Dignity, fairness and good government: the role of a Human Rights Act

On 11 December 2008 Lord Thomas Bingham delivered the following lecture in the Banco Court, Queens Square. The lecture marked the 60th anniversary of the Universal Declaration of Human Rights.

It would clearly test to destruction the tolerance of the ordinary red-blooded Australian to have a Pom getting off the plane from London and telling them how to run their country. So I shall not presume to say how the current human rights debate in this country should be resolved. But perhaps I may contribute some thoughts, prompted by our own experience in the United Kingdom, acknowledging as I do so that the Australian context, while in some ways similar, is in others significantly different.

In the autumn of 1992 I was appointed master of the rolls – in effect, the president of the civil Court of Appeal of England and Wales – and was interviewed by a radio journalist who asked what single change I would most like to see made in the law. I said my choice would be to incorporate into domestic law the European Convention on Human Rights, to which the UK had formally acceded in 1951, the first state to do so. This was not a novel or original choice on my part. The former head of my chambers in the Temple (Lord Scarman) had strongly argued for incorporation, in his Hamlyn Lectures of 1975[1] and even more particularly after his retirement in 1986. Two Bills providing for incorporation had passed through the House of Lords, only to fail in the Commons. In recent years incorporation had been championed by a number of prominent advocates, among them Lord Lester QC. But in 1992 both the main parties, for rather different reasons, were adamantly opposed to the idea, which was supported only by the numerically weak Liberal Democrats. On 2 March 1993 I developed my reasons for favouring incorporation in a Denning Lecture entitled 'The European Convention on Human Rights: Time to Incorporate'.[2] By then, however, the political scene had had altered significantly: just before my lecture, the late John Smith, then leader of the Labour Party in opposition, encouraged (as I understand) by his shadow Lord Chancellor (Lord Irvine), had adopted incorporation of the Convention as part of the Labour Party's programme. This, despite misgivings in some sections of the party, it thereafter remained.

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It is well-known that the European Convention, like the Universal Declaration which it followed, found its genesis in the horrors which had afflicted much of the world in the 1930s and 1940s. The victorious allies, Britain and France, were prominent in promoting and drafting the Convention, wanting to share with other less fortunate nations the rights and freedoms which they took for granted. After all, we had grown up on Magna Carta and they on the Declaration of the Rights of Man and the Citizen of 1789. I do not think either country foresaw that its own laws and institutions would be subjected to scrutiny and found wanting.

By the 1990s, however, there was no longer room for complacency in Britain that we had nothing to learn. As early as the 1950s, complaints made by Greece about British conduct in Cyprus had caused official embarrassment.[3] One suspect had been 'subjected to the Chinese water torture', or what we may now refer to as 'waterboarding'.[4] A 15-year old suspect had been whipped so severely as to require treatment in hospital.[5] After the rather casual grant by the British Government of a right of individual petition to the European Court of Human Rights in Strasbourg in 1966, the rate of applications to Strasbourg sharply increased and so did the incidence of decisions adverse to the UK. Thus violations were found in relation to the right to life[6], the right not to be subjected to inhuman or degrading treatment[7], the right to personal liberty[8], the right to a fair trial[9], the right to respect for private life,[10] the right to freedom of expression[11], the right to freedom of association[12] and the right not to be discriminated against in the enjoyment of Convention rights.[13] Throughout this period the orthodox rule was that, the Convention not being part of English law, no notice could be taken of it by the British courts[14], save interstitially, as for instance where a statutory provision was found to be capable of bearing two meanings, one consistent and one inconsistent with the international obligations of the UK as expressed in the Convention, in which event preference was to be given to the former.[15] The context of course was that the United Kingdom was bound in international law to observe the Convention and comply with Strasbourg decisions to which it was party, and it was regarded as unthinkable to renounce the Convention.

It seemed to me in the early 1990s, and still does, that this orthodox approach had at least four grave weaknesses. First, it meant that

complaints reached the European institutions at Strasbourg without the benefit of a domestic judgment addressing the Convention issues. Sometimes such a judgment would have made no difference; quite often it would. It is rather a sterile process to exhaust domestic remedies when there are no domestic remedies to exhaust. It was always my expectation that the UK's record would improve when the court in Strasbourg had the benefit of a British judgment, and so it has proved.

Secondly, it seems to me hugely important that a domestic legal system should command the confidence of the public as one which is inclusive, belongs to them and affords a remedy for obvious wrongs. It is destructive of such confidence if there is a justified belief that for a significant category of serious wrongs the domestic court can offer no remedy and the disappointed litigant is obliged to go away and seek this superior justice abroad. Such, until the *Human Rights Act 1998* came into force, was the position.

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Thirdly, it was very undesirable that members of the public should have been put to the expense and the very considerable delay of seeking redress in Strasbourg for a Convention complaint which could, had the Convention been part of domestic law, have been granted more inexpensively and much more quickly at home.

The fourth weakness was the most serious of all. If the rights and freedoms embodied in the Convention were, as described, 'fundamental', it was a grave defect that they were not fully protected in domestic law. Of course, many of them were protected by the common law and statute and a mixture of the two, and the judges on the whole did their best to remedy perceived injustices. But the coverage was piecemeal, as evident from the record of cases lost by the UK at Strasbourg, and it is not easy to see why fundamental rights and freedoms should not be directly and expressly recognised in domestic law without taxing the ingenuity of the judges.

Perhaps I may give just one example to illustrate these weaknesses. In *X (Minors) v Bedfordshire County Council*[16] five child plaintiffs complained that they had been the victims of maltreatment and neglect which had been brought to the attention of the defendant council but on which, for a long time, the council had failed to act. The facts, only assumed when the strike-out application was heard in England, but established or accepted when the claimants took their complaint to Strasbourg, were very strong. An experienced and highly respected child psychiatrist described the children's experiences as 'to put it bluntly, horrific' and added that it was the worst case of neglect and emotional abuse that she had seen in her professional career.[17] The local authority's failure to intervene, which had permitted the abuse and neglect to continue, was held by a majority of the Court of Appeal and unanimously in the House of Lords to afford the children no tortious remedy in negligence against the local authority in English law. So the children applied to Strasbourg under the Convention. It was there accepted that the neglect and abuse suffered by the children reached the threshold of inhuman and degrading treatment[18] and a violation of article 3 of the Convention was found, arising from the failure of the system to protect the children from serious, long-term neglect and abuse.[19] The court awarded compensation amounting to £320,000, a very large figure by Strasbourg standards.[20]

So the Labour government of 1997, fresh to office after a long period of Conservative government, inspired by Lord Irvine, introduced what became the 1998 Act. The general thrust of that Act will be very familiar to this well-armed audience, but perhaps I may comment on five features of it. First, the cornerstone of the Act is the provision in section 6(1) which makes it unlawful for any public authority, widely defined so as to include a court or tribunal, to act in a way which is incompatible with a Convention right. Thus parliament was requiring compliance with the scheduled Convention rights across the whole spectrum of government, parliament itself, alone, excluded.

Second is the power conferred on the higher courts by section 4, if satisfied that a provision of primary legislation is incompatible with a Convention right, to make a declaration of incompatibility. This was not to affect the validity of the statute and was not to be binding on the parties, but it would be a formal statement of the court's view. If a declaration was made, ministers were empowered but not obliged to put it right. Thus there was to be no power to annul, strike down or set aside primary legislation. The reason for this unusual device was very clearly explained in the White Paper introducing the Bill:

> The government has reached the conclusion that the courts should not have the power to set aside primary legislation, past or future, on the ground of incompatibility with the Convention. This conclusion arises from the importance which the government attaches to parliamentary sovereignty. In this context, parliamentary sovereignty means that parliament is competent to make any law on any matter of its choosing and no court may question the validity of any Act that it passes. In enacting legislation, parliament is making decisions about important matters of public policy. The authority to make those decisions derives from a democratic mandate. Members of parliament in the House of Commons possess such a mandate because they are elected, accountable and representative. To make provision in the Bill for the courts to set aside Acts of parliament would confer on the judiciary a general

> power over the decisions of parliament which under our present constitutional arrangements they do not possess, and would be likely on occasions to draw the judiciary into serious conflict with parliament. There is not evidence to suggest that they desire this power, nor that the public wish them to have it. Certainly, this government had no mandate for any such change.[21]

These closing sentences were, I think, completely accurate. There was no judicial pressure for more sweeping powers, and had the Bill not preserved parliamentary sovereignty, it is perhaps unlikely that it would have passed. The government's expectation at the time was that there would be relatively few declarations of incompatibility, and this has proved to be the case.

The government's expectation in this regard was attributable to the third feature of the Act to which I draw attention. This was the requirement in section 3(1) of the Act that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." I emphasise the imperative "must". This provision also was explained by the White Paper:

> 2.7 The Bill provides for legislation – both Acts of parliament and secondary legislation – to be interpreted so far as possible so as to be compatible with the Convention. This goes far beyond the present role which enables the courts to take the Convention into account in resolving any ambiguity in a legislative provision. The courts will be required to interpret legislation so as to uphold the Convention rights unless the legislation itself is so clearly incompatible with the Convention that it is impossible to do so.
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> 2.8 This 'rule of construction' is to apply to past as well as to future legislation. To the extent that it affects the meaning of a legislative provision, the courts will not be bound by previous interpretations. They will be able to build a new body of case-law, taking into account the Convention rights.[22]

Thus the intention and the expectation were that use of this unusual interpretative power would obviate the need for declarations of incompatibility in all but a small minority of cases.

The fourth feature I would mention, less well known than the others I have mentioned, is the obligation placed by section 19 on a minister in charge of a Bill in either house of parliament, before its second reading, either to make a statement that in his view the provisions of a Bill are compatible with the Convention rights, or to make a statement to the effect that although he is unable to make a statement of compatibility the government nonetheless wishes the House to proceed with the Bill. This second course was followed in relation to what became the *Communications Act 2003*, because of doubt about the effect of Strasbourg authority, but that was a rarity and the first course is the norm. Thus a government Bill is ordinarily presented to parliament on the premise that it is (in the jargon) Convention-compliant, reflecting the intention of the Human Rights Act as a whole that the scheduled rights should be reflected across the whole spectrum of public administration.

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The fifth feature, which is well-known, is a requirement that British courts, when determining questions which have arisen in connection with Convention rights, must take into account any judgment, declaration or advisory opinion of the European Court (or an opinion or decision of the Commission or the Council of Ministers).[23] This has been understood, in my view correctly, as meaning that Strasbourg authority is not strictly binding on UK courts, like the law of the European Community, but that UK courts should ordinarily follow it unless there is some good reason for not doing so.

The UK, like Australia, is party to the International Covenant on Civil and Political Rights, 1966, many of the articles of which (although differently numbered) match corresponding provisions of the European Convention. But I think it is true to say that in the UK the impact of the ICCPR and the rulings of the Human Rights Committee of the UN have been very marginal compared with those of the Strasbourg institutions. It is no doubt unwelcome, perhaps even a little humiliating, for a proud sovereign state to be found by any respected international body to have violated important human rights, but it must be very doubtful whether the UK's experience of reverses in the Human Rights Committee would have impelled it to give domestic effect to the rights in the ICCPR. To that extent at least, the situation in Australia differs from that in the UK.

As is well known, the *Human Rights Act 1998* has attracted much media criticism in the UK, particularly in the tabloid and right-wing press and in sections of the Conservative Party. Much of this criticism has been the product of misrepresentation and misunderstanding and there is a tendency to blame the Act for almost anything of which the public disapprove. But among many ill-directed criticisms are some points which are serious and call for consideration. Whether these are points which have relevance in an Australian context I do not know, and must leave you to judge.

First, it is sometimes argued that the Act is unnecessary, that common law and statute can readily be interpreted and applied to provide the protection that is needed. Up to a point this is true.

There are well-known cases in which, although the Convention is invoked, the courts find the common law and the Convention jurisprudence to be in harmony and choose to base their decision on the common law alone.[24] But the common law and statute have not always provided adequate protection, as evidenced by the British record of failure at Strasbourg before 2000, when the Act came into force. As was explained in the White Paper, already referred to, one of the reasons for this record of failure was that:

> there has simply been no framework within which the compatibility with the Convention rights of an executive act or decision can be tested in the British courts: these courts can of course review the exercise of executive discretion, but they can do so only on the basis of what is lawful or unlawful according to the law in the United Kingdom as it stands.[25]

Thus the Act was necessary if, in accordance with the UK's duty in the international law under article 1 of the Convention, the rights embodied in the Convention were to be secured to everyone within the jurisdiction of the UK in the domestic courts, without the need for a journey to Strasbourg.

It is said, secondly, that the effect of the Act is to undermine the sovereignty of parliament. I do not find this point entirely easy to understand. As I have tried to show, the Act was very carefully devised so as to preserve parliamentary sovereignty. It was a surprise to many when, in the course of e-mail exchanges with Henry Porter, an *Observer* journalist, Tony Blair himself appeared to misunderstand this fundamental premise of the Act.[26] But there is, I suggest, no room for doubt. The courts cannot annul an Act of parliament. They can declare it to be incompatible with a Convention right, but that does not affect its validity or effect. Ministers may act to rectify a provision declared to be incompatible but are not obliged to do so and may, if they choose, leave the complainant to try his luck in Strasbourg. And it cannot, I think be suggested – nor, to my knowledge, has it been suggested – that parliament lacks the power to repeal the Act if the necessary majority favours that cause. There are some statutes, like that giving equal voting rights to women, which parliament is exceedingly unlikely to repeal, and the 1998 Act may be or become one of them, although repeal would not free the UK of its international law duty to comply with the Convention. But I think it clear that, domestically, parliament has maintained the whip hand, as was always intended.

A third criticism is that the process established by the Act is undemocratic, since it permits decisions of the nation's representatives in parliament, including particularly elected members of the House of Commons, to be challenged by unelected judges. It is of course true that a declaration of incompatibility questions the lawfulness of primary legislation, and exercise of the interpretative power in section 3 of the Act may involve the interpretation of legislation in a sense which it is acknowledged parliament did not intend. This has been described as a strong obligation[27], and such it is. But if one asks what authority these unelected judges have for departing from their usual role of seeking to give the words of a statute the meaning which parliament intended its words to bear, the answer is clear: they have the authority of a mandatory instruction issued to them by parliament itself. To determine whether it is possible to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights of course calls for what may be a difficult and controversial exercise of judgment, but judgment is what judges are paid to exercise, even if unelected. It must nonetheless be accepted that any Bill or Charter of Rights is, in one sense, undemocratic in that it is counter-majoritarian. Its purpose is to give a measure of protection to minorities who lack the strength and the representation to obtain protection through the political process: prisoners, mental patients, gypsies, homosexuals, asylum-seekers, despised racial or religious minorities and the like. It was recognition by the American Founding Fathers that a majority may exert its power to oppress a minority – a phenomenon amply demonstrated in the country's history – which inspired the 1791 amendments to the US Constitution, comprising the US Bill of Rights and such is the inspiration of later instruments also. Chief Justice Sir John Latham made the point very succinctly when he said that in Australia the popular minorities can generally look after themselves; protective laws are basically needed for minorities and especially unpopular minorities.[28]

A fourth criticism of the Act is that it gives too much power to the judges, in particular, to make decisions of a sensitive and personal nature. It is true, I think, that the Act leads to judges making decision of a rather different kind from those they were used to making. This was recognised in parliament when the Bill was debated, and was an intended consequence. But the judges are still making what are distinctively judicial decisions. They have to establish the facts, which are often crucial. They have a text, contained partly in the Act and partly in the Convention rights scheduled to the Act. They have principles of interpretation to apply, some of them deriving from domestic sources, some from Strasbourg

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and other international sources. They have a body of precedent to work on, some of it from Strasbourg, some domestic, some from other sources, some of it binding, some not. The task which the judges perform is not different in kind from their conventional role, and they have of course to give reasons, based on the text, the principles of interpretation and the authorities, for reaching whatever conclusion they do. They are not metamorphosed into legislators. Nor is any decision made by a judge which is not in the last resort made by a judge under the pre-existing regime. The question, at least for the UK, was: which judge should make the decision in the first instance?

Then it is said – a fifth criticism – that the Act is a source of mischief because it involves the judges in political controversy and makes for conflict between the government and the judiciary. It is certainly true that in the UK the courts have given some decisions under the Act which have been very unpopular with the government. But that is also true of judicial review decisions not given under the Act. There is, as I have suggested elsewhere,[29] an inevitable and proper tension between the two arms of government. Particularly when confronted by serious threats such as terrorism, governments understandably seek to exercise their powers to the limit of what is lawful. But in doing so they may cross the line which divides the lawful from the unlawful, and then it is the constitutional role of the courts so to hold. There are countries in the world where all judicial decisions find favour with the powers that be, but they are not countries where one would wish to live. Governments of course have no greater appetite for losing cases that any other litigant, perhaps even less; but most would recognise that losing cases on occasion is part of the price to be paid for the rule of law.

A sixth criticism, sometimes made in the UK by those who generally favour a bill or charter of rights, is that the Act gives domestic effect to the wrong rights, either because the Convention, now nearly 60 years old, is looking rather dated, or because it does not give effect to distinctively British rights. Neither of these criticisms is in my view at all persuasive. The age of the Convention is not very relevant since the articles are expressed (like chapter 39 of Magna Carta 1215) in very broad terms, and the Strasbourg court has treated the Convention as a living instrument:[30] the meaning of the articles does not change but their application has been held to do so in relation, for example, to the distinction between inhuman and degrading treatment and torture and the treatment of homosexuals[31] and transsexuals.[32] The second point is also misplaced. There is nothing un-British or foreign about the content of the Convention rights, to which British negotiators made a great contribution. Nor, in the land which gave birth to Magna Carta and the Bill of Rights 1689, is there anything antithetical to the UK Constitution in the notion of a Bill or Charter of Rights. There are, no doubt, rights which could be added to those guaranteed by the European Convention and its protocols, but the Convention imposes a minimum, not a maximum: any state which wishes to secure more extensive rights than the Convention guarantees is not precluded from doing so.

The European Court of Human Rights, Strasbourg. Photo: iStockphoto

The Act is also criticised, seventhly, not for doing too much but for doing too little. For instance, Henry Porter, a respected *Observer* journalist, has deplored the failure of the Act to stem the seemingly inexorable increase of personal surveillance in Britain,[33] making the British perhaps the most watched people in the free democratic world.[34] I share the author's concern. But I question whether this result can be attributed to a defect in the Convention. The courts can, after all, only rule on complaints which litigants choose to bring before them and it seems that on the whole the British public is less concerned about official intrusion into their private affairs than one might expect, perhaps because they do not appreciate the extent to which it is going on.

I come to an eighth criticism. This is that the effect of the Convention is to elevate the rights of the individual over those of the community to which he or she belongs. I do not consider this to be a justified criticism. While some of the Convention rights (such as the prohibition of torture) are expressed in unqualified terms and have, on occasion, been applied in an unqualified way,[35] it has repeatedly been held in Strasbourg that 'inherent in the whole of the Convention is a search for a fair balance between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights';[36] a theme loyally echoed in the domestic cases.[37] To the extent that individual rights have been improperly preferred to community rights, this is a perversion, not an implementation, of the Convention.

A ninth criticism of the Act is that it provides a field day, and rich pickings, for lawyers. Before it came into force there was indeed a worry that the courts would be swamped by an uncontrollable flood of claims. This has not happened. There have been a considerable number of claims under the Act, but they have been manageable

and the pickings have not been rich. Under the statute now in force in Victoria there has, as I understand, been a surprising reluctance to rely on the Act.

The tenth and last criticism which I would mention is, if justified, the most serious of all: that the Convention gives rise to much wrong decision making. This must not be a matter of opinion. There are Strasbourg decisions which I myself consider wrong,[38] and domestic decisions also which I have been party to overruling.[39] It is not, however, uncommon that judicial decisions fail to command universal acceptance, and I do not think that the incidence of aberrant decision-making is greater in this field than in others. Challenged to identify decisions they criticise as foolish or mischievous, most critics either falter or fall back on what turn out to be not judicial decisions but misconceived interpretations of the Act by official bodies. What is perhaps more remarkable, because more unusual, is the development of a constructive dialogue between the UK courts and that at Strasbourg. Where the Strasbourg court gives a judgment which the UK courts venture to criticise, the Strasbourg court has on more than one occasion shown a refreshing willingness to modify its position.

These are, I think, the main criticisms directed at the *Human Rights Act* and the European Convention. As will be obvious, they do not, in my opinion, amount to very much. They do not begin to outweigh the very real benefit which the Act confers by empowering the courts to uphold certain very basic safeguards even – indeed, particularly – for those members of society who are most disadvantaged, most vulnerable and least well-represented in any democratic representative assembly. Decisions have undoubtedly been made in the UK which have, in my view, been beneficial and which would not – in some cases could not – have been made without the mandate given by the Act. Examples are plentiful, but among those which spring readily to mind are the ordering of a public enquiry into the beating to death of a young Asian detainee by a rabidly racist and violent detainee put into the same cell at a young offenders' institution;[40] a finding that the conditions in which prisoners were held at Barlinnie Prison in Glasgow amounted to inhuman or degrading treatment or punishment;[41] a finding that the indefinite detention of a foreign

national suspected of association with terrorism without charge or trial was disproportionate, irrational and discriminatory;[42] a finding that an 18-hour curfew, coupled with stringent restrictions on where the subject could go, whom he could meet and whom he might speak to, amounted to an unlawful deprivation of liberty;[43] a finding that temporary judges in Scotland lacked the security necessary to make them appear to be an independent and impartial tribunal;[44] an order restraining the return of a mother and child to Lebanon, where the child would be required to live with a violent father she had never met;[45] a finding that the police had unlawfully interfered with a demonstration against the Iraq war outside a Royal Air Force base in Gloucestershire;[46] and an order condemning as discriminatory and disproportionate a scheme requiring immigrants seeking to marry otherwise than under the rites of the Church of England to obtain the consent of the Secretary of State.[47] These examples could, as I say, be multiplied. I do not for my part doubt that such decisions enhance the fairness, decency and cohesiveness of the society in which we live in the United Kingdom.

1. *English Law – The New Dimension* (Stevens & Sons, 1974), pp.10-21.
2. (1993) 109 LQR 390-400; and see Thomas Bingham, *The Business of Judging* (OUP, 2000), pp. 131-140.
3. See AW Brian Simpson, *Human Rights and End of Empire* (OUP, 2001), chapters 18 and 19.
4. Ibid., 930.
5. Ibid., 946.
6. E.g. *McCann v United Kingdom* (1995) 21 EHRR 97.
7. E.g. *Ireland v United Kingdom* (1978) 2 EHRR 25; *Tyrer v United Kingdom* (1978) 2 EHRR 1.
8. E.g. *Ashingdane v United Kingdom* (1985) 7 EHRR 528.
9. E.g. *Golder v United Kingdom* (1975) 1 EHRR 524; *Saunders v United Kingdom* (1996) 23 EHRR 313.
10. E.g. *McGinley and Egan v United Kingdom* (1998) 27 EHRR 1; *Dudgeon v United Kingdom* (1981) 4 EHRR 149; *Malone v United Kingdom* (1984) 7 EHRR 14.
11. E.g. *Tolstoy-Miloslavsky v United Kingdom* (1995) 20 EHRR 442; *The Observer* and *The Guardian v United Kingdom* (1991) 14 EHRR 229.
12. E.g. *Young, James and Webster v United Kingdom* (1981) 4 EHRR 38.
13. E.g. *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471.
14. *R v Secretary of State for the Home department, Ex p Brind* [1991] 1 AC 696.
15. *Garland v British Rail Engineering Ltd* [1983] 2 AC 751, 771.
16. [1995] 2 AC 633.
17. *Z v United Kingdom* (2001) 34 EHRR 97, para 40.
18. Para 74.
19. Para 74-75.
20. See *D v East Berkshire Community Health* NHS Trust [2005] UKHL 23; [2005] 2 AC 373, para 22.
21. 'Rights Brought Home: The Human Rights Bill'.
22. Ibid., chapter 2, paras 27-28.
23. Section 2(1).
24. E.g. *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, 551F; *McCartan Turkington Breen (A Firm) v Times Newspapers Ltd* [2001] 2 AC 277, 299D; *A and others v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71; [2006] 2 AC 221, para 52.
25. White Paper, above, para 1.16.
26. 'Britain's Liberties: the Great Debate', *The Observer* (London), 23 April 2006.
27. *R v Director of Public Prosecutions, Exp Kebilene* [2000] 2 AC 326, 366A, 373F; *R v A* (No. 2) [2001] UKHL 25, [2002] 1 AC 45, para 44; *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 30.
28. *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 124.
29. Thomas Bingham, 'The Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 79.
30. *Handyside v United Kingdom* (1979) 1 EHRR 737, para 49.
31. *Dudgeon v United Kingdom* (1982) 4 EHRR 149, para 60.
32. *Goodwin v United Kingdom* (2002) 35 EHRR 18.
33. *The Observer* (London), 9 March 2008, p.33.
34. Timothy Garton Ash, 'The threat from terrorism does not justify slicing away our freedoms', *The Guardian* (London), 15 November 2007, p.33.
35. E.g. *Chahal v United Kingdom* (1996) 35 EHRR 413.
36. *Sporring and Lonnroth v Sweden* (1982) 5 EHRR 35, para 69.
37. *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, [2004] 2 AC 368; *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167.
38. Such as *McCann v United Kingdom* (1995) 21 EHRR 97.
39. Such as *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2004] QB 335.
40. *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653.
41. *Napier v Scottish Ministers* 2005 1 SC 229.
42. *A and others v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68.
43. *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.
44. *Starrs and Chalmers v Procurator Fiscal, Linlithgow*, Appeal Court, High Court of Justiciary, Appeal No 1821/99.
45. *EM (Lebanon) v Secretary of State for the Home Department (AF (A Child) and others intervening)* [2008] UKHL 64; [2008] 3 WLR 931.
46. *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2006] UKHL 55; [2007] 2 AC 105.
47. *R (Baiai) v Secretary of State for the Home Department (Nos 1 and 2) (Joint Council for the Welfare of Immigrants intervening)* [2008] UKHL 53; [2008] 3 WLR 549.