrane v United Kingdom* (1974) 44 CD 101).

The decisions of the European Court of Human Rights are binding in international law on those states that have accepted the compulsory jurisdiction of the Court and place a duty on the state to comply with the judgment, in respect of both paying any just satisfaction awarded by the Court and of making any necessary changes to domestic law and practice. Under article 41 the European Court is empowered to award just satisfaction so as to place the victim into the position had the violation not occurred. Any such award can include pecuniary damages to compensate for any direct financial loss such as loss of property, and non-pecuniary loss, where the applicant has suffered because of the nature of the violation, for example, for physical or mental distress (*Smith and Grady v United Kingdom* (2000) 29 EHRR 493). In some cases the Court will regard the judgment itself as just satisfaction and offer no damages award (*McCann v United Kingdom* (1995) 21 EHRR 97). The Court can also compensate for legal costs and expenses 'actually, necessarily and reasonably incurred by the applicant'.

With respect to the effectiveness of the Convention and its machinery, it could first be argued that the enormous number of applications received and dealt with by the European Court, necessitating the creation of a full-time Court via Protocol No 11, is testimony to the success of that machinery. Indeed, the Convention may have become a victim of its own success. Protocol No 14, yet to be ratified, attempts to deal with the increasing caseload of the Court by adding a new procedure and a new criterion of admissibility. Under the Protocol, in certain cases a single judge can decide on admissibility and three men committees can decide on admissibility in the case of repeated violations or 'clone' cases. Further, cases can be declared inadmissible where the applicant has not suffered a serious disadvantage and where respect for human rights does not require the court to examine the merits of the case. Such evidence suggests that the Court is now regarded as an international court of appeal, providing victims with a further opportunity of redress if they have been unsuccessful at the domestic level. This would conflict with the original intent of the Convention, which was that the Convention would enforce duties on the state itself and that the Court would only be used as a last resort.

Secondly, it cannot be denied that the decisions of the European Court have had an enormous impact on the protection of the human rights of certain groups such as prisoners (*Golder v United Kingdom* (1975) 1 EHRR 524), detainees subjected to ill treatment (*Ireland v United Kingdom* (above) and *Selmouni v France* (2000) 29 EHRR 403), those facing expulsion from the state (*Soering v United Kingdom* (1989) 11 EHRR 439), children (*Tyrer v United Kingdom* (1978) 2 EHRR 1 and *A v United Kingdom* (1999) 27 EHRR 611), and sexual minorities (*Dudgeon v United Kingdom* (above) and *Goodwin v United Kingdom* (above)). These cases have not only highlighted human rights abuses of such groups, but have also provided the victim with a remedy that would not have been available in domestic law. In addition, the judgments have often acted as a catalyst for legal change at the domestic level with respect to matters such as corporal punishment, prison regulation, and the equalization of sexual consent.

Thirdly, the decisions of the European Court of Human Rights have had a considerable influence on the establishment of international human rights norms. Thus, the Court has established firm principles of legality and proportionality with respect to areas such as the death penalty (*Ocalan v Turkey* (2003) 37 EHRR 10), ill-treatment of detainees (*Ireland v United Kingdom* (above)), the extra-territorial liability of state parties (*Soering v United Kingdom* (above)), freedom of the press (*Sunday Times v United Kingdom* (1979) 2 EHRR 245 and *Lingens v Austria* (1986) 8 EHRR 407), and the right of access to the courts (*Golder v United Kingdom* (above)). The principles enunciated in these cases have been accepted by other international agencies, such as the Human Rights Committee, and continue to inform the content and application of domestic human rights law.

Fourthly, the obligation imposed by article 1 of the Convention on each member state to secure human rights within their own jurisdiction has led to the incorporation of Convention rights and principles into the domestic law of individual states. Although incorporation of the Convention is not a condition precedent of membership of the Council of Europe, and the European Court has not insisted on such in order for the state to offer effective remedies under article 13 (*Silver v United Kingdom* (1983) 5 EHRR 347), incorporation represents one of the essential aims of the Convention and of the Council of Europe. Such a measure represents a state's strong agreement with the rights and principles in the Convention, recognizing that it is preferable that the individual victim can find an effective remedy at the domestic level rather than using the international machinery in Strasbourg. Consequently, the passing of the Human Rights Act 1998, although not representing full incorporation of the Convention, is to be welcomed as providing a more effective and immediate remedy for human rights violations.

However, the number, and success rate, of applications brought before the European Court should not be used as the sole measure of the Convention's success. Such figures illustrate the ability of the Court to hear adjudications and make binding decisions, which should in turn inform and change domestic law. On the other hand, the fact that so many applications continue to be brought, particularly against established

member states, might indicate that the central aim of the Convention—of providing effective domestic protection against the violation of human rights—is not being realized. Further, the machinery provided under the Convention might be criticized for concentrating on judicial remedies to deal with established violations to the exclusion of monitoring and investigative procedures that might prevent violations taking place. In conclusion, therefore, although the Convention and its machinery for enforcement may be seen by many as a panacea of international legal protection against human rights abuse, it is clear that it needs to exist alongside wider and different mechanisms of protection, such as education and state reporting, which are intended to address and improve the human rights records of each state.

Question 2

To what extent does the European Court of Human Rights attempt to strike a balance between on the one hand ensuring that member states comply with the standards laid down by the Convention, and on the other respecting the authority of each member state and its legal system?

Commentary

This question tackles the balance between state autonomy—the right of states to control their own affairs and to make their own decisions on human rights issues—and the monitoring of human rights protection via the European Convention on Human Rights. The area is quite popular with courses that concentrate on international human rights, but this type of question is increasingly popular on courses studying the European Convention.

The question is principally about the 'margin of appreciation', a doctrine established by the European Court of Human Rights to ensure that each member state is given an element of discretion in how they implement and apply Convention standards in their own domestic law. To answer the question, the student needs to be aware of the relationship between the Convention machinery for enforcement and state autonomy, and in particular of article 1 of the Convention, which places the primary duty to protect Convention rights on the member states themselves. The student will then need to examine the relevant case law where the margin of appreciation has been applied and modified by the European Court of Human Rights, particularly with respect to the conditional rights contained in articles 8 to 12 of the Convention. The question also calls for an examination of the doctrine (the margin of error) with respect to article 15 of the Convention—which allows states to derogate from their Convention obligations in times of war and other emergencies. There is also room to consider

whether the doctrine plays a role in the determination of absolute rights, such as the right to life and freedom from torture.

Answer plan

- Explanation of the general conflict between state sovereignty and the universal protection of human rights
- Examination of the machinery for the enforcement of human rights contained in the Convention with respect to its relationship with the state's domestic law
- Identification of the Convention provisions allowing state derogation and the role of the margin of error
- Critical examination of the doctrine of the margin of appreciation and the setting of common European standards by the European Court of Human Rights
- Conclusions as to the balance between enforcing human rights standards and respecting state authority

Suggested answer

Any international or regional human rights treaty poses a threat to national sovereignty and to the political, cultural, and social differences pertaining in that state. Such treaties require the acceptance of universal standards and thus seek to measure the legality of each state's laws and practices with those standards. This inevitably threatens the state's power to protect the human rights of those within its jurisdiction in a manner that is consistent with the community values of that state, and as a consequence some states will decide not to sign the treaty, or ratify all its provisions and enforcement mechanisms. This conflict between international and domestic values is particularly acute in the European Convention on Human Rights (1950), where each state's obligations is monitored by a Court of Human Rights that has the power to rule on the compatibility of state law with Convention rights and to make enforceable judgments in that respect. Assuming the state has agreed to the jurisdiction of the Court, the latter is then faced with the question of whether it is to apply international norms in disregard of the states' various values, or whether it will display a level of judicial deference, thereby allowing the state a level of discretion as to how it will realize its obligations under the Convention.

In reality, the European Court has recognized this friction and has devised mechanisms by which it can show a level of respect to each member state, whilst maintaining its function in ensuring that the values laid down in the Convention are recognized and respected by that state. Although many commentators, in particular Timothy Jones, have criticized this concept as devaluating the rights in the Convention and of frustrating the Convention's effort to establish a common European standard of rights protection, these mechanisms are now clearly part of the European Court's jurisprudence and are

used extensively in assisting the Court in its function of establishing a violation of the Convention.

First, and most specifically, the European Court has shown a good deal of deference when interpreting and applying article 15 of the Convention, which allows states to derogate from their Convention obligations (apart from those laid down in articles 2, 3, 4, and 7 of the Convention) in times of war or other public emergency threatening the life of the nation by adopting measures that are strictly required by the exigencies of the situation. Although the Court has insisted that these measures will need to be passed or carried out for a legitimate purpose and will need to correspond to a very pressing social need and meet a strict test of proportionality, it has also recognized that the state should have a good deal of discretion in such cases. Thus, in *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, in deciding that the detention of the applicant without trial for a period of five months was justified within the terms of article 5, the Court stressed that the respondent government should be afforded a certain 'margin of error' or appreciation in deciding what measures were required by the situation. Accordingly, it was not the Court's function to substitute for the government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism. Moreover, the Court stated that it must arrive at its decision in the light of the conditions that existed at the time that the original decision was taken, rather than reviewing the matter retrospectively.

This deference was clearly evident in the case of *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539, which involved a challenge to the United Kingdom's derogation of article 5(3) following the European Court's decision in *Brogan v United Kingdom* (1989) 11 EHRR 117—which held that provisions contained in the Prevention of Terrorism Act 1978 failed to guarantee the right of detained persons to be brought promptly before a judge or other officer. The Court held that the derogation was justified, even though it had not been lodged before the Court's decision in *Brogan*, accepting the government's claim that there was an emergency situation, and finding that the derogation was not invalid merely because the government had decided to keep open the possibility of finding a means of ensuring greater conformity with the Convention. Thus, provided the Court is satisfied that the Convention rights are safeguarded against arbitrary interference—in *Brannigan* the Court noted the availability of remedy of the *habeas corpus*—it offers the state a margin of appreciation and will generally respect the State's assessment of the situation as well as the proportionality of the specific measures. However, the recent decision of the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 AC 68 shows that there is a limit to judicial deference even in this sensitive area.

More generally the European Court might want to offer some discretion to a member state when adjudicating upon alleged human rights violations and deciding whether a potential violation is justified for reasons of other individual or state interests. In particular, the conditional rights contained in articles 8–11 of the Convention require the Court to decide whether an interference with the right of, for example, freedom of expression is 'necessary in a democratic society' for the purpose of achieving the

legitimate aim of, say, protecting public morals. In *Handyside v United Kingdom* (1976) 1 EHRR 737 the European Court stressed that the machinery of the Convention is subsidiary to the national systems safeguarding human rights, leaving to each contracting state, in the first place at least, the task of securing the rights and liberties in the Convention. As a consequence the Court recognized that provisions such as article 10(2) leave to each state a 'margin of appreciation', given both to the domestic legislature and to the bodies called upon to interpret and apply the laws. This margin of appreciation, according to the Court, goes hand in hand with its powers to give the final determination on whether a restriction is compatible with the Convention right in question.

This margin of appreciation, or discretion, will allow the member state in question to defend its laws and practices against alleged violations even though such laws are not apparent, or enforced with the same rigour, in other states. Although the doctrine may militate against the enforcement of universally accepted human rights norms and the establishment of a common standard of protection in Europe, it exists for a number of reasons. First, the doctrine recognizes that the Court's role under the Convention is subsidiary to the system adopted and carried out by each member state. This is born out by article 1 of the Convention, which provides that the principal obligation to secure Convention rights is placed on the High Contracting Parties. Secondly, the doctrine allows the Court to apply an element of judicial reticence and to respect the law and decision-making of a particular state when making value judgments in determining whether something is necessary and proportionate. Thirdly, and of particular significance to international treaties, in certain cases it is difficult, if not impossible, to decide whether a particular law and its application is 'necessary in a democratic society' because of the problem in establishing a common European standard by which the necessity of a particular law or practice can be measured. For example, one would not expect domestic laws on obscenity, blasphemy, or public order to display a common standard among member states, and thus it might be argued that the Court should respect the different cultural and social conditions prevailing in each state when its laws are challenged.

Nevertheless, the doctrine is a potential threat to the universal enforcement of human rights and as a result it has not been applied without caution. Similarly, it does not apply equally in all contexts. Thus the Court has always afforded a wide margin of appreciation in cases where matters of public morality are at issue. For example, in *Handyside* (above) the Court held that the states, by reason of their direct and continuous contact with the vital forces of their countries, were in a better position than the international judge to give an opinion on the exact content of the requirements of morals, as well as to the necessity of any restriction or penalty intended to meet those requirements. In that case, therefore, it upheld a prosecution for obscenity despite the publication being freely available in most other parts of Europe. This reluctance to interfere on moral issues, which the Court feels are better determined by the domestic authorities, is also evident in cases involving blasphemous speech (*Wingrove v United Kingdom* (1996) 24 EHRR 1 and *Otto-Preminger Institut v Austria* (1994) 19 EHRR

34). Further, a wide margin of appreciation appears to be given to domestic authorities when administering public order laws that interfere with the right of peaceful assembly (*Chorherr v Austria* (1993) 17 EHRR 358).

On the other hand, the Court has applied a narrower margin of appreciation where the restriction in question impinges on the enjoyment of the individual's right to private life. Thus, in *Dudgeon v United Kingdom* (1982) 4 EHRR 149 it held that the prohibition on homosexual acts via the criminal law concerned a most intimate aspect of private life, and accordingly there had to exist particularly serious reasons before interference with that right could be justified under article 8(2) of the Convention. In such circumstances the Court needed to be satisfied that a change to the law would seriously injure the moral standards of the community, it not being sufficient that the majority of society merely disapproved of such conduct and would object to a change in the law. Similarly, in *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 the Court held that a prohibition on homosexuals from remaining in the armed forces could not be justified solely on the basis of the negative attitudes of heterosexuals towards homosexuals. Although the European Court is prepared to allow some margin to member states in the control of private sexual life (*Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39), it is beginning to take a more robust approach in this area (*ADT v United Kingdom* (2001) 31 EHRR 33). This is particularly true with respect to the legal and civil status afforded to transsexuals in domestic law. In a number of earlier decisions the Court refused to outlaw domestic law that interfered with transsexuals' Convention rights (*Cossey v United Kingdom* (1990) 13 EHRR 622 and *X, Y and Z v United Kingdom* (1997) 24 EHRR 143). However, more recently, the Court decided that the state's margin of appreciation had run out and found such interferences in violation of the Convention (*Goodwin v United Kingdom* (2002) 35 EHRR 18). Sometimes, the Court will allow the state to take its own measures to deal with such dilemmas and will only interfere if there is no evidence that the state has applied its judgment to such issues, as in the case of the disenfranchisement of convicted prisoners (*Hirst v United Kingdom (No 2)* (2004) 38 EHRR 40).

The Court has also given a narrow margin of error in the area of press freedom, recognizing that most laws which impinge on press freedom display a reasonably common European standard, and accepting that press freedom is fundamental to the operation of any democratic state and thus requires the greatest degree of justification. For example, in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 the Court accepted that the laws of contempt of court displayed a relatively common approach, allowing the Court to more easily judge the necessity of any particular interference so that in such a case a more extensive European supervision corresponds to a less discretionary power of appreciation. Equally, because the Court regarded the duty of the press to inform the public on matters of great public interest as essential to democracy, it submitted the law and the measure in question to the utmost scrutiny.

Although the doctrine of the margin of appreciation in its strict sense applies only to the enforcement of conditional rights, there is evidence that the Court will offer some

element of discretion in the interpretation and application of more absolute rights, such as the right to life and freedom from inhuman and degrading treatment or punishment. This will offer each state an area of discretion to pass and administer laws that might otherwise infringe on Convention rights. For example, in *Pretty v United Kingdom* (2002) 35 EHRR 1 the Court noted that there was no general right to die under article 2 of the Convention, and that even though some states practised controlled euthanasia there was no obligation on any state to introduce such a right. Further, in *Vo v France* (2005) 40 EHRR 12 the Court confirmed that the right to life did not on its proper interpretation cover the right of the unborn child, noting that there was still a considerable amount of difference of opinion among member states as to when 'life' begins. Equally, in determining applications under article 3, the Court has offered an area of discretion with respect to penal policy. For example, in *V and T v United Kingdom* (2000) 30 EHRR 121, in finding that there had been no violation of article 3 when two young boys were given life sentences for murder, the Court recognized that there was no fixed or common agreement among European states on the minimum age for incarceration. Similarly, the European Court has not laid down any maximum age for imprisonment, leaving such matters to the discretion of each state and the circumstances of each case (*Papon v France* (2004) 39 EHRR 10). These cases recognize that there is a certain area of discretion available to the domestic authorities, even in respect of the enjoyment of fundamental human rights.

In conclusion, therefore, despite strong criticisms, the doctrines of the margin of appreciation and the margin of error have become important principles in the Court's jurisprudence and case law. Accordingly, it has been employed by the Court to balance its role in upholding the Convention rights of the individual with the desire to ensure that the appropriate level of autonomy of each member state is respected. Although the doctrine appears to be unwieldy and discretionary, there have emerged some guiding principles determining the extent of the doctrine and its application, and ensuring that each state complies with the essence of the Convention rights whilst being permitted an element of discretion as to how such enjoyment is to be achieved (as in *Hirst* (above)). Although the notion of a flexible enforcement of human rights in each state appears to contradict the universal nature of such rights, such a notion is essential in recognizing the autonomy of each state's legal culture and, provided the margin is not extended unduly, is not inconsistent with the aims of the European Convention.

Question 3

With reference to relevant case law, explain the importance of the following principles and doctrines with respect to the role of the European Court of Human Right's role in protecting human rights:

'Prescribed by or in accordance with law';
'Necessary in a democratic society';
'The doctrine of proportionality'.

Commentary

The question is reasonably straightforward and is also nicely broken down for the student. The introduction to the answer should explain where these principles appear and illustrate the context in which they arise—in the justification of *prima facie* violations of so-called 'conditional rights', contained in articles 8–11 of the Convention. The question calls for relevant case law, and should not be attempted unless the student has a very sound knowledge of the cases under each principle.

The student should not just deal with each principle in turn, but should attempt to explain how each one assists the European Court of Human Rights in adjudicating on human rights cases by upholding principles of legality, the rule of law, democracy, and reasonableness. The question clearly calls for an analysis of the European Court's jurisprudence, and students should avoid detailed discussions of domestic case law on these principles, although some reference to domestic authorities may be useful to illustrate the scope of the Court's jurisprudence.

Answer plan

- General explanation of the role of the European Court within the Convention machinery
- Explanation of the term 'prescribed by/in accordance with law' and an analysis of relevant case law
- Explanation of the term 'necessary in a democratic society' as interpreted and applied by the European Court of Human Rights
- Explanation of the doctrine of proportionality and its impact on human rights adjudication, as applied by the European Court of Human Rights

Suggested answer

Some rights contained in the European Convention are classified as 'conditional' and can be violated in certain circumstances provided the violation possesses certain characteristics of legality and reasonableness. Thus, once the European Court has established that the applicant's Convention rights are engaged and have been violated, it must then turn to the question of whether the restriction on that right is permissible. For example, the rights contained in articles 8–11 of the Convention, guaranteeing

rights such as private life, religion, freedom of expression, and the right to association and peaceful assembly, begin with a statement that everyone has the right to, say, freedom of expression, but in the next paragraph provide that such rights are subject to such restrictions that are prescribed by law (or in the case of article 8—guaranteeing the right to private and family life—'in accordance with law') and necessary in a democratic society for the protection of one of a number of legitimate aims. These qualifying paragraphs recognize that the enjoyment of certain fundamental rights is not absolute, but is capable of clashing with other individual and state interests requiring compromise in certain circumstances. Equally importantly, however, by insisting that any restriction is 'prescribed by law' and 'necessary in a democratic society', these qualifications are restricted in their scope and must meet generally recognized standards of legality and fairness in order to be permissible.

Prescribed by/in accordance with law

With respect to the requirement that a restriction is 'prescribed by law' or 'in accordance with law', any interference with a Convention right must first be justified by reference to some provision of domestic law. For example, article 5 of the Convention allows interference with a person's liberty and security of the person, but only in accordance 'with a procedure prescribed by law', and the phrase 'lawful arrest or detention' employed in that same article has been interpreted to mean that the law not only has a legitimate source, but that it complies with the fundamental ideals of the rule of law in that it is sufficiently fair, impartial and clear (*Steel v United Kingdom* (1999) 28 EHRR 603). Consequently, any restriction on a Convention right that lacks such a legal basis will be automatically unlawful under the Convention, however necessary that provision may be felt to be in securing individual or public good.

The phrase 'in accordance with the law', employed in article 8, was considered by the European Court of Human Rights in *Malone v United Kingdom* (1984) 7 EHRR 14. According to the Court, for a measure to be in accordance with law it had to first have a sufficiently established legal basis, secondly be accessible so that those affected by it can find out what the law says, and thirdly be formulated with sufficient certainty to enable people to understand it and to regulate their conduct by it. Consequently the Court found that the rules relating to telephone tapping, being included in secret administrative guidance, were not in accordance with law as required by article 8(2). In *Silver v United Kingdom* (1983) 5 EHRR 347 it was held that the phrase 'prescribed by law', employed in articles 9–11 of the Convention, should be interpreted and applied in an identical manner.

Any provision that interferes with a Convention right must be subject to sufficient control, and in *Malone* (above) the European Court held that there must be a measure of legal protection against arbitrary interference by public authorities with the right in question. Consequently, as the process of telephone tapping was controlled by administrative regulation rather than formal law that could be subjected to judicial supervision, it found that such measures were not in accordance with law and thus

unlawful under article 8. The Court also stressed that provisions must be sufficiently independent of those who administer them. Further, the requirement, that the rule has to be accessible, insists that a person who is likely to be affected by the rule should have access to it. Thus, in *Malone* the Court found a breach of this requirement where the rules on telephone tapping were only available to the government or those responsible for administering the practice. Again, in *Silver v United Kingdom* (above)—a case involving the regulation of prisoners' correspondence via administrative guidance produced by the Secretary of State for the Prison Service—the European Court held that restrictions on prisoners' correspondence authorized by non-legal and non-published Standing Orders were not in accordance with law.

In addition, law should be sufficiently certain and clear and in *Sunday Times v United Kingdom* (1979) 2 EHRR 245 the Court held that a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. Thus, a person must be able (with appropriate advice if necessary) to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, the Court stressed that those consequences need not be foreseeable with absolute certainty, accepting that most laws are inevitably couched in terms which, to some extent, are vague. The Court also noted that the legal provisions in question do not have to be in statutory form, but could derive from the common law. Thus, in the *Sunday Times* case, although the common law of contempt of court was inevitably uncertain and dependent on interpretation, a person could, by examining its application via the case law, predict with a sufficient degree of certainty whether the publication of an article would be caught by the law. Conversely, if a rule is so vague that its meaning and extent cannot be reasonably predicted, then the rule will not be regarded as law. Thus, in *Hashman and Harrap v United Kingdom* (1999) 30 EHRR 241 the European Court held that the power of the domestic courts to order a person to desist in conduct that was *contra bones mores* (conduct which is seen as wrong in the eyes of the majority of contemporary citizens), failed to give sufficient guidance to the applicants as to what conduct they were not allowed to partake in.

Necessary in a democratic society

All restrictions on the rights contained in articles 8–11 of the Convention must be 'necessary in a democratic society' for achieving one of the legitimate aims listed in the article. Thus, the Court must not only be satisfied that the state interfered with the applicant's rights for a legitimate purpose, such as the protection of public morals, it must also be persuaded that the restriction was necessary in all the circumstances. This involves the Court considering the merits of the relevant domestic legal provision and subjecting such laws to a test of necessity and reasonableness to ensure that the interference can be justified for some greater public or individual good. In *Handyside v United Kingdom* (above) the Court established the process of inquiry in assessing whether a restriction is necessary in democratic society. First, the Court must inquire whether there is a 'pressing social need' for the restriction. Secondly, if that is so

established, it must ask whether that restriction corresponds to that need. Finally, if it does, then the Court must ask whether it is a proportionate response to that need and in any event, whether the reasons advanced by the authorities are relevant and sufficient. The Court has also stressed that in deciding whether a restriction is necessary it is not faced with a choice between two conflicting principles, but with a principle of, for example, freedom of expression subject to a number of exceptions, which must be narrowly interpreted (*Sunday Times v United Kingdom* (above)). This would appear to assume that any interference with a fundamental right is in breach of the Convention, placing the onus of proving necessity and proportionality on the violating state.

In *Handyside v United Kingdom* (above) the European Court held that the word 'necessary' did not mean 'absolutely necessary' or 'indispensable', but neither did it have the flexibility of terms such as 'useful' or 'convenient'. Instead, in the Court's view, there must be a 'pressing social need' for the interference and any interference must be proportionate to the protection of a legitimate aim (see below). Thus, although a member state does not have to show that society could not possibly do without the legal restriction, the Court is not prepared to accept a restriction merely because it provides a useful tool in achieving a social good, particularly where there is little evidence that such a good is being achieved in practice by the existence of that restriction and its application in the particular circumstances. For example, in *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 the European Court was not satisfied that in practice the ban on homosexuals in the armed forces served any real purpose of maintaining national security via an effective national fighting force.

Thus, the Court insists that there is strong objective justification for the law and its application, that the member state can point to a real social harm, that the legal restriction exists to preserve a legitimate aim, and that the employment of that law is necessary to achieve that aim. For example, in *Dudgeon v United Kingdom* (1982) 4 EHRR 149 the European Court noted that, as opposed to the time when legislation prohibiting homosexual conduct was passed in Northern Ireland, there was evidence of a greater understanding and tolerance of such conduct. Accordingly, a blanket prohibition of such conduct, irrespective of the age of the participants, did not correspond to a pressing social need. The European Court's review, however, may be weakened when it recognizes that the state should be provided with a wide margin of appreciation. For example, in *Handyside v United Kingdom* (above) the Court accepted that the prosecution in the English Courts of an obscene publication was justified even though the publication was freely available in most other European states.

Proportionality

In assessing the necessity of a restriction the Court employs the doctrine of proportionality, ensuring that a fair balance is achieved between the realization of a social goal, such as the protection of morals, and the protection of the fundamental rights contained in the Convention. In *Handyside* (above) the Court insisted that any restrictions should be strictly proportionate to the legitimate aim being pursued and that the restriction

in question does not go beyond what is strictly required to achieve that purpose. The extent to which the Court is prepared to conduct such an inquiry may well depend on a number of factors, such as the importance of the right that has been interfered with, the extent to which the right was violated, the urgency of the pressing social need, and the sanction imposed on the right user, including whether there was a less restrictive alternative available to the domestic authorities. For example, in *Tolstoy v United Kingdom* (1995) 20 EHRR 442 the European Court held that the award of £1.5m damages in a libel action was a disproportionate interference with freedom of expression, as it would have a chilling effect on freedom of the press. Further, in *Bowman v United Kingdom* (1998) 26 EHRR 1 it was held that imposing a £5 ceiling on election expenditures for the purpose of supporting a candidate's election campaign was a disproportionate interference with the applicant's freedom of expression, particularly as it was applied at a time when the public interest in free speech was greater than normal.

It is also clear that the doctrine of the margin of appreciation may play a vital role in determining the extent of the Court's interference, and indeed the European Court has adopted a number of approaches in determining the necessity and proportionality of restrictions depending on the context of the decision. Thus, where the Court feels that there is little evidence of a common European approach to the matter (such as in cases concerning public morality), and wishes to give the state a wide margin of appreciation, it has simply asked whether the state has advanced relevant and sufficient reasons for the interference (*Handyside v United Kingdom* (above)). Conversely, where the Court is intent on thorough scrutiny, and where there is evidence of a common European standard, it might ask whether the domestic authorities had available to them a less restrictive alternative than the one applied to the applicant. Such an approach is usually taken when the Court is faced with restrictions on press freedom (*Goodwin v United Kingdom* (1996) 22 EHRR 123) or the public right to know (*Sunday Times v United Kingdom* (above)). The Court and Commission have also asked whether the restriction destroys the very essence of the Convention right in question, and in *Hamer v United Kingdom* (1982) 4 EHRR 139 the European Commission for Human Rights held that the prohibition on prisoners marrying whilst in prison destroyed the very essence of the right to marry contained in article 12 of the Convention.

The need to establish necessity and proportionality bestows a potentially wide power on the European Court to judge the acceptability of state law and practice, arguably taking the European Court beyond a mere reviewing function. The scope of the European Court's powers in this respect was noted by the House of Lords in *R (Daly) v Secretary of State for the Home Department* [2002] 2 AC 532, where Lord Steyn observed that the doctrine of proportionality requires the reviewing court to assess the balance that the decision-maker had struck and requires attention to be directed to the relevant weight accorded to the interests and considerations. Such powers may be restricted by the domestic principle of judicial deference and, with

respect to the European Court's powers, it could be argued that similar deference might be shown by the Court employing the doctrine of the margin of appreciation.

Conclusion

The fact that restrictions on Convention rights have to be prescribed by law, and to be necessary and proportionate in their application, is central to the Convention's aim of ensuring that fundamental human rights are not violated unless there are legitimate and pressing reasons for doing so. The requirement that restrictions are prescribed by law upholds the general tenets of the rule of law in that it insists that even formal law must be prospective, accessible, and clear. Further, the need to show that restrictions are necessary in a democratic society and proportionate recognizes that rights should not be interfered with unless there is a pressing and urgent need to do so and that such rights should not be compromised on grounds of convenience or simply because their enjoyment is not countenanced by the majority. Although the European Court's application of these principles is tempered somewhat by the application of the doctrine of the margin of appreciation, their existence does provide a safeguard against unlawful and unnecessary interference with basic rights.

Question 4

To what extent does the European Convention on Human Rights maintain a distinction between absolute and conditional human rights? Is this distinction a practical and sustainable one?

Commentary

This question is concerned with how the European Convention classifies human rights into either absolute rights—which cannot be interfered with or derogated from in any circumstances—or conditional rights—which can be interfered with in particular circumstances provided certain requirements are met. It is a question that is likely to be asked given the passing of the Human Rights Act 1998, which 'incorporates' both types of rights into domestic law.

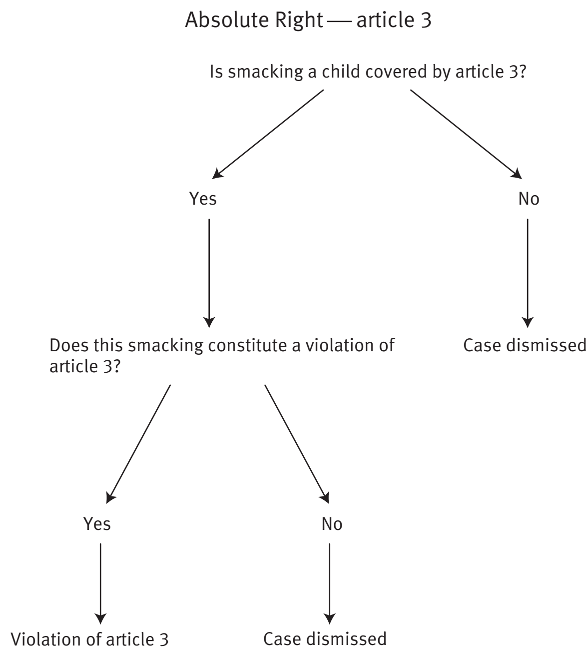
In the first part the student should draw the distinction between such rights as freedom from torture and freedom from slavery (which cannot be infringed even in times of war) and rights such as freedom of expression and privacy, which, by their very nature are qualified and can be compromised in certain circumstances. The student must also identify certain Convention rights—such as liberty of the person and the right to a fair

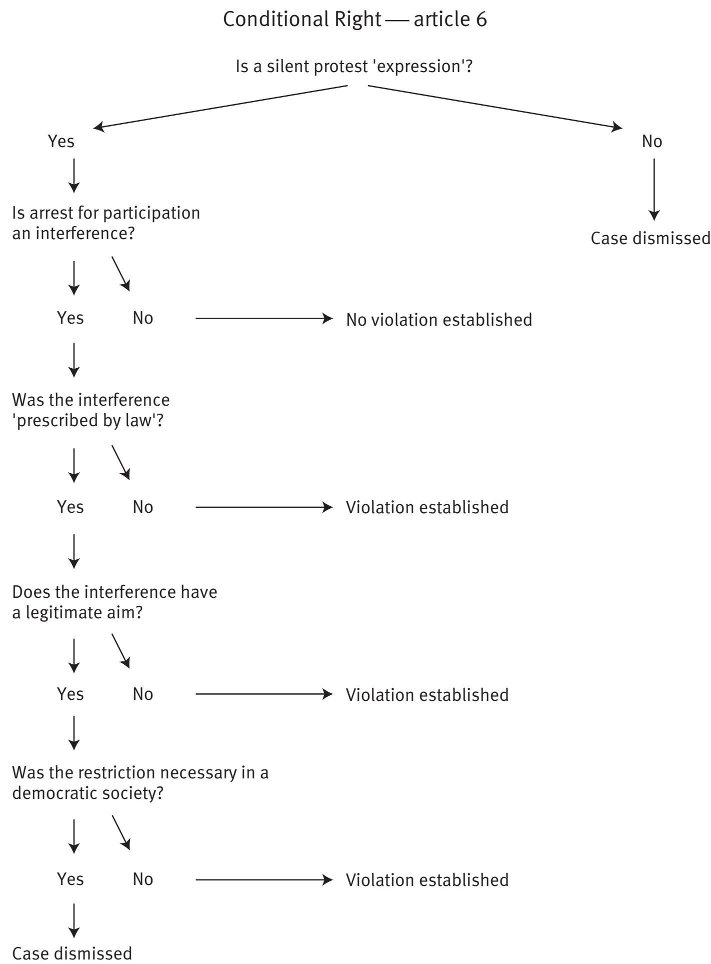
trial—which are limited by certain prescribed exceptions. The second part of the question is more difficult for it requires the student to appreciate why the Convention makes that distinction on both moral and practical grounds, and to give substantive examples where so-called 'absolute rights' have been upheld absolutely by the Court and where such rights have been subjected to qualification and exception via the process of interpretation and application.

The figures on pages 45 and 46 illustrate the European Court's role in adjudicating on alleged violations of absolute and conditional rights.

Answer plan

- Summary of the substantive rights contained in the European Convention on Human Rights
- Explanation of the general difference between absolute and conditional rights and the reasons for such a distinction
- Detailed examination of various absolute and conditional rights under the European Convention
- Critical analysis of the Convention's attempts to maintain the distinction and the problems encountered by the European Court and Commission in attempting to do so
- General conclusions as to the rationale behind and the viability of making such a distinction





Suggested answer

The purpose of any human rights treaty, or domestic bill of rights, is to ensure that fundamental human rights can be enjoyed without interference from either the state or from other citizens. The human right, therefore, is elevated to an 'immunity', so that it is free from interference and placed beyond the reach of the regular law. However, in practice human rights can rarely be enjoyed absolutely and without restriction, for even the staunchest libertarian will concede that human rights may have to be compromised if their enjoyment causes an identifiable and real harm. Consequently, most human rights will not be considered unimpeachable in every sense and the state will be allowed to restrict them in certain situations and for legitimate purposes. Nevertheless, certain rights may be regarded as absolute in nature and the treaty or bill

of rights will attempt to defend those rights from any encroachment, even during times of emergency.

The European Convention on Human Rights (1950) attempts to employ this dichotomy to some extent and the rights under the Convention are often referred to as either absolute or conditional. This distinction is based on two factors. First, certain rights under the Convention are regarded as so fundamental that it is not permissible to violate them even in times of war or other public emergency. Thus, although article 15 of the Convention allows member states to derogate from their responsibilities under the Convention in such situations, no such derogation is allowed in respect of some of the rights under the Convention; for example, article 3, which prohibits torture and inhuman or degrading treatment or punishment. A similar exception to article 15 is made in respect of other Convention rights, such as the right to life under article 2, although article 15 does provide for an exception in cases of deaths resulting from lawful acts of war. Further, there can be no derogation of article 4(1), guaranteeing freedom from slavery, or article 7, which provides protection against retrospective criminal law. Because these rights are regarded as so fundamental to individual liberty and dignity and to the general aims of the Convention itself, their violation cannot be excused whatever the situation. Their absolute protection, therefore, is regarded as the bedrock of civilized democratic society, and violation is not seen as a justifiable option.

Secondly, and more generally, the Convention makes the distinction between absolute and conditional rights in relation to whether that right can be interfered with in normal circumstances for either individual or social good. In this sense some of the Convention rights, including the right not to be subject to torture or other ill-treatment, are regarded as absolute, to be enjoyed without any interference, however justified, whilst rights such as freedom of speech and the right to private life are expressly made conditional and subject to restrictions, allowing the state to interfere with those rights within certain limits. For example, article 4(1) provides simply that no one shall be held in slavery or servitude and article 9 guarantees the right of freedom of thought, conscience, and religion, such rights not being subject to legitimate and necessary restrictions, see below. Similarly, in the case of article 3, above, once it has been established that a violation has taken place, there can be no justification for that violation, no matter how clear that legal restriction or for what purpose the treatment was administered. For example, in *Chahal v United Kingdom* (1997) 23 EHRR 413 the European Court recognized the fundamental and absolute character of article 3 and held that once there were grounds for believing that there was a real risk that, if deported, someone would be subjected to treatment in violation of article 3, then the activities of that individual and his danger to society could not be regarded as material. Similarly, in *Tyrer v United Kingdom* (1978) 2 EHRR 1, the fact that the birching of young persons was an effective deterrent against youth crime and approved of by the majority of society was irrelevant to the question whether it constituted inhuman and degrading treatment. Such is the importance of defending individuals from attacks on their human dignity that the Convention affords no possible excuse for such violations.

In comparison, freedom of expression, for example, is classed as a conditional right and article 10 recognizes that such a right carries with it duties and responsibilities and is thus subject to lawful exceptions. Consequently, once it is established that a person's freedom of expression has been violated, a member state is allowed to justify that violation by proving that the restriction was prescribed by law and was necessary for the purpose of achieving a legitimate aim, such as upholding public morality (*Handyside v United Kingdom* (1976) 1 EHRR 737). Article 10 thus envisages that free speech may cause harm and might have to be justifiably compromised in a variety of situations, provided the restriction meets certain conditions of legality and necessity. A similar format is used for other Convention rights, such as the right to private life (article 8), freedom to manifest one's religion (article 9), and the right to association and peaceful assembly (article 11), the article beginning with a statement of the right in question and then adding a paragraph allowing interference for a number of legitimate aims. In addition, the European Court offers each state a certain 'margin of appreciation' with respect to what restrictions they place on such rights and the extent to which they interfere with them (*Handyside v United Kingdom* (above)). The distinction is neatly illustrated in article 9 of the Convention, guaranteeing the right to freedom of thought, conscience and religion. Whilst the basic right is absolute and not subject to any restriction, the right to *manifest* one's religion and beliefs is subject to the qualifications laid out in paragraph 2 of the article.

This distinction between absolute and conditional rights will then determine the role of the European Court of Human Rights in interpreting and applying the Convention. In the case of a claim under article 3, the Court's role is to interpret the term 'torture' and then to decide whether the particular case before it reveals a violation of that term (*Ireland v United Kingdom* (1978) 2 EHRR 25). There is then no question of justification of that act and the Court's finding determines the case. In the case of conditional rights, however, the Court's role is extended; the Court first determining whether there has been a violation of that right on the facts, and then considering whether that violation can be justified within the exceptions allowed under the Convention. Thus, in cases involving conditional rights the Court conducts a balancing act between that right and other rights or interests, using the concepts of necessity and proportionality to resolve the dispute, although it has stressed that its role is to ensure the freedom's enjoyment subject to restrictions, which must be narrowly defined and applied (*Sunday Times v United Kingdom* (1979) 2 EHRR 245). The classification of a right as 'conditional' should not, therefore, be seen as an attack on the fundamental character of that right; rather it recognizes that, unlike freedom from torture or slavery, there may be legitimate and *acceptable* reasons for its compromise.

To what extent, therefore, is the distinction between absolute and conditional rights realistic and sustainable? First, it must be stressed that, apart from rights such as the ones identified above that are clearly absolute, whether other rights in the Convention are absolute or conditional can be more difficult to determine. Some rights, for example, are subject to either express or implied exceptions. For example, article 5 of the Convention,

after establishing that everyone has the right to liberty and security of the person, lays down a number of specific circumstances (for example, arrest on reasonable suspicion of committing an offence) where it is permissible to interfere with that basic right, provided such an interference is 'in accordance with a procedure prescribed by law'. Accordingly, although article 5 is not generally classified as a conditional right, it shares some of the characteristics of such rights because it recognizes certain legitimate aims (arrest, detention after conviction of a competent court, etc) that can justify interference and uses similar concepts of legitimacy employed in articles 8–11, above.

Secondly, some rights, including some non-derogable rights, expressly allow for exceptions to their enjoyment. For example, article 2 of the Convention provides a number of exceptions to the general right to life, permitting the taking of life in the execution of a sentence of law and, in times of war or other emergency, via lawful acts of war. Therefore, the right to life, regarded universally as the most fundamental of all human rights, can be compromised to achieve certain social goals, such as retribution and deterrence or the successful prosecution of war. Article 2 also states that deprivation of life will not be unlawful where it results from the use of force affecting a lawful arrest or quelling a riot. Although these express limitations are qualified by the requirement that state authorities follow the rule of law when applying the relevant domestic provisions, they expose the difficulty of maintaining a strict categorization of absolute rights, for most civilized societies, and international treaties, will regard the taking of life as justifiable in certain circumstances. Similarly, although article 7, prohibiting retrospective criminal law, cannot be derogated from even in times of war and other emergency, article 7(2) states that the prohibition of retrospective criminal law and sanctions does not apply to behaviour that at the time of its commission was criminal according to the general principles of international law. This exception was applied by the European Court to justify the retrospective criminalization of marital rape in domestic law (*SW and CR v United Kingdom* (1995) 21 EHRR 404).

Thirdly, some Convention rights appear to be absolute but have been interpreted either to include implied exceptions or have been subjected to legitimate and necessary restrictions. For example, article 14, which provides that no one shall be subject to discrimination in the enjoyment of their Convention rights, has been interpreted to allow rules or practices of discrimination that have a reasonable and objective justification, and which are legitimate and proportionate according to the tests applied to interferences with conditional rights (*'Belgian Linguistics' Case* (1968) 1 EHRR 252). Consequently, once the Court determines that the victim has been discriminated against in the enjoyment of his Convention rights, it will inquire into whether such restrictions are justifiable. For example, in *Pretty v United Kingdom* (2002) 35 EHRR 1, although the Court found that the applicant had been discriminated against by the blanket application of the prohibition on assisted suicides, it felt that such discrimination was justified by the state's desire to control abuse in this area. Conversely, some Convention rights appear to allow a member state an unlimited discretion to exclude persons from the enjoyment of their Convention rights, but in practice the European Court insists

that such discretion be applied proportionally and in a manner that does not destroy the essence of that right. For example, although the right to marry in article 12 is stated to be dependant on national laws governing the exercise of that right, it has been held that such limitations must not destroy the essence of the right to marry (*Hamer v United Kingdom* (1982) 4 EHRR 139).

Fourthly, and perhaps most importantly, whether a right is to be enjoyed absolutely or with reservation may depend to a great extent on its judicial interpretation and application. Thus, although the right to life under article 2 is regarded as absolute in some respects, its enjoyment may not extend to all claims. For example in *Vo v France* (2005) 40 EHRR 12 the European Court held that article 2 did not fully recognize the right of the unborn child to its protection, and in *Pretty v United Kingdom* (above) the Court held that the right to life under article 2 did not extend to the right to die with dignity. Similarly, the absolute right under article 3 may be lost in the process of interpretation, and for reasons very similar to the aims recognized in the so-called 'conditional rights'. The European Court has insisted that treatment or punishment must reach a particular level before it is regarded as inhuman or degrading (*Tyrer v United Kingdom* (above)). Thus, imprisonment, although capable of degrading most individuals, would not, in the majority of cases, constitute a violation of article 3, as incarceration in appropriate cases fulfils a useful and legitimate penal purpose of all civilized states' criminal justice systems. Further, the Court has offered states a good deal of discretion with respect to the minimum age for imprisonment (*V and T v United Kingdom* (1999) 29 EHRR 121) and on the question of whether incarceration of elderly or infirm prisoners is in breach of article 3 (*Papon v France* (2004) 39 EHRR 217). From these examples, one can see that although articles 2 and 3 are not conditional rights in the sense of containing qualifying paragraphs allowing permissible violations, the Court nevertheless recognizes that in interpreting and applying such rights due weight has to be given to the attainment of social goals in the enjoyment of fundamental individual rights. The difference between, say, freedom of expression and freedom from torture is that once a violation is established, the state cannot seek to justify that violation for any purpose. However, in determining whether there is a violation of article 3 in the first place, the Court clearly conducts some balance between the right and the realization of acceptable social goals, such as state security and the protection of others.

In conclusion, although one can draw a basic and theoretical distinction between absolute and conditional rights, the status of particular Convention rights is flexible, both in the wording of those articles and in the practice of interpretation. The classification of non-derogable rights under article 15 reflects the Convention's concern that some rights should not be compromised in any circumstances, whatever benefit may be derived from that violation. To a degree, it also reflects the varying importance of some rights in comparison with others, re-iterating that torture, slavery, and retrospective criminal law has no place in a civilized and democratic society. Outside the context of article 15 the distinction is more difficult to identify and sustain, with many

fundamental and non-derogable rights being subjected to certain exceptions. Similarly, once the Convention rights are interpreted and applied in practice, the concept of absoluteness is sometimes more difficult to maintain than one would imagine given the wording and structure of each article.

Question 5

Critically examine the extent to which article 15 of the European Convention allows member states to derogate from its obligations under the Convention in times of war or other emergency.

Commentary

This question considers the right of a member state to depart from or reduce its human rights obligations under the Convention in times of war or other public emergency. This type of question has become very popular given the United Kingdom government's efforts to safeguard the state and the public from the threat of terrorism, and references should be made to recent legislation and its review by the domestic courts.

The answer should begin with the general wording of article 15 and, in particular, its rationale. At this point the student should identify the scope and extent of article 15, noting when it can and cannot apply and what Convention articles are not covered by it. Then, via the use of cases, the student can explain what discretion member states are left with in this area and the extent to which the European Court of Human Rights is prepared to regulate its use by states. The case law will primarily be that of the European Court, although a discussion of domestic affairs and recent domestic decisions with respect to detention without trial will be particularly apposite.

Answer plan

- Explanation of the rationale behind article 15 and how human rights might be compromised in times of war and emergency
- Examination of the wording of article 15 and its restrictions and limitations
- Critical examination of the monitoring of state derogation under article 15, together with relevant case law of the European Court of Human Rights and recent domestic decisions in this area
- Conclusions as to the scope of the power of derogation and its compatibility with the protection of fundamental human rights

Suggested answer

Article 15 of the European Convention on Human Rights provides that member states can derogate from its obligations under the Convention—to ensure that everyone in its jurisdiction enjoys the rights contained in Part One of the Convention—during times of war or other public emergency threatening the life of the nation. This article, which is expressed in similar terms in article 4 of the International Covenant on Civil and Political Rights 1966, reflects the fact that war and other emergencies place extra pressure on states in terms of maintaining social order and that individual rights and liberties might need to be compromised in the light of threats to such order and national integrity. For example, if a state is threatened by war or by internal or external terrorism it may be necessary to invoke regulations allowing the state and its officials extra powers with respect to the arrest and questioning and detention of individuals suspected of endangering the order of that society. Similarly, during such times it might be necessary to place restrictions on the right to association, freedom of movement, or freedom of expression. It should be noted that this power of derogation is in addition to the increased area of discretion given by the European Court to states in the control of serious crime, including acts of terrorism. Thus, the Court has held that it could and should take into account the threat of terrorism when judging the reasonableness of a police officer's suspicion that someone has committed a crime (*Fox, Campbell and Hartley v United Kingdom* (1991) 13 EHRR 157 and *O'Hara v United Kingdom* (2002) 34 EHRR 32), although it has stressed that such circumstances should not destroy the very essence of the due process rights contained in article 5 of the Convention.

As derogation measures will have an increased impact on the enjoyment of individual rights and liberties, it is essential that any measures are subject to limitations and, in particular to some form of judicial control. As recent events in the United Kingdom and the United States have shown, our fundamental rights and liberties can be under the greatest threat during such times and governments can often overreact and impose unnecessary and draconian measures, which not only violate the rights of those who are affected by the measures, but also threaten the very democratic values that such rights purport to uphold, such as the rule of law and the control of arbitrary government. These dilemmas are recognized by the Convention and accordingly the right of derogation under article 15 is circumscribed by a number of rules, which limit the power of derogation and place it under the control of the Convention's supervisory organs.

First, under article 15(3), the Convention provides that any High Contracting Party using the right of derogation must keep the Secretary-General of the Council of Europe informed of the measures which it has taken, along with the reasons for derogation. In addition, the state must inform the Secretary-General when such measures have ceased to operate and that the provisions of the Convention are being fully executed. However, as we shall see, a state is allowed to rely on article 15 even though it did not plead that article in previous proceedings brought against it, relying on it after unsuccessfully defending such proceedings (*Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539).

Secondly, if the derogation is challenged before the European Court of Human Rights, it must be satisfied not only that an emergency threatening the life of the nation exists, but that any measures taken are *strictly required* by the exigencies of the situation. Thus, not only does the Convention retain control over the member state during these times, deciding what measures are necessary, but by using the phrase *strictly required*, it also indicates that the measures must correspond to a very pressing social need and meet a strict test of proportionality. Thus, although the member state will be afforded quite a wide margin of error in such situations, article 15 gives the Convention organs the right to monitor the emergency situation and to provide some objective review of the emergency and the measures necessary to deal with such. This will allow the Court to take into account the seriousness of a state departing from fundamental standards of rights protection, whilst offering some margin of discretion to a state faced with an emergency situation that is threatening its nation.

Thirdly, the article states that the measures taken by the member state must not be inconsistent with its other obligations under international law. This provision ensures that any derogation must comply with other internationally accepted standards applying to war or other emergency situations, such as the obligations imposed under the Geneva Convention, and that the state does not depart from basic norms of civilized behaviour. Fourthly, and in support of the above, article 15 provides that no derogation is allowed in respect of certain Convention rights. Thus, no derogation is possible in relation to article 2 (the right to life), although an exception is made in respect to deaths resulting from lawful acts of war, article 3 (prohibition of torture and inhuman or degrading treatment or punishment), article 4(1) (prohibition of slavery or servitude) or article 7 (prohibition of retrospective criminal law). This reflects the view that there are certain rights which should never be transgressed, whatever the circumstances or possible justification, and accordingly certain things which should never be carried out in the defence of the state and of social justice.

The extent to which a state is allowed to derogate from its Convention obligations, and whether a proper balance between human rights and social order is maintained during such situations, will depend primarily on how the European Court monitors the use of article 15. The European Court has examined the employment of article 15 in a number of emergency situations, and the case law thus far suggests that it will offer states a wide area of discretion. In *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, the applicants claimed that their internment without trial was in breach of their right to liberty of the person, whilst the state argued that such measures were justified under article 15 because of the emergency situation existing in Ireland. Although the Court found that the detention of the applicant without trial for a period of five months was in violation of article 5(3) of the Convention—guaranteeing the right to be brought promptly before a court for trial or release—it held that the Irish government was entitled to derogate from its obligations by virtue of the existence of a public emergency. Although the Court stressed that the measures governments can take when derogating are strictly limited to what is required by the exigencies of the situation, it

was satisfied that those strict limitations were met in the present case. Importantly, the Court held that the respondent government should be afforded a certain margin of error or appreciation in deciding what measures were required by the situation, and that it was not the Court's function to substitute for the government's assessment any other assessment of what might be the most prudent or most expedient policy to combat terrorism.

The decision in *Lawless* suggests that the European Court would be loath to interfere with the judgment of the state or to subject its measures to intense review. Further, in that case the Court stressed that it must arrive at its decision as to the compatibility of the measures in the light of the conditions that existed at the time that the original decision of derogation was taken, rather than reviewing the matter retrospectively. This judicial reticence was evident in the case of *Brannigan and McBride v United Kingdom* (above), concerning the United Kingdom's derogation in relation to article 5 following the European Court's decision in *Brogan v United Kingdom* (1989) 11 EHRR 117, where it had held that detention provisions contained in the Prevention of Terrorism Act 1978 were in contravention of article 5(3) of the Convention. Following that decision, the government lodged a derogation in respect of article 5(3) because of the emergency position in Northern Ireland. Those measures and the derogation were challenged in *Brannigan and McBride* (above), but the Court held that they were justified despite the derogation only being lodged after the Court's decision in *Brogan.* Accepting that there was an emergency situation, it held that the derogation was not invalid merely because the government had decided to keep open the possibility of finding a means in the future, other than employing article 15, of ensuring greater conformity with its Convention obligations. With respect to the necessity of the provisions that were successfully challenged in *Brogan*, the Court found that there were effective safeguards, such as the availability of *habeas corpus*, to safeguard against arbitrary action, and consequently such measures were strictly required by the situation.

It is quite clear from these cases that the Convention doctrine of the margin of error will force the European Court to take a 'hands off' approach and allow the state wide latitude in compromising human rights for the sake of social order. However, the recent domestic events surrounding the challenge of provisions allowing detention without trial have shown that, free from the shackles of the margin of error, the domestic judiciary will be unwilling to relinquish their role of safeguarding basic rights, even in times of emergency. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 a challenge was made to provisions in the Anti-Terrorism, Crime and Security Act 2001, which provided for an extended power to arrest and detain foreign nationals suspected of terrorism and whose removal was not possible because they would face ill-treatment in violation of article 3 of the Convention if returned to that particular country. The government had derogated from article 5(1) of the European Convention in order to comply with the European Courts' judgment in *Chahal v United Kingdom* (1996) 23 EHRR 413, where it was held that in order to comply with article 5 of the Convention, deportation proceedings had to be prosecuted with due diligence.

After the Court of Appeal had upheld the detentions as lawful and proportionate (*A v Secretary of State for the Home Department* [2003] 2 WLR 564), a majority of the House of Lords held that the measures allowing indefinite detention without trial or charge were incompatible with the United Kingdom's obligations under the Convention and could not be excused within article 15. (Lord Walker delivered a dissenting opinion.) The majority of their Lordships accepted that there existed a 'public emergency threatening the life of the nation' so as to allow derogation, adding that great weight should be given to the judgment of the Home Secretary and Parliament because they had to exercise a pre-eminently political judgement and that as a consequence the court's role in scrutiny would be smaller. Lord Hoffmann offered a powerful dissent, believing that the government had equated a situation where there was a threat of serious physical damage and loss of life with one where there was a threat to the life of the nation. In Lord Hoffmann's view the real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, came not from terrorism but from laws such as those in issue.

However, the majority then held that the measures taken were not proportionate to that threat and were not strictly required by the exigencies of the situation. Lord Bingham conceded that where the conduct of government was threatened by terrorism difficult choices had to be made and that the decision of a representative democratic body demanded a degree of respect. Nevertheless, he stressed that even in a terrorist situation neither the Convention organs nor the domestic courts were willing to relax their residual supervisory role. His Lordship found that the measures were disproportionate because they did not deal with the threat of terrorism from persons other than foreign nationals, in other words United Kingdom nationals, and permitted suspected foreign terrorists to carry on their activities in another country provided there was a safe country for them to go to. Further, they permitted the detention of non Al-Queda supporters even though the threat relied on to justify the measures was from that source. Lord Bingham concluded that, if the threat posed by UK nationals could be addressed without infringing the right to personal liberty, it had not been shown why similar measures could not adequately address the threat posed by foreign nationals.

Their Lordships also held that the measures were in violation of article 14 of the European Convention, which provides that Convention rights should be enjoyed without discrimination, because the provisions allowed foreign nationals to be deprived of their liberty but not UK nationals, and the appellants were thus treated differently because of their nationality or immigration status. Their Lordships conceded that some distinction might be made between those groups in an immigration context, but concluded that such a distinction could not form the legitimate basis of depriving one group of their Convention right to liberty of the person as protected by article 5.

The decision of the House of Lords confirms that human rights must be enjoyed despite the existence of an emergency and that the courts' role in safeguarding such rights should not be diminished to the point that a government is allowed to compromise human rights at their discretion and without strong and cogent evidence and justification.

Although the House of Lords accepts that the question of whether an emergency exists is primarily political, it is adamant that the proportionality of such measures is for the courts to determine. Equally importantly, the decision highlights the fact that the violation of basic rights can be as damaging to democratic principles as the threats to social order themselves. Indeed, the domestic courts have taken a similarly robust approach with respect to non-derogating control orders, passed under the Terrorism Act 2005 (*JJ v Secretary of State for the Home Department* [2006] 3 WLR 866).

In conclusion, article 15 has the potential to endanger the protection of fundamental human rights and to undermine the central aims of the European Convention, particularly if it is not effectively monitored. Although the article's use is limited in its scope and subject to examination by the Council of Europe and the European Court, the case law of the Court thus far suggests that the European Court will offer states a very wide margin of appreciation, leaving each state to decide what measures to take to deal with the emergency situation. However, the decision of the House of Lords in *A v Secretary of State for the Home Department* (above) clearly indicates that the state will not be left with an unlimited discretion in this area. That decision, although not of the European Court itself, relied on the principles of the Convention and the case law under article 15 and it is to be hoped that the European Court itself would take a similarly robust approach in ensuring that a state of emergency is not used as an excuse for departing from the essential values underlying the Convention and the rights contained in it.

Question 6

'. . . all persons are equal before the law and are entitled to the equal protection of the law;' (preamble to Protocol No 12 to the European Convention)

How effective is article 14 of the European Convention on Human Rights as a vehicle for guaranteeing freedom from discrimination?

Commentary

This question is concerned with the effectiveness of article 14 of the Convention in protecting individuals from discrimination. The student needs to appreciate the limited scope of article 14 in prohibiting discrimination, and to discuss the gaps in that provision as well as examining its interpretation and application.

The answer should begin by explaining the importance of equality and freedom from discrimination, identifying how that right relates to the enjoyment of other human rights. The student can then examine the wording and scope of article 14, along with the relevant case law of the European Court in this area; students can also cite domestic decisions in the

post-Human Rights Act era in illustration. The student can examine the possible reforms to article 14, comparing it with article 26 of the International Covenant on Civil and Political Rights 1966, before drawing conclusions as to its general effectiveness.

Answer plan

- Brief explanation of the basis of equality and freedom from discrimination and how discrimination impacts on the enjoyment of other human rights
- Examination of article 14 and Protocol No 12 of the European Convention and their relationship with other substantive articles
- Examination of relevant case law of the European Court of Human Rights under article 14
- Critical analysis of the scope and effectiveness of the Convention provisions and any relevant case law
- Conclusions as to the effectiveness of protection against discrimination under the Convention

Suggested answer

Equality and freedom from discrimination lie at the heart of all domestic and international treaties on human rights. Most constitutions will contain a declaration to the effect that all people are born equal and should receive equal protection under the law and this principle is reflected in the preamble of the United Nations Charter 1945, which 'reaffirms faith in the equal rights of men and women . . .' This reflects the notion of the 'social contract' theory, ensuring that every person is allowed to enjoy their fundamental rights, and Ronald Dworkin's idea that every state has a duty to treat all of its citizens with equal concern and respect. Every person therefore has a moral right to be treated equally and in particular to enjoy their human rights free from discrimination on grounds such as race, sex, or social status; consequently, discriminatory treatment is viewed as an affront to human dignity and worth.

Protection from discrimination can be achieved in a number of ways. For example, the law might provide for a general clause, as contained in article 26 of the International Covenant on Civil and Political Rights 1966, which provides that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. This can then be buttressed by domestic laws which ensure that individuals and groups are not subject to unlawful discrimination, and which then provide the individual with a specific remedy on violation of those laws. This method ensures that all laws, including those impacting on fundamental human rights, are interpreted and applied equally and that the individual is given effective protection against discrimination, irrespective of whether the perpetrator is a public or private body. Alternatively, a national constitution or international treaty might contain a clause which ensures the

enjoyment of fundamental human rights irrespective of discrimination, leaving domestic law to pass specific legislation protecting identified groups.

This latter approach is adopted by article 14 of the European Convention on Human Rights, which provides that the enjoyment of Convention rights and freedoms shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth, or other status. Article 14 ensures that no one is denied the enjoyment of those rights on any of the above grounds and applies equally to the situation where the equal treatment of individuals has a discriminatory effect (*Thlimmenos v Greece* (2001) 31 EHRR 15). The article can also be used as guiding principle when the European Court is considering the legality and necessity of any restriction on those rights. Thus, if a person is denied freedom of expression purely because of his political affiliation, there could be a violation of article 10 of the Convention because of the lack of necessity of that interference, and of article 14 because of its discriminatory basis. Article 14 thus complements the other Convention rights, rather than providing a 'free-standing' and separate right not to be discriminated against.

Article 14 can, therefore, be used in addition to (or in conjunction with) claims made under other articles of the Convention, and in certain cases the Court will find it unnecessary to make a separate ruling on article 14. For example in *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 the European Court found a violation of the applicants' right to private life when they had been dismissed from the armed forces because of their sexual orientation. Consequently, after finding that their treatment was not justified by the need to maintain the morale of the armed forces, the Court found it unnecessary to consider whether that treatment constituted a violation of article 14. In such cases, therefore, the Court has already considered the discriminatory effect of the violation in determining the legality and proportionality of the interference and thus does not need to consider the claim separately under article 14. Similarly, in *ADT v United Kingdom* (2001) 31 EHRR 33, having found that the applicants had only been penalized (for committing gross indecency) because they were men, the Court held that such a penalty was an unnecessary and disproportionate interference with private sexual life under article 8, making it unnecessary to consider article 14.

However, this does not mean that article 14 has no individual impact on the enjoyment of Convention rights. It is possible that an applicant will succeed under article 14, even where the claim on the substantive right alone would have failed because, without the discrimination, the interference would have been lawful and necessary. In such a case article 14 can be used in conjunction with another Convention right to establish a violation (*'Belgian Linguistics' Case* (1968) 1 EHRR 252). This was illustrated in *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471. In this case the applicants claimed that the government's refusal to give permission to their spouses to enter and remain in the United Kingdom constituted an unlawful interference with the right to private and family life under article 8 of the Convention. The European Court held that because a state had a wide margin of appreciation in refusing to allow

non-national spouses to enter the country, any interference with article 8 was necessary in a democratic society. However, as the rules relating to the entry of such persons into the country were applied more harshly to women who wished to bring their husbands into the country, the Court concluded that there had been a violation of article 14. A similar decision was made by the domestic courts in *R (Baiai) v Secretary of State for the Home Department* [2007] 4 All ER 199 with respect to the Home Secretary's efforts to control sham marriages.

That decision shows that the principles underlying article 14 have a pervasive influence on all Convention rights and can thus inform the Convention's general jurisprudence. Thus, in certain cases a discriminatory decision might constitute a violation of another Convention article. For example, in the *East African Asians Case* (1973) 3 EHRR 76 the European Commission held that to publicly single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity, and thus constitute degrading treatment within article 3 of the Convention. In that case, therefore, it held that the government's refusal to allow the applicants leave to enter the country had been made on grounds of their race and colour and thereby subjected them to inhuman and degrading treatment within article 3.

However, the scope of article 14 is severely curtailed by the requirement that any complaint under article 14 must be related to an alleged violation of another Convention right. In other words the complaint must at least engage another Convention right. This is starkly illustrated in the European Commission's decision in *Choudhury v United Kingdom* (1991) 12 HRLJ 172. The applicants had attempted to bring blasphemy proceedings against a publisher for vilifying the Islamic faith, but the domestic courts held that the law only protected the Anglican faith (*R v Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 QB 1006). The applicant's claim under the European Convention was declared inadmissible because the Commission held that article 9 of the Convention (guaranteeing the right to freedom of religion) did not include a positive obligation on behalf of the state to protect religious sensibilities via effective blasphemy laws. Further, with respect to the claim under article 14, it held that because there was no positive obligation of a state to protect the right to be free from offence under article 9, it could not be a breach of article 14 to deny someone that protection even on grounds forbidden under article 14.

That decision is difficult to reconcile with the European Court's decision in the *'Belgian Linguistics' Case* (above), where it was held that although a person had no right to demand that the state create separate educational establishments, once a state had set up such an institution, it could not lay down discriminatory entrance requirements. In any case, the decision in *Choudhury* illustrates the shortcomings of article 14, in comparison with the more general protection provided by article 26 of the International Covenant, which would have protected the applicants in that case. This gap might be filled by the ratification of Protocol No 12 of the Convention, concerning the prohibition on discrimination. The protocol was established to facilitate

the further promotion of the principle of equality and article 1 of Protocol provides that the enjoyment of any right set forth *by law* shall be secured without discrimination on any of the grounds identified in article 14 of the Convention. This extends freedom from discrimination beyond the enjoyment of Convention rights to the enjoyment of any legal right in domestic law, and is complemented by the guarantee that no one shall be discriminated against by a public authority on any such ground. This, combined with the general right under Protocol 12, would extend the protection offered by specific UK discrimination law such as the Sex Discrimination Act 1975 and would thus offer a general, albeit conditional, human right to be free from discrimination.

In addition, although article 14 does not contain any qualifying provisions, as in articles 8–11 of the Convention, it is clear that the enjoyment of Convention rights without discrimination is not absolute. Consequently, article 14 does not secure complete equality of treatment and in the *'Belgian Linguistics' Case* (above) the European Court held that article 14 is only violated where the difference in treatment has no objective or reasonable justification. Furthermore, although any difference in treatment must pursue a legitimate aim, and must be reasonably proportionate in achieving that aim, the Court is prepared to afford a margin of appreciation to each state to reflect its social and cultural values. Thus, in the *'Belgian Linguistics' Case* (above) it held that there would be no breach of article 14 (together with article 8 and article 2 of the First Protocol) when domestic law stated that, generally, state-funded schools would only teach in the designated official language of their region.

This qualifies the impact of article 14, and in that case the Court stressed that the effect of article 14 (in conjunction with other articles) was not to *guarantee* the right to enjoy the Convention right, but to ensure that it is secured by each state without discrimination. The enjoyment of Convention rights is, therefore, subject to justified exceptions, which need to be assessed in relation to the aims and effects of the measures under consideration and the principles that normally prevail in a democratic society. Clearly, any distinction needs to be based on legitimate grounds and cannot be justified if the difference in treatment is explainable only on the basis of discrimination. Thus, in *Willis v United Kingdom* (2002) 35 EHRR 21 the Court held that the exclusion of men from entitlement to the Widowed Mother's Allowance constituted a violation of article 14 and article 1 of the First Protocol; the only reason for being refused the benefits was that he was a man and that distinction was not based on any objective and reasonable justification. This illustrates that differential treatment must be based on reasonable and objective factors and that the state must provide substantive justification in this respect. For example, in *PM v United Kingdom* (2006) 42 EHRR 45, Article 14 was violated when tax relief in respect of maintenance payments to a child were denied because the applicant had not been married to the girl's mother. The Court held that although the purpose of the deductions made it easier for married fathers to support a new family, it was difficult to see why unmarried fathers would not have similar difficulties. This approach has been followed in the domestic courts and in *R (Morris) v Westminster City Council* [2006] 1 WLR 505 it was held that the Housing Act 1996

was incompatible with article 14 and article 8 because it required a dependent child to be disregarded when determining priority needs if that child was subject to immigration control.

On the other hand, in some cases the Court has been reluctant to interfere, preferring to defer to the state's assessment. Thus, in *Pretty v United Kingdom* (2002) 35 EHRR 1 it held that there had been no violation of article 14 when the applicant had been denied her right to terminate her life. Although the Court accepted that she had been discriminated against, because she was not (due to her physical state) able to personally exercise her self-autonomy, there existed objective and reasonable justification for not distinguishing in law between those who are and those who are not physically capable of committing suicide and thus not allowing her partner to assist her. This approach may be justified because of the sensitive nature of the issue at hand—in the *Pretty* case the right to life and the legal issues surrounding euthanasia. In such a case, therefore, the Court will be reluctant to interfere with the state's discretion where there is room for other, acceptable, views.

The case law on article 14, therefore, remains fluent, reflecting the Court's willingness to offer a margin of appreciation with respect to other Convention articles. Thus, for some time the Court allowed member states to decide whether they would afford full civil status to transsexuals (*Rees v United Kingdom* (1986) 9 EHRR 56), or allow such individuals the right to marry (*Cossey v United Kingdom* (1990) 13 EHRR 622). In those cases the Court used a restrictive approach to articles 8 and 12 to uphold the legality of any discrimination against such individuals. However, as social conditions changed the Court has changed its stance, holding that such discrimination was unjustifiable (*Goodwin v United Kingdom* (2002) 35 EHRR 18), and a similar approach has been evident when considering different age limits for heterosexuals and homosexuals (*Sutherland v United Kingdom, The Times*, April 13 2001). Similarly, the European Court has taken a more robust approach with respect to the issue of whether prisoners should have the right to vote (*Hirst v United Kingdom (No 2)* (2004) 38 EHRR 40).

In conclusion, article 14 offers a general protection against unjustified discriminatory interference with the enjoyment of an individual's fundamental human rights. This is not a freestanding right not to be discriminated against, although the ratification of Protocol No 12 by all member states, including the United Kingdom, would assist in the fuller recognition of equality under the law. Further, the qualification of article 14 by the recognition of objective and reasonable discrimination dilutes the impact of the article in challenging discriminatory practices. Such qualifications, as of other Convention rights, are inevitable, although the margin of appreciation in this area needs to reflect the Court's desire to provide a more uniform and stricter protection of human rights and human dignity.

Further reading

Harris, D.J., O'Boyle, M., Warbrick, C., and Bates, E. *The Law of the European Convention on Human Rights*, 2nd edn (OUP 2008).

Mowbray, A. *Cases and Materials on the European Convention on Human Rights*, 2nd edn (OUP 2007).