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25 YEARS OLD: THE HUMAN RIGHTS ACT 1998

A survey of some of the leading cases,
looking at how the 1998 Act has operated in our courts

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PART 1: SETTING THE SCENE

1. "Let me tell you a story". Those are not generally the opening words, when an advocate begins to speak to a tribunal or court in a human rights case. But maybe they should be.

2. Every case that comes before every court involves a story. A true story. An important part of the role of any advocate is to be able to tell the story, or to help it to be told. The "Court" – whether it is tribunal judges, magistrates, a jury, a judge, or a group of judges – needs to listen to the story, to try to understand it and its ramifications, from all sides and all points of view. Every one of these stories has a chapter, whose ending needs to be written, by a Court. Sometimes it has to be rewritten, by another Court.

3. In this lecture I am conducting a survey of some of the leading cases. I will use the cases to look at how the Human Rights Act 1998 (the "HRA" for short) has operated in our courts. I have not gone for all the ones you might expect. I have chosen a 'spread' of 25. I have made particular choices, and I have focused on cases which were argued all the way up the Courts to the very top. Other choices – other cases and other tribunals and courts – are available. There will be one case for each year from 1999 to 2023. When I get to one of my 25 cases I will give you the year and the **Case Number** between 1 and 25.

4. In December 2001, the Home Secretary issued 9 certificates, each recording that a named individual was to be detained without trial as a suspected foreign international terrorist. Two months earlier, lorries brought exhibits to the first DSEI (Defence and Systems Equipment International) Arms Fair to be held at the Excel Centre in London's Docklands. The lorries came the same year that six year old Beaurish Tigere came to the UK from Zambia, with her mum and dad. She was aged eight when in October 2003 Yousif Adam – a refugee with a legal right to stay here – was living in a sleeping bag in the Brixton car park of the Refugee Council. The previous month, three and a half thousand miles away, occupying British soldiers seized hotel receptionist Baha Mousa and took him to a British military base. Earlier that year, a woman arrived at Holloway police station, driven there by the taxi driver who had brought her home in a very bad state, and brought at the insistence of one of her neighbours who was worried about her condition.

5. The HRA received Royal Assent on 9 November 1998. On that day, it became an Act of Parliament. So, although many of its provisions did not come into force until October 2000, the HRA was on the statute book. It is not difficult for us to imagine a group of people who gathered together in Peel Park, next to the University of Salford, on that evening of 9 November 1998. An important day. We can imagine the expectation. The whispered phrase that gradually turned into a song. "It's coming home. It's coming. It's coming home." The Government's 1997 White Paper had been entitled: "Rights Brought Home". An earlier consultation document had been called "Bringing Rights Home".

6. In February 2005, Mahmoud Baiai and Izabela Trzcinska received bad news: the Home Office had refused permission for them to get married. In March 2005, Manchester City Council started county court possession proceedings against Cleveland Pinnock, based on anti-social behaviour at his council house in Meldon Road. In April 2005, the Electoral Registration Officer for Wakefield refused to register Peter Chester to vote in national and EU elections. In May 2005, Peter Rice was attacked at his Birkenhead flat, making a statement to the police describing his attackers. In June 2005, 51 year old Tony Nicklinson suffered a catastrophic stroke in an Athens hotel room. He was left paralysed below the neck and able to communicate only by blinking.

7. 25 years ago, "it" was "coming home". But what was "it"? What was "home", and how was it "coming"? Well, "it" was the European Convention on Human Rights (also known as the "ECHR" and "the Convention"). "Home" was the domestic UK courts, where these codified Convention rights were going to be directly enforceable. And it was "coming" home by means of a 26-page statute. It is a statute of two halves. The second half is dominated by Schedule 1, which links to section 1 and lists the "Convention rights". The first half contains a framework of provisions governing how those rights are enforceable. By the way, I do not think people did gather in Peel Park to sing: "It's coming home". But what I said was that we could imagine it.

8. Two key provisions of the HRA are sections 3 and 6. And here is a story. Penelope Wilson owned a BMW convertible. She needed cash. So she pawned the car for 6 months for £5,000. The interest rate was 94.78%. She had to pay more than £1,800 in interest,

plus the £5,000 to get the car back. Then she worked out that one of the credit agreement terms had been inadequately stated. That put its enforcement in breach of the Consumer Credit Act 1974. She got the car back and paid nothing. The pawnbrokers said this all-or-nothing law was so harsh that it violated their Article 1 Protocol 1 property rights. That argument failed. This is Wilson v First County Trust: **Case Number 5 (2003)**.[1]

9. It was in this case that Lord Nicholls said that the HRA prescribed "two principal means" by which it "brings human rights home from Strasbourg". The first was by making provision to interpret legislation compatibly with Convention rights. The second was by making provision to ban public authorities from violating Convention rights.

10. These are an 'internal inhibition' (section 3) and an 'external prohibition' (section 6). They do the same thing in different ways. Let me explain. Suppose you are a public authority. You exercise powers and discharge duties under a statutory scheme. That statutory scheme regulates your functions, and you are very familiar with it. The inhibition ensures your scheme is rights-compatible. This is one way to protect against violations of Convention rights. It shrinks your powers and enhances your duties, at source. So, it is your internal inhibition on you violating Convention rights. But there is also a separate ban. It applies to everyone who discharges a public function. It prohibits you from violating Convention rights. That is HRA section 6. It is your external prohibition. Double human rights protection.

11. The internal inhibition was part of the story of Cleveland Pinnock's terminated tenancy at Meldon Road, Manchester. This is a **Case Number 12 (2010)**: Manchester City Council v Pinnock.[2] Judge Holman made an order for possession. But did that violate Cleveland Pinnock's Article 8 rights (respect for home)? The applicable statutory scheme said the judge had to order possession if the statutory procedure had been followed. But section 3 of the HRA – the internal inhibition – meant reinterpreting this to protect against any Convention rights violation. Like Wilson, this is another human rights case in the county court. It is also an example of using the HRA to defend a claim, rather than to bring one. Mr Pinnock lost though. The Supreme Court said that a possession order satisfied the proportionality principle.

12. So, the HRA can make other statutes protect Convention rights. It is also one of a 'bundle' of statutes directly protecting Convention rights. This can be seen from HH v Italy: **Case Number 14**.[3] Mrs AFK was the mum of five children and was their primary carer. The youngest two were aged 3 and 8. Mum was wanted for extradition to Poland, after many years of delay, to face a fraud trial. Dad had health issues and could not care for the children. This case originated in the magistrates' court. The Supreme Court decided that extradition would violate the Article 8 (family life) rights of the youngest children, because of disproportionately severe consequences. This was not the HRA, but another Act in the 'bundle'. Section 21 of the Extradition Act 2003 bars extradition if it would

[1] Wilson v Secretary of State for Trade and Industry [2003] UKHL 40 (10 July 2003) (bailii.org)
[2] Manchester City Council v Pinnock [2010] UKSC 45 (03 November 2010) (bailii.org)
[3] HH v Deputy Prosecutor of the Italian Republic, Genoa [2012] UKSC 25 (20 June 2012) (bailii.org)

violate a Convention right as scheduled to the HRA. The 2003 Act is in the 'bundle' of statutes.

13. The extradition judge had a duty, under section 21 of the Extradition Act, to prevent a violation of Convention rights. And this is a key feature of the HRA. Parliament has required the Courts to rule on questions of human rights compatibility. Parliament has required the Courts to enforce the codified Convention rights. Remember those eight foreign suspected terrorists certified by the Home Secretary? Theirs was **Case Number 6 (2004)**: A & Others v Home Secretary.[4] That case arose in a tribunal: the Special Immigration Appeals Commission. Lord Bingham explained that it is the duty of the courts to protect Convention rights. He said that the importance of that duty could not be "emasculated" through "excessive deference" to a governmental decision.

14. Lord Bingham also said that an earlier case had exposed the greater intensity of review now needed, applying the proportionality principle, rather than the old common law test of reasonableness.

15. This is the earlier case Lord Bingham was remembering. Jeanette Smith and Graeme Grady had joined the RAF in the 1980s. They progressed well. Graeme Grady was promoted. Jeanette Smith was recommended for promotion. But by the end of 1994, each had been discharged. That followed interviews about their sexual orientation. A policy banned lesbian women and gay men from serving the armed forces. A common law human rights claim was brought at "home". It failed. But the case succeeded "away", in the European Court of Human Rights. There was a violation of Article 8 rights (private life). There was also a violation of Article 13 (the right to an effective domestic remedy). That was because reasonableness was too weak a standard of review for Convention rights. This is **Case Number 1 (1999)**: Smith & Grady v MOD.[5]

PART 2: CRACKING THE CODE

16. I have explained that the Code of "Convention rights" makes up the second half of the HRA. One consequence of having 25 years since enactment of the HRA is that, by now, every Convention rights has featured in at least one – sometimes many – cases in our highest court. That explains the source and spread of the cases which I have chosen.

17. Before I look at individual Articles of the Convention, I want to identify two core principles by which many of Convention rights operate. One is the prescription principle. The other is the proportionality principle. Prescription is this idea: state intrusions into human rights should happen only if regulated by a clear and foreseeable legal framework. Proportionality is this idea: state intrusions into human rights should happen only if the ends justify the means.

18. These two core principles can be seen in **Case Number 21 (2019)**: Gallagher.[6] Here is the story. Lorraine Gallagher obtained an offer of employment in the care sector. But that

[4] A & Ors v. Secretary of State for the Home Department [2004] UKHL 56 (16 December 2004) (bailii.org)
[5] Smith & Grady v UK ECtHR 33985/96 (27 September 1999) (bailii.org)
[6] Re Gallagher Judicial Review (NI) [2019] UKSC 3 (30 January 2019) (bailii.org)

offer was withdrawn when her new employer found out about her 'spent' convictions. Nearly 20 years earlier, Ms Gallagher had on one occasion driven children without a seatbelt, and on another without a correctly fastened seatbelt. The statutory scheme required disclosure of spent convictions, if you were applying to work with children or vulnerable adults. Lorraine Gallagher's claim failed. Unlike a previous statutory scheme, this scheme met the principles of prescription and proportionality. Prescription, because this wide duty was foreseeable in its application. Proportionality, because these were justified as clear and workable bright line rules. The Supreme Court emphasised the latitude enjoyed by Parliament as the legislator and emphasised that Parliament had already redesigned the old scheme.

Missing Articles

19. In turning to the Code, I want to start with three missing Articles. They are in the ECHR, but not in Schedule 1 to the HRA. One is Article 13 (the right to an effective domestic remedy). That was found to have been violated in Smith & Grady (the RAF case). Article 13 is missing. But the HRA as a whole enforces the Convention rights, with the required intensity of review, as a statutory duty of the Courts, as Lord Bingham explained in A & Others.

20. In fact, the common law intensity of review was catching up with proportionality. George Daly was a prisoner. His cell was regularly searched, in his absence, under the Home Office's 1995 policy instruction. Six 'exceptional risk' prisoners had escaped from HMP Whitehall in 1994. A public enquiry had found prisoner intimidation and obstruction, preventing effective cell searches. Geroge Daly's human rights claim was based on the common law, arguing by analogy with Article 8. Lord Bingham repeated that the Smith & Grady intensity of review problem was removed by the HRA. He also said the policy instruction was unlawful, at common law, because it was not proportionate. It allowed a degree of intrusion into a fundamental right which was greater than justified. Daly v Home Secretary is my **Case Number 3 (2001)**.[7]

21. The second 'missing Article' is Article 15. This is not a human right. It is a state entitlement to derogate from ECHR obligations. It applies in time of war or other public emergency threatening the life of the nation, and only to the extent strictly required and compatibly with international law obligations. It is enough that section 14 of the HRA makes provision for derogations. Article 15 was central in the foreign suspected international terrorists case of A & Others. The standards of Article 15 were applied and were found to have been breached.

22. Article 1 says the state has a duty to secure the Convention rights to everyone within its "jurisdiction". It is a missing Article. But the HRA operates to achieve its protection. **Case Number 9 (2007)**: Al-Skeini v SSD[8] was the case of the Basra hotel receptionist. He was seized and detained and beaten to death by British soldiers. Article 2 (the right to life) triggered a duty to conduct an effective investigation. The British military facility

[7] R v Secretary of State for the Home Department, ex p Daly [2001] UKHL 26 (23 May 2001) (bailii.org)
[8] Secretary of State for Defence v Al-Skeini [2007] UKHL 26 (13 June 2007) (bailii.org)

was within the UK's extra-territorial "jurisdiction". Other killings in British-occupied southern Iraq were outside UK "jurisdiction" (a conclusion later overturned by Strasbourg). Lord Rodger said the central purpose of the HRA was to provide remedies in domestic law to those whose Convention rights are violated by a UK public authority. 'It had come home'.

Convention Rights from the Code

23. I have already illustrated Article 2 (the occupied Iraq case) and Article 1 Protocol 1 (the BMW convertible case). I am going to return in Part 3 to illustrate Articles 6, 10 and 12. They are the right to a fair trial, freedom of expression, and the right to marry. Let me now run through the remaining Convention rights in the Code. In doing so, we will again encounter Tony Nicklinson; Beaurish Tigere; an arms fair at the Excel Centre; and Peter Chester's voter registration.

24. Article 3. Yusif Adam was the refugee living in the sleeping bag in the car park. Parliament had enacted a statute which precluded asylum support or accommodation if the Home Secretary thought an asylum claim was too slow. The statute made an exception if support or accommodation was necessary to avoid a Convention rights violation. Like the Extradition Act, this is another example of the 'bundle' of statutes. Article 3 prohibits inhuman or degrading treatment. The Government said refusing or stopping asylum support or accommodation was not "treatment". Yes it was, said the Courts. And the denial of shelter, food and the basic necessities of life, to asylum seekers banned from working, facing an imminent prospect of serious suffering, violated Article 3. This was the case of Limbuela v Home Secretary: **Case Number 7 (2005)**.[9]

25. Article 4 is the prohibition of slavery and forced labour. MS v Home Office is **Case Number 22 (2020)**.[10] The Courts decided that Article 4 entailed a positive obligation of effective investigation into a viable claim of child exploitation in the work force, an obligation so important that the victim could not lawfully be removed from the UK until it had taken place. That case was a statutory appeal. It was another 'bundle' case, with a statutory protection for Convention rights. It also involved international law. The content of Article 4 was informed by the European Convention On Action Against Trafficking. In the extradition case about Mrs AFK, Article 8 was similarly informed by the International Convention on the Rights of the Child.

26. Article 5. In **Case Number 2 (2000)**: Evans,[11] prisoners had been kept in prison too long. The Courts had got the law about calculating their release dates wrong. The HRA was not yet in force. But the approach to the common law of false imprisonment was reinforced by Article 5 (the right to liberty).

27. Article 7. **Case Number 25 (2023)** is Morgan v MOJ.[12] Seamus Morgan was convicted in 2020 at Belfast Crown Court of belonging to the IRA. He was sentenced to a prison

[9] R (Limbuela) v Secretary of State for the Home Department [2005] UKHL 66 (3 November 2005) (bailii.org)
[10] MS (Pakistan) v Secretary of State for the Home Department [2020] UKSC 9 (18 March 2020) (bailii.org)
[11] R v Governor of Her Majesty's Prison Brockhill Ex Parte Evans [2000] UKHL 48 (27 July 2000) (bailii.org)
[12] Morgan v Ministry of Justice (Northern Ireland) [2023] UKSC 14 (19 April 2023) (bailii.org)

term of 3 years. The sentencing judge told him in open court that the 'custodial period' would be the first half of the 3 year term. Then came some new legislation, after two incidents – the London Bridge stabbing of 5 people and an attack in Streatham High Road – which changed release entitlements for those in prison for terrorist related offences. Article 7 is no punishment without law. In cracking the Code, the Supreme Court explained the key distinction between (a) a new law which changes the penalty and (b) a new law which changes the manner of execution of the penalty. But which was this?

28. Article 8. Tony Nicklinson's stroke left him with 'locked in' syndrome. This led him to conclude that he wanted to be able to decide how and when to die. That needed external help. A 1961 statute made assisting suicide a crime. Tony Nicklinson's human rights claim challenged that statute as violating his Article 8 right (respect for private life). The Supreme Court' 111-page judgments described their uniquely intense deliberation. The claim failed: the forum for resolving the issues was Parliament. That is **Case Number 16 (2014)**: Nicklinson v MOJ.[13]

29. Article 9. In September 2002 14-year-old Shabina Begum arrived at school in Luton wearing a jilbab. The assistant head teacher told her to go home and change into her school uniform. She brought a claim based on Article 9 (freedom of thought, conscience and religion). Her claim succeeded in the Court of Appeal. But the House of Lords rejected it. There was no rights interference and in any event the proportionality standard was satisfied. The Court emphasised that Shabina had the option of attending another school without surrendering her religious autonomy. That is my **Case Number 8 (2006)**: Begum v Denbigh High School.[14]

30. I have now mentioned lots of Articles from the Code. I have also mentioned lots of the 25 stories. But you are still wondering about the woman at Holloway police station; about 6 year old Beaurish Tigere; about Mahmoud Baiai and Izabela Trzcinska's wedding; about Peter Chester voting; and about Peter Rice's statement to the police. I can tell you this much. Beaurish Tigere went on to be a star student at her community college in York and was all set to go to one of the universities in the city of Manchester (MMU). And there was a reason why it was the Wakefield Electoral Registration Officer who refused Peter Chester's voter registration. Peter Chester was serving a life sentence at Wakefield Prison.

31. Article 11. **Case Number 23 (2021)** is DPP v Ziegler.[15] Lorries were arriving at the 2017 DSIA arms fair at the Excel centre. In protest, Nora Ziegler lay down in the middle of the dual carriageway approach road. She and others locked their wrists inside metal boxes to be more difficult to move. It worked. It took the police 90 minutes to move them. In Stratford Magistrates' Court in February 2018 District Judge Angus Hamilton acquitted Nora Ziegler of wilfully obstructing a highway. He found that she had a defence of "lawful excuse", to protect her from a violation of her Article 11 (freedom of assembly) right. That acquittal was upheld by the Supreme Court. The frontline judge in the

[13] R (Nicklinson) v Ministry of Justice [2014] UKSC 38 (25 June 2014) (bailii.org)
[14] R (Begum) v. Denbigh High School [2006] UKHL 15 (22 March 2006) (bailii.org)
[15] Director of Public Prosecutions v Ziegler [2021] UKSC 23 (25 June 2021) (bailii.org)

magistrates' court had evaluated the question of proportionality. There was no basis for overturning that evaluative judgment.

32. Article 14 and Article 2 Protocol 1. Beaurish Tigere's university place was to study international business management. In order to be able to attend, she needed a student loan. The student loan regulations required 3 years of ordinary residence (regularised immigration status), which she had by the time of her appeal. The regulations also required that she had attained formal 'settled status' (indefinite leave to remain), which she had not. Her case was about Article 2 Protocol 1 (the right to education) combined with Article 14 (the prohibition on discrimination). The 'settled status' regulation violated these combined rights, and so she could come and study in the greatest city in the world. This is **Case Number 17**: Tigere v Business Secretary.[16]

33. Article 3 Protocol 1. This is **Case Number 15 (2013)**: Chester v Justice Secretary.[17] The Courts accepted, not the first time, that the blanket statutory ban on prisoner voting was a violation of Article 3 of Protocol 1 (the right to free elections). But there was no point giving another declaration of incompatibility. It was for Parliament to remove the blanket prohibition. And, said the Court, it was unlikely that Peter Chester would benefit from any lawful redesigned scheme.

34. By the way, Seamus Morgan's Article 7 claim about the change in his release date failed. The answer was that the new law changed the manner of execution of the penalty.

PART 3: GOLDEN THEMES

35. There are lots of important themes and features of the operation of the HRA. I have already spoken about principles of prescription and proportionality. One golden theme is that Convention rights have to be "practical and effective". Another is that all Convention rights involve striking a "fair balance" between competing rights and interests. When I put my 25 cases together, I got 15 hits for "practical and effective" and 72 hits for "fair balance".

Positive Obligations

36. Many Convention rights include "positive obligations". That means the violation may lie in inaction, rather than direct intrusion. We see this in the effective official investigation cases. Which takes us to Holloway police station. The woman who arrived that night became known as DSD. The police thought she was intoxicated through alcohol and a drug user. DSD herself was beginning to understand that she had been drugged and raped. At 08:30 that day, she reported this to the police. They had not thought to take the name of the taxi driver. They did not think to collect the CCTV taken from outside the police station. The taxi driver committed more than 105 rapes and sexual assaults upon women, late at night, before he was finally caught by the police, 5 years after DSD reported that she had been raped. The claim came to court. There was no actionable duty of care at common law. But DSD succeeded in showing a violation of the Article 3 "positive

[16] R (Tigere) v SS for Business, Innovation and Skills [2015] UKSC 57 (29 July 2015) (bailii.org)
[17] R (Chester) v Secretary of State for Justice [2013] UKSC 63 (16 October 2013) (bailii.org)

obligation" to conduct an effective investigation. It did not matter that the rapist was a private individual. It did not matter that the serious police failings were purely operational. And damages under the HRA (section 8) were vital to vindicate and uphold human rights. This is **Case Number 20 (2018):** DSD v Metropolitan Police.[18]

37. You may be wondering why some claimants are "A", "DSD", "Mrs AFK", "MS". Sometimes, an anonymity order is necessary and proportionate, as a derogation from open justice. That is because of the courts' own "positive obligation" to protect Convention rights.

Indirect Effect

38. We saw near the beginning how the HRA could be relevant in a claim between a car owner and a lending company. **Case Number 24 (2022)** is ZXC v Bloomberg.[19] This illustrates the same sort of wider impact. It also illustrates Article 10 and competing Convention rights. Bloomberg News published an online news story. It named ZXC as a criminal suspect under investigation. Bloomberg had obtained a letter written by a UK law enforcement authority to its foreign counterpart. ZXC brought a private law damages claim, for the tort of misuse of private information. Convention rights came in through tort law and section 12(4) of the HRA. The common law tort framework used a test which balanced two rights. The test took ZXC's reasonable expectation of privacy (Article 8), balanced against Bloomberg's freedom of expression (Article 10). One question was this. In principle, where a person is under criminal investigation, but has not yet been charged, do they have a reasonable expectation of privacy?

Autonomy, Interrelationship and Dialogue

39. The application of the HRA raises a whole series of questions about the division of responsibility between different decision-makers. These decision-makers include the following: the Strasbourg court when it issues its judgments; the UK Parliament when it enacts primary legislation; public authorities including central government when they make rules, policies or decisions; and frontline judges. There are questions about autonomy; interrelationships; boundaries; divisions of responsibility; dialogue. The Courts have the duty of working out the principled lines, identifying their own boundaries, and applying the common law.

40. The HRA (section 2) obliges the domestic UK courts to "take account" of decisions in the Strasbourg Court. That provides a space for important choices to be made. Sometimes there is an unanswerable basis for applying the approach to Convention rights identified by the Strasbourg Court. That had happened prior to Peter Chester's voter registration case, and Cleveland Pinnock's housing repossession case. But sometimes there is an important role for a 'dialogue' with the Strasbourg Court.

[18] Commissioner of Police of the Metropolis v DSD [2018] UKSC 11 (21 February 2018) (bailii.org)
[19] Bloomberg LP v ZXC [2022] UKSC 5 (16 February 2022) (bailii.org)

41. That takes us **Case Number 11 (2009)**: R v Horncastle.[20] You will remember a Birkenhead flat where in May 2005 Peter Rice was attacked, and his police statement naming his attackers. Peter Rice subsequently died. Could the statement be admitted as hearsay evidence at the trial of Christopher Horncastle, who he had named? Yes, said the crown court. Horncastle was convicted. He appealed on grounds of a violation of Article 6 (the right to a fair trial). That was because Peter Rice could not give oral evidence. He could not be cross-examined. The Strasbourg case-law on Article 6 said a conviction could not stand if based solely or decisively on hearsay evidence. The Supreme Court politely declined to follow that case-law. They were concerned that Strasbourg judges had not sufficiently appreciated aspects of the UK criminal process including the detailed statutory code and the accompanying safeguards. They wrote a judgment which promoted a fully informed reconsideration by Strasbourg. The Strasbourg Court was convinced and modified its previous thinking. This is the 'dialogue' between domestic courts and the Strasbourg Court.

42. Turning to the autonomy of the UK Parliament, the design of the HRA gives primacy throughout to Parliament. Both the internal inhibition (section 3) and the external prohibition (section 6) yield to clear primary legislation. That includes yielding to delegated legislation which is itself mandated by clear primary legislation. So, if clear primary legislation produces a violation of Convention rights, the HRA allows only the special remedy of a 'declaration of incompatibility'. This triggers a special mechanism for Parliament to think again. That is the 'dialogue' between Courts and Parliament.

43. **Case Number 4 (2002)** is Anderson v Home Secretary.[21] Mr Anderson was serving a life sentence. His minimum term tariff had been set by the Home Secretary. He established an Article 6 violation. Tariff-setting was part of the sentencing function and was required to be undertaken by a judge. But his remedy was a declaration of incompatibility. The deliberate legislative intent in the statute meant that a human rights compatible reinterpretation was impossible without undertaking an act of "judicial vandalism".

44. Frequently, issues and decisions and choices are properly matters for Parliament. That was the answer in Tony Nicklinson's case, where the difficult issues about this assisted suicide are best left to the UK Parliament. And in Lorraine Gallagher's case about disclosing the spent convictions the choices made by the UK Parliament were respected as to the principles of prescription and proportionality. There was another 'dialogue' situation: the earlier statutory scheme had been found incompatible with Article 8 rights and had been replaced by Parliament.

45. Then there is the autonomy of decision-makers, policy-makers and rule-makers. Wherever a human rights claim is concerned with a rule, policy or decision by a public authority the court will be grappling with questions about the appropriate latitude to afford to decisions made within the autonomous severe of the decision-maker or

[20] R v Horncastle [2009] UKSC 14 (09 December 2009) (bailii.org)
[21] R (Anderson) v SSHD [2002] UKHL 46 (25 November 2002) (bailii.org)

policymaker. **Case Number 18 (2016)** is Ali v Home Secretary.[22] The Home Office had designed criteria within the immigration rules, to calibrate tribunal decisions in Article 8 deportation cases. The issue was whether calibrated criteria within immigration rules dictate the answer to that appeal tribunal. The Supreme Court explained that the rules were a legitimate starting point to be given considerable weight and not simply put to one side, but that the tribunal's ultimately had to decide for themselves whether deportation would be a violation.

46. So far as the autonomy of front-line judges is concerned, we have seen in Norma Ziegler's case a latitude being afforded for the magistrates' evaluative judgment.

47. Questions about interrelationships and boundaries also arise at common law. I have referred to human rights and the common law, in cases like Evans and Daly. **Case Number 19 (2017)** is Unison v Lord Chancellor.[23] Governmental rule-makers had introduced secondary legislation setting new higher fees for claims to employment tribunals. The union Unison brought a claim relying on the right of access to the court. The claim succeeded. This was the application of the proportionality principle. The degree of intrusion into fundamental rights could not be greater than justified by the objectives intended to be served. This was not a HRA case. The union did not qualify as a victim of any human rights violation (HRA section 7). This was a common law, constitutional analysis. It reminds us that the HRA enforcement of Convention rights runs alongside a different model: the constitutional protection of rights.

48. By the way, that question: in principle, does a person who is under criminal investigation, but has not yet been charged, have a reasonable expectation of privacy? The answer in ZXC v Bloomberg was yes.

Simple and Straightforward Insights

49. My final golden theme under the HRA is this: important cases can ultimately be decided by reference to simple and straightforward insights.

50. **Case Number 13 (2011)**: Quila v Home Secretary[24] was an Article 8 case. It turned on a simple insight. The immigration rules denied marriage visas if either or both of the spouses were under 21. This was to protect against forced marriage. But it was a disproportionate interference with Article 8 family life. Why? Because young marriage could not be equated with forced marriage. Simple.

51. Smith & Grady in Strasbourg turned on simple insight. High-ranking officials and policymakers were claiming that military operational effectiveness would be undermined if gay men and lesbian women were allowed to serve. It would undermine morale. The Strasbourg Court firmly pointed out that this supposed justification was founded solely on negative attitudes. They would not be countenanced if you substituted race for sexual

[22] Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 (16 November 2016) (bailii.org)
[23] R (UNISON) v Lord Chancellor [2017] UKSC 51 (26 July 2017) (bailii.org)
[24] Quila v Secretary of State for the Home Department [2011] UKSC 45 (12 October 2011) (bailii.org)

orientation. There was no concrete substantiating evidence. The ban was impossible to justify. It was a story of the emperor's new clothes.

52. Remember the suspected foreign international terrorists, detained without charge or trial? They won their case – A & Others – through simple insights. First, Article 14 protection against discrimination means the state has to justify not the measure (detaining suspected terrorists), but the differential in treatment (detaining only suspected foreign terrorists). Second, British suspected international terrorists are every bit as much a threat as foreign suspected international terrorists. Simple.

53. Remember Beaurish Tigere's student loan case? It was decided on this straightforward basis. A person who in practical reality is 'settled' in the UK is every bit as likely as a person who in legal terms is 'settled' in the UK: to stay here, to complete their education, to contribute to the economy and to repay their student loan. Simple.

54. It was the same with the Daly case about prisoner cell searches. The straightforward insight was this. If you have concerns about intimidation and obstruction from prisoners, you can take steps in those situations. You do not need a blanket policy treating every prisoner as intimidatory or obstructive. Simple.

55. And so it was with the final story out of my chosen set of 25. Here is the remaining Convention right. Here are the two remaining people. Article 12 is the right to marry. Izabela Trzcinska and Mahmoud Baiai received the news in February 2005: the Home Office had refused permission for them to get married. Their case became **Case Number 10 (2008)**: Baiai v Home Secretary.[25] Mahmoud Baiai was a Muslim from Algeria and was subject to immigration control. Izabela Trzcinska was a Roman Catholic from Poland and had EU rights to be here. Under the scheme of enactments and policies, their marriage needed a prior certificate of approval (unless it was in the Anglican Church). The scheme involved criteria about immigration status. There was a fee of £295 each (remembering this was 2008). This scheme was said to be to help prevent marriages of convenience (fake marriages). But it was found to be a violation of their Article 12 rights. There were two simple insights. First, the state cannot justifiably prevent a marriage by imposing a fee at an unaffordable level. Second, that immigration status criteria have nothing to do with whether it is a marriage of convenience.

56. So, here are some straightforward insights. The marriage of people who are subject to immigration control does not mean fake marriage. The marriage of people who are young does not mean forced marriage. If you detain foreign terrorist suspects, but not British terrorist suspects, you are not really preventing terrorism. You are doing something else. Being a prisoner is not the same as being an obstructive or intimidating prisoner. A student can be settled here in reality, even if not settled here in legal status. Diversity and inclusion are consistent with operational effectiveness of the armed forces. These are the sorts of ideas which can win human rights cases.

[25] Baiai v Secretary of State For The Home Department [2008] UKHL 53 (30 July 2008) (bailii.org)

Finally

57. "Here is how this chapter of the story ends". Those are not generally the closing words, when a tribunal or court gives a decision, reaches a verdict or writes a judgment in a human rights case. But maybe they should be.

58. After his claim was rejected by the High Court, Tony Nicklinson took the decision to refuse nutrition fluids and medical treatment. Using his assisted technology, he composed this tweet: "I have concluded that a few weeks of discomfort are better than 30 years like this". He died on 22 August 2012. His widow Jane took his case to the Supreme Court and then to Strasbourg. It failed, but the questions endure, and the Health and Social Care Committee is holding an inquiry into assisted suicide.[26]

59. The HRA implications of the killing of Baha Mousa led to a public enquiry and the killings other Iraqi civilians led to a scheme of independent investigation[27].

60. Yusuf Adam's case about asylum support affected 800 judicial review cases – a quarter of all judicial review cases started in autumn 2003 – in a setting where it was reported that 9,415 individual asylum seekers received no form of government support whatsoever in 2003.[28]

61. There is Government Guidance on school uniforms, religious clothing and Article 9 rights, which says: "It should be possible for most religious requirements to be met within a school uniform policy and a governing board should act reasonably through consultation and dialogue in accommodating these".[29]

62. Peter Chester became able to vote, but only because he was released in 2022, after 45 years behind bars. There were new 2017 rules about prisoners and voting. These allowed remand prisoners to vote, but not prisoners serving custodial sentences.[30]

63. Mahmoud Baiai and Izabela Trzcinska received their certificate of approval and were married in 2007, after winning in the Court of Appeal.

64. Beaurish Tigere came to study in the greatest city in the world. Her case led to the launch of a "Young, Gifted and Blocked" campaign.[31] She did an undergraduate degree and a master's degree. She is still here in Manchester working as an analyst.

65. 2008 was the year that military personnel first marched in UK Pride parades in uniform. The Head of the Army, General Sir Richard Dannatt, said in a speech that year that respect for gay, lesbian, bisexual and transexual officers and soldiers was now "a recognised command responsibility", "vital for operational effectiveness". 15 years on,

[26] See Inquiry - Assisted dying/assisted suicide - Committees - UK Parliament.
[27] See Baha Mousa Inquiry report (www.gov.uk); and Iraq Historic Allegations Team (www.gov.uk)
[28] See Joint Committee On Human Rights - Tenth Report 2006-2007 (parliament.uk)
[29] See Guidance - School uniforms (www.gov.uk)
[30] See Prisoners' voting rights - House of Commons Library (parliament.uk)
[31] See Young, Gifted and Blocked | Just For Kids Law

in July 2023, implementing the first recommendation of Lord Etherton's Independent Review, Prime Minister Sunak formally apologised for the "appalling failure" of the British state in banning lesbian women and gay men from serving in the armed forces[32].

66. That failure was being exposed 25 years ago. It was exposed "away from home", in Strasbourg, through the enforcement of Convention rights. But it was exposed at a time when a statute, addressing the enforcement of a human rights Code, meant people could say (or even sing): "It's coming home".

- The University of Salford Law Lecture 2023 was delivered at the Lady Hale Building, chaired by Sally Penni MBE (barrister, Kenworthys chambers), and co-organised by Dr Francine Morris (Associate Dean, Enterprise & Engagement) and Louise Hall (Senior Lecturer in Law). A live stream recording is at University of Salford Annual Law Lecture - YouTube.

[32] See News 30.6.22 (mod.uk); BBC News (19.7.23); LGBT Veterans Independent Review (www.gov.uk)