However, it seems that in *disciplinary cases* where it is necessary to reach decisions quickly, it might well be appropriate to refuse legal representation. Thus, in *Maynard* v *Osmond* [1977] 1 All ER 64, the Court of Appeal held that natural justice did not require that a police constable should have legal representation at a hearing before the chief constable on a disciplinary matter involving an allegation that a sergeant had falsely stated that PC Maynard had been asleep while on duty. Furthermore, the House of Lords decided in *R* v *Board of Visitors of the Maze Prison, ex parte Hone and McCarten* [1988] 1 All ER 321 that a prisoner charged with a disciplinary offence is not entitled, as of right, to legal representation at the disciplinary hearing.

Whether a decision is judicial, quasi-judicial or administrative, or disciplinary, the rules of natural justice need not necessarily be applied if national security is involved.

(c) Effect of failure to comply with rules. In recent times the courts have made it clear that anything done by a tribunal in breach of natural justice (or *ultra vires*) is void. If action has been taken on the decision of a tribunal which is void that action is also void. If the decision was merely voidable action taken on it prior to the court quashing it would be valid.

(d) Error of law on the face of the record. A quashing order lies to quash a decision the record of which discloses an error of law. According to Lord Denning in *R* v *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 All ER 122, the record consists of 'the document which initiates the proceedings, the pleadings (if any), and the adjudication, but not the evidence or the reasons unless the tribunal chooses to incorporate them'. As we have seen, the Tribunals and Inquiries Act 1992 requires reasoned decisions in cases coming before tribunals and inquiries so that there should now normally be a record giving reasons which will assist the High Court in exercising its supervisory jurisdiction. In addition, if a reasoned decision is required by the 1992 Act a mandatory order lies to compel the tribunal or inquiry to give one.

However, the above provisions do not apply to magistrates' courts. If an order of a magistrates' court does not contain reasons for the making of the order, then, provided the magistrates have stayed within their jurisdiction and observed the rules of natural justice, a quashing order does not lie on the order under this heading.

R v *London County Council, ex parte Entertainments Protection Association Ltd*, 1931 – Quashing orders and *ultra vires* (**9**)

Dimes v *Grand Junction Canal*, 1852 – Monetary bias (**10**)

R v *Bingham Justices, ex parte Jowitt*, 1974 – Other bias (**11**)

R v *Secretary of State for Home Department, ex parte Hosenball*, 1977 – Natural justice and national security (**12**)

Ridge v *Baldwin*, 1963 – Effect of failure to comply with rules of natural justice and *ultra vires* (**13**)

A prohibiting order lies to prevent an inferior tribunal from exceeding its jurisdiction, or infringing the rules of natural justice. It is governed by similar principles to a quashing order, except that it does not lie once a final decision has been given (a quashing order is then the appropriate order). The object of a prohibiting order is to prevent an inferior tribunal from hearing and deciding a matter which is beyond its jurisdiction. A prohibiting order and a quashing order are available against the Crown and public authorities but not against private persons or bodies, e.g. the big industrial conglomerates and trade unions.

Applications for quashing and prohibiting orders are often brought together, e.g. to quash a decision already made by a tribunal, and to prevent it from continuing to exceed or abuse its jurisdiction.

A prohibiting order may be issued to any person or body (not necessarily an inferior court, since it might be issued to a local authority). It commands him or them to carry out some public duty. Once again, it is not available against private persons or bodies.

It might be used to compel an administrative tribunal to hear an appeal which it is refusing to hear, or to compel a local authority to carry out a duty lying upon it, e.g. to produce its accounts for inspection by a council tax payer (*R* v *Bedwellty UDC* [1943] 1 KB 333). A mandatory order lies to compel the exercise of a duty and of a discretionary power, though in the case of the latter not in a particular way.

It is not available against the Crown itself, but it may issue against Ministers or other Crown servants to enforce a personal statutory duty.

The High Court has power to issue the above orders under s 29(3) of the Supreme Court Act 1981 (becomes Senior Courts Act 1981) in respect of all decisions of the Crown Court (with the exception of matters relating to trial on indictment) where such orders are normally appropriate, e.g. where an error of law appears on the face of the record in, say, a licensing decision as where the Crown Court appears to have misinterpreted statutory provisions (*R* v *Exeter Crown Court, ex parte Beattie* [1974] 1 All ER 1183). Appeals from trials on indictment are to the Court of Appeal, Criminal Division.

Injunction and declaratory judgment

The High Court can also exercise control over the decisions of inferior tribunals by granting, at its discretion, an injunction to prevent, for example, the implementation of a decision made by an inferior tribunal which does not observe the rules of natural justice. The remedy is not *normally* available against the Crown (*Factortame Ltd* v *Secretary of State for Transport* [1989] 2 All ER 692), but see Chapter 8. Defiance of an injunction amounts to contempt of court. In many ways the remedy is like a prohibiting order. However, it is rarely used against public tribunals. It is more commonly brought into play against domestic tribunals.

A *declaratory judgment* may be asked for by a person aggrieved by the decision of an inferior tribunal so that the High Court can state the legal position of the parties. Defiance of a declaratory judgment is not a contempt of court and there is no method by which it can be enforced, but parties usually observe it. However, disobedience could lead to a later action for an injunction or damages in which the law would already have been decided leaving only the facts to be proved. A declaration by the court that an administrative act was *ultra vires* will make it void and of no effect. It is particularly useful in respect of complaints against the actions of government departments and Ministers.

It is important to note here that in *R* v *Secretary of State for Employment, ex parte Equal Opportunities Commission*, 1994 (see Chapter 19) the House of Lords gave a declaratory judgment to the effect that UK employment law on part-time working was incompatible with the Treaty of Rome and the EC Equal Pay Directive. In doing so they were, in effect, saying that what was then the government's Employment Protection (Consolidation) Act 1978 was not correct. Their Lordships also made two decisions of great importance as follows:

(*a*) that the judicial review procedure is available to deal with defects in the government's interpretation of EC employment law. This is a much quicker way of sounding out the possible application of EC law than a reference to the European Court of Justice;

(*b*) that the Equal Opportunities Commission had the necessary *locus standi* (right to be heard) in this case. In other words, the EOC was qualified to act on behalf of a group of workers, i.e. part-timers. This principle was previously in doubt and the House of Lords did not feel that it was prevented from making this decision by *IRC* v *National Federation of Self-Employed and Small Businesses Ltd*, 1981 (see Case **8**), though the case was not overruled. The decision strengthens the power of pressure groups, as does the judicial review ruling.

Damages

Although a public authority has acted unlawfully in the sense of being *ultra vires*, a person affected, such as Shell UK in *R* v *Lewisham BC, ex parte Shell UK* (see Case **6**: Comment (ii)), cannot recover damages against the wrongdoer unless he can base his claim on breach of contract, or a tort, or alleges infringement of a property right (*O'Reilly* v *Mackman* [1983] 2 AC 237). It was held in *R* v *Knowsley Metropolitan Borough Council, ex parte Maguire* (1992) *The Independent*, 19 June (High Court) that there was no general right to damages against a local authority for maladministration.

Where on an application for judicial review it appears that there is a case, e.g. a breach of contract, for which damages might be available, the court may, instead of refusing the application, order the proceedings to continue as if begun by claim form under the Civil Procedure Rules 1998 and may give directions either allocating the proceedings to a case management track or providing for allocation questionnaires or an allocation hearing (see further Chapter 5).

R v *Commissioner of Police of the Metropolis, ex parte Blackburn*, 1973 – Mandatory orders and discretionary powers (**14**)

R v *Secretary of State for Social Services, ex parte Grabaskey*, 1972 – Mandatory orders may be issued against Ministers (**15**)

Laker Airways v *Department of Trade*, 1977 – Declaratory judgments: actions of government departments and Ministers (**16**)

Judicial review – delay

It was decided in *R* v *Dairy Produce Quota Tribunal for England and Wales, ex parte Caswell* [1989] 3 All ER 205 that if application for judicial review was not made promptly or within three months at the latest as prescribed by Order 53 of the Rules of the Supreme Court, the judge had to refuse leave to continue an action unless the applicant had a good reason for the delay.

Judicial review and infringements of human rights

When reviewing the decision-making powers of public authorities the court has sometimes used the *Wednesbury* reasonable test (see p 80) under which the court has quashed the decision of a public authority not on the basis that it did not have the power to make it but that it was an unreasonable decision. The court is saying in effect that no reasonable decision-maker could have made the decision that the court is being asked to review.

However, where the decision is also an infringement of an individual's human rights the House of Lords in *R* v *Secretary of State for the Home Department ex parte Daly* [2001] 2 WLR 1622 has substituted a test of 'proportionality'. Thus in a human rights case the court will not ask whether it would have made the decision (a merits-based test) nor whether the decision was so unreasonable that no reasonable decision-maker could have made it (*Wednesbury*). Instead the test will be proportionality. This means that the court needs to look at the legitimate decision of a public authority in terms of whether there is a *fair balance* between the protection of individual rights and the interests of the public at large.

The proportionality test has always been the approach of the European Court of Human Rights and an example from that court is to be found in *Open Door Counselling and Well Woman* v *Ireland* [1993] 15 EHRR 244 where the court found that an injunction preventing the publicising of information about abortion was disproportionate to the aim of protecting

morals because it was framed as an absolute ban, i.e. it prevented information being given even where there might be serious medical need.

Although the proportionality test has arisen in connection with human rights claims there have been statements by the senior judiciary that it should be recognised in all cases of judicial review. It will obviously be difficult to combine the *Wednesbury* reasonable test with the test of proportionality and it is likely that the proportionality test will take over from *Wednesbury*.

In the *Daly* case the Home Secretary had introduced a blanket policy allowing cell searches in prisons and examination of correspondence between the prisoner and his lawyers in the prisoner's absence. The House of Lords ruled that the policy infringed the prisoner's right to legal professional privilege at common law and was contrary to the Human Rights Convention, Art 8 (right to privacy). The infringement was greater than could be shown to be justified by the aim, e.g. of revealing and prosecuting crime successfully. In other words, the House of Lords was saying that the policy was disproportionate.

There is some difference between the tests, the proportionality test being more *objective*. The *Wednesbury* test does involve the court in saying that no reasonable decision-maker could have made it and yet as we know some religious groups are opposed to abortion and some of them are decision-makers. Indeed, some governments are pro-life and yet have been elected by a wide franchise. Are all the decisions of such a government to be declared unreasonable where they follow pro-life policies? The proportionality test is more objective and less personal in its approach though it will often produce the same effect as *Wednesbury*.

Judicial review – a commercial context

The remedy of judicial review has traditionally operated mainly in the field of public law in terms, for example, of the review of decisions made by local and central government or Ministers. More recently the remedy has been extended into a more commercial context. Thus in *Interbrew SA* v *Competition Commission and the Secretary of State for Trade and Industry* [2001] All ER (D) 305 the Belgian brewer Interbrew had tried to acquire Whitbread the UK brewer but the Competition Commission exercising powers under the Competition Act 1998 had decided that in view of the fact that Interbrew had already acquired Bass Brewers, the makers of Carling and Tennants lager, the acquisition of Whitbread would be contrary to the public interest as creating abuse of a dominant position in terms of supply. The Commission ruled that if Whitbread was acquired Interbrew must sell off Bass. Interbrew claimed that the Commission had not given it a fair hearing in terms of other solutions put forward to it by Interbrew, but the Secretary of State had followed the decision of the Commission. The Administrative Court found for Interbrew and quashed the decision of the Secretary of State.

Other controls on decision making

Ministers of the Crown and the courts

Sometimes an Act of Parliament places a Minister in a supervisory role over, for example, the decisions of local authorities, and where this is so he must act judicially and not administratively in respect of that supervisory role. If he does not exercise the supervisory role in the way envisaged by the Act which gave it to him, the Minister's directions are themselves subject to review by the court. This is, of course, in addition to the parliamentary question and the rule of ministerial responsibility to Parliament.

Secretary of State for Education and Science v *Tameside Metropolitan Borough Council*, 1976 – Courts can examine executive action (**17**)

The Ombudsman

It has become a popular idea to give the citizen safeguards against maladministration which are in addition to the traditional ones of application to a court or tribunal, by the setting up in various areas of administration of Ombudsmen, so called because the system is modelled upon the Scandinavian office of Ombudsman. Some examples appear below.

The Parliamentary and Health Service Commissioner

A further check on abuse of power by government departments was created by the appointment of the Parliamentary Commissioner for Administration (or 'Ombudsman') (now the Parliamentary and Health Service Commissioner) under the provisions of the Parliamentary Commissioner Act 1967 (whose jurisdiction has been extended by the Parliamentary Commissioner Act 1994). The Commissioner is appointed by the Crown and has the same security of tenure as a judge of the Supreme Court. He is also a member of the Council on Tribunals. His function is to investigate complaints relating to the exercise of administrative functions. However, investigation of central government departments is made only at a Member of Parliament's request and a citizen who wishes to have a complaint investigated must first bring it to the MP's notice.

Unfortunately, the Commissioner is very often limited to a consideration of the *administrative procedures* followed and is powerless to act if the correct procedure has been followed even though the decision is bad. Furthermore, he cannot investigate personnel matters. Nevertheless, each year sees a steady rise in the number of complaints referred to him, though the Commissioner and his functions are still not well enough known and he is at the present time less effective than his counterparts in other countries. In fact, Britain is alone among the countries with national ombudsmen in not allowing the Ombudsman to initiate his own investigations. Most of the complaints involve government departments in constant contact with the public, more complaints being levied against the Department of Social Security, followed by the Inland Revenue, than any other department. In this connection, there is now a Revenue adjudicator to whom taxpayers can complain. Those who are not satisfied with the adjudicator's decision may still ask their MPs to take up the complaint with the Parliamentary Ombudsman.

The Commissioner's jurisdiction under the Act of 1967 is limited to certain aspects of Central Government administration but the Parliamentary Commissioner (Consular Complaints) Act 1981 extends the jurisdiction of the Parliamentary Commissioner to complaints about the conduct of United Kingdom consular officers abroad. The Parliamentary and Health Service Commissioners Act 1987 extends the jurisdiction of the Parliamentary Commissioner to non-departmental bodies etc. listed in Sch 1, e.g. the Information Commissioner under the Data Protection Act 1998. Section 110 of the Courts and Legal Services Act 1990 extends the jurisdiction of the Commissioner to administrative acts of the administrative staff of courts and tribunals. This does not include review of the acts of the judiciary or tribunal members.

There is also a Health Service Commissioner for England and Wales to investigate complaints about certain aspects of the National Health Service. The Commissioner is the Parliamentary Commissioner who, therefore, combines the two offices and takes the title of Parliamentary and Health Service Commissioner.

Under the Act of 1967 the Parliamentary Commissioner is given discretion whether to investigate a complaint or not. It was held in *R* v *Parliamentary Commissioner, ex parte Dyer* [1994] 1 All ER 375 that there was nothing in either the Commissioner's role or statutory framework which placed him beyond judicial review, but because of the largely discretionary nature of his duties the court would not readily interfere with his exercise of those discretions. In consequence, a prohibiting order will not issue to him since he has no duty to hear a complaint (*Re Fletcher's Application* [1970] 2 All ER 527). Furthermore, there is no way of enforcing the findings of the Ombudsman and there are those who feel that it would improve matters if the courts had power to enforce these findings. Judicial review is available against the decisions of local commissioners (see *R* v *Local Commissioner for Administration for the South, the West, the West Midlands, etc.* [1988] 3 All ER 151).

Commissions for Local Administration

In addition, there are two Commissions for Local Administration in England and Wales each consisting of Local Commissioners appointed by the Secretary of State plus the Parliamentary Commissioner. A Local Commissioner may investigate a written complaint made by a member of the public who claims to have sustained injustice in consequence of maladministration in connection with action taken by or on behalf of a local authority, joint board, police authority or water authority, being action taken in the exercise of administrative functions. The complaint will normally be made in writing either through a member of the local authority complained against *or* with evidence that a member has been asked to refer it but has not done so. Furthermore, it must be made within a time limit of 12 months. Any one of the Local Commissioners has the same powers as the High Court to require the attendance of witnesses and production of documents when he is conducting an investigation. He must report the results of any investigation to the person who referred the complaint to him, to the complainant and to the authority concerned which must make copies available for public inspection. If he finds that injustice has been caused, the authority concerned must consider his report and notify him of what action they have taken. The greatest number of complaints relates to activities of local housing and planning authorities. Certain matters, such as the conduct of legal proceedings, action taken to prevent crime, or action concerning the giving of instruction or discipline in schools, are excluded from the jurisdiction of a Local Commissioner.

Legal Services Ombudsman

Sections 21–26 of the Courts and Legal Services Act 1990 set up the office of Legal Services Ombudsman. The object is to help people who have a genuine cause for complaint against members of the legal profession but have not been able to sort their problems out. The Ombudsman has power to investigate the handling of complaints by the Law Society, the Bar Council and the Council for Licensed Conveyancers, reinvestigate the complaints and recommend remedies. He reports annually to the Lord Chancellor and Parliament.

Under s 49 of the Access to Justice Act 1999 the powers of the Ombudsman are widened and binding awards of compensation can be made, but the jurisdiction does not extend to alleged overcharging as such. Bad work is a main ground of complaint. Under the provisions of s 50 of the 1999 Act the Lord Chancellor can require the relevant professional bodies to pay contributions to the Ombudsman's expenses, which goes some way to making the ombudsman scheme self-funding.

Other Ombudsmen

The Financial Services Authority has set up a company called The Financial Services Ombudsman Scheme to operate an arrangement capable of resolving disputes between, e.g.

independent financial advisers regulated by the FSA and consumers. The Financial Services Ombudsman has appointed three ombudsmen to deal with banking, insurance and investment services. Compensation up to £100,000 (currently) can be awarded with an additional £1,000 where the complainant has suffered distress and inconvenience. If a regulated firm has not dealt with a consumer's complaint within eight weeks, the consumer can go to the Ombudsman. These complaints can, of course, be brought in the ordinary courts since they will usually be based on negligence and/or breach of contract. Section 225 of the Financial Services and Markets Act 2000 contains the necessary powers for the FSA to set up an ombudsman service.

Sections 150–160 of the Pensions Act 1995 provide for a Pensions Ombudsman to adjudicate in disputes between an individual and a pension scheme or provider. In addition, the Institute of Chartered Accountants in England and Wales has appointed an ombudsman called the 'Receiver of Complaints' to review complaints against its members.

Under Article 195 of the EC Treaty, the European Parliament is enabled to appoint an ombudsman to investigate maladministration by Community institutions including the non-judicial functions of the EC courts. The Ombudsman may be approached directly or through an MEP, or may investigate of his own motion. He holds office for the duration of the Parliament and can only be dismissed by the European Court at the request of the Parliament.

The Human Rights Act 1998

The materials discussed so far in this chapter have been concerned with the operation of various controls on authority of one sort or another. The Human Rights Act 1998 (HRA) which came into force on 2 October 2000 represents the most massive vehicle for control of authority, whatever called, in its day-to-day activities. The following is an outline of its effects upon English law.

New legislation

Under s 19 the HRA provides that, in respect of new legislation, the Minister in charge of it must make a statement that the relevant Bill is compatible with the rights of the European Convention on Human Rights, most of which it incorporates into UK law. This statement, which must be made before the Second Reading of the relevant Bill, also appears on the front of the Bill and on the Explanatory Notes and Financial Memorandum which accompany it. The object is to concentrate the mind of government on the matter of compatibility. It also informs Members of Parliament that human rights are relevant in debates on the Bill. Finally, it reminds the judiciary of the need to give the Bill, when it passes into law, a compatible interpretation, although s 3 requires this anyway. If a Bill is not compatible with the Convention, the appropriate Minister must give reasons during Parliamentary debate.

A new rule of statutory interpretation

Section 3 provides that so far as it is possible to do so, Acts of Parliament and delegated legislation must be interpreted in a way which is compatible with Convention rights. This introduces a new rule of construction (see further Chapter 6) and has a significant effect on the rule of precedent in that for example a Crown Court could be obliged to refuse to follow a previous decision of the Court of Appeal or even the House of Lords on the meaning of an Act of Parliament if this was required to give effect to Convention rights. Thus, if a piece of

legislation can be interpreted in two ways, one compatible with the Convention and one not, the court is required to choose the compatible interpretation. Nevertheless, the section makes clear that if the only possible interpretation is contrary to the Convention, it must be applied and remains valid.

Section 3 applies to past as well as future legislation. This rule of construction is not unique in that our courts and tribunals are already required to interpret the provisions of English domestic law in order to be compatible with European law.

Method of interpretation

Under s 2 UK courts must take into account relevant case law of the European Court of Justice and the Commission of Human Rights when determining a question of human rights, but the relevant decisions are not binding on UK courts. The UK courts will, in having regard to Convention cases, have to use Convention techniques of interpretation. Since the general theme of the European approach is that human rights are always developing and that the Convention is a 'living document' a practical effect will be that UK courts will be less inclined to have regard to older UK case law. Nevertheless, it is only the Convention that binds UK courts and not the interpretive case law. Clearly the UK Human Rights Act 1998 must be interpreted in a way compatible with Convention rights.

Declaration of incompatibility

Under s 4 where a 'designated court', e.g. the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal or the High Court, is satisfied that primary or secondary legislation is incompatible with Convention rights and cannot be interpreted to be otherwise, it may (not must) make a declaration of 'incompatibility'. This does not affect the validity of the provision nor is it binding on the parties to the case in which it is made and it operates only as a notification to Parliament that a measure has been found incompatible.

The ability to make a declaration of incompatibility in the case of subordinate legislation applies where the primary legislation under which it was made prevents the removal of that incompatibility. If not, delegated legislation can be struck down by the court or merely disapplied. This is not possible with primary legislation (see s 3(2)). This is a major extension of the *ultra vires* rule discussed earlier in this chapter.

It should be noted that common law case law has no protection under the HRA as has legislation, particularly primary legislation. The common law must be developed in a way compatible with the Convention.

Public authorities

Section 6 provides that it is unlawful for a public authority to act in a way which is incompatible with Convention rights. There is no full definition of 'public authority'. It was felt by Parliament to be better to leave this to the courts as cases came before them. However, s 6 expressly excludes both Houses of Paliament and expressly includes courts and tribunals. Beyond that, it includes 'any person certain of whose functions are functions of a public nature'.

Proceedings against public authorities

Section 7 provides that anyone who claims that a public authority has acted or proposes to act in a way incompatible with rights in the Convention may:

- bring proceedings against that authority; or
- join in proceedings brought by someone else where the person joining the proceedings is a 'victim', e.g. a person whose Convention rights have been violated.

Freedom of expression

Section 12 applies and was inserted into the HRA at a late stage. The main object is to protect the freedom of the press.

Freedom of thought, conscience and religion

Section 13 was also a late amendment inserted mainly to deal with problems posed by religious groups which felt that the Act might lead to interference with doctrinal matters, such as requiring churches to marry homosexual couples.

Remedial orders

A remedial order is by reason of s 20(1) a statutory instrument. The provision relating to such order is contained in s 10. These orders amend legislation in order to remove any incompatibility with Convention rights. When faced with a judicial declaration of incompatibility Parliament will generally legislate to remove it. There are three major safeguards on the use of the power as follows:

- there must be a finding of incompatibility by the judiciary;
- the Minister involved must feel that there are 'compelling reasons' for making a remedial order; and
- there must be Parliamentary approval in line with Sch 2.

A Minister may infer incompatibility from a decision of the European Court of Human Rights, but it must be a decision containing a judgment against the UK and, therefore, binding on the UK in international law. Judgments against other contracting parties to the Convention will not suffice, even though they reveal incompatibility in UK legislation.

Commission for Equality and Human Rights

However, the Equality Act 2006, which received the Royal Assent on 16 February 2006, will set up the Commission for Equality and Human Rights (CEHR). The Commission will take over the existing duties of the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission. It will promote equality and combat unlawful discrimination also in the new areas of sexual orientation, religion or belief and age, and it will promote understanding of human rights and encourage public authorities to comply with the Human Rights Act 1998.

The CEHR will be established in October 2007 for areas other than racial equality. This area transfers by March 2009.

Further details of this legislation appear in Chapter 19.

Remedies

Section 8 gives the court a general discretion as regards remedies and an award of damages is included. However, the court must have power to award damages so that criminal courts cannot make such an award. They may, however, quash a conviction. As regards action

against public authorities, the court could quash a decision made by such an authority, or award damages. In a criminal matter, the court may also order the exclusion of evidence. Loss of earnings is recoverable and awards of damages have been made by the ECHR (European Court of Human Rights) for 'permanent and deep anxiety' caused by violation of Convention rights as where civil proceedings have been unduly prolonged. High awards of damages have been made for police misconduct and wrongful detention and for unfair trials, e.g. non-attendance of the claimant's lawyer after a decision to let the trial proceed. High awards have also been made for interference with rights of privacy and in child care cases where a parent has been denied contact with a child. Environmental issues, as where pollution has caused illness, distress or inconvenience, have also received high awards.

Limitation period

Under s 7(5) the limitation period for bringing claims against public authorities is one year from the doing of the act complained of. Otherwise, no limitation period is imposed by the HRA. In addition, of course, a court may find that an over-short limitation period is a violation of human rights.

Companies

Although the Convention rights are seen initially at least as a tool for the relief of individuals against arbitrary acts of the state, the HRA does not preclude claims by companies if they are victims of human rights abuse. It is also worth noting that the City Panel on Take-overs and Mergers which operates self-regulatory controls in company take-over situations is a public body and potentially within human rights law as is the Financial Services Authority which controls, under the statutory authority of the Financial Services and Markets Act 2000, almost the whole of the financial services industry.

The EU experience

It is not possible in a book of this nature to go into the detail of Convention case law so far. However, the following headings indicate the main areas involved.

- ***The right to a fair trial in civil proceedings***. This has included unfair arbitration clauses, short limitation periods, legal aid and admissibility of evidence, burden and standard of proof, expert witnesses who are over-biased in favour of a client and are sometimes referred to as 'hired guns'. Enforcement of judgments and rights of appeal are included.
- ***The right to life and physical integrity***. Here are included abortion, euthanasia, the death penalty, torture, and medical care and access to health information.
- ***Police powers***. This includes fingerprinting, search and seizure, entrapment, arrest and detention and discrimination.
- ***Mental health***. This includes detention and the right of periodic review.
- ***Family life***. This includes adoption, embryology and surrogacy, lesbian and gay couples and transsexuals, divorce and separation, and domestic violence.
- ***Children***. This concerns parental control, corporal punishment, detention and abuse.
- ***Freedom of expression***. This includes defamation proceedings and access to information.
- ***Workplace rights***. This covers the right to form a trade union and the right to join or not to join one, industrial action and privacy at work, including security vetting.

There have also been rulings in the fields of immigration and asylum, prisoners' rights, education, housing planning and the environment, welfare benefits, protest and public order, property rights, thought, conscience and religion, and discrimination.

The UK experience

Many cases in which the Convention has been raised have come before UK courts and it is therefore reasonable to expect students to be able to quote some of these as examples of the use of the Articles of the Convention by claimants. As an introduction, however, it has emerged from the case law that if a human rights point is taken it should be taken properly and not thrown into the case as a makeweight. Advocates wishing to rely on the Convention are under a duty to the court to make available any material in terms of decisions of the European Court of Human Rights on which they could rely or that might assist the court (see *Barclays Bank plc* v *Ellis and Another* (2000) *The Times*, 24 October).

An advocate should also consider carefully whether the 1998 Act and Convention add anything to the argument (*Daniels* v *Walker* [2000] 1 WLR 1382) and should not use court hearings as an international seminar on human rights (*Williams* v *Cowell* [2000] 1 WLR 187).

Finally, although the Court of Appeal has found certain of the provisions of the Consumer Credit Act 1974 incompatible with the Convention (see below), the impact of the Act of 1998 to date has not been as far-reaching as some commentators said it would be. This is hardly surprising. It would be rather odd if UK law was found to be full of serious deficiencies. What we have seen is many challenges to substantive law by reference to the Act and Convention. This process is likely to continue.

Case law Art 6: right to a fair trial of disputes

Wilson* v *First County Trust (No 2) [2002] QB 74

In this case the Court of Appeal held the absolute bar on the enforcement of a consumer credit agreement in s 127(3) of the Consumer Credit Act 1974 which provides that such an agreement is unenforceable if it fails to contain the terms prescribed under s 61 of the 1974 Act, infringed the trader's rights for the purposes of Art 6. He was unable to recover a loan and interest simply because the agreement had misstated the amount owing in the loan agreement. The court made a declaration of incompatibility of the relevant sections of the 1974 Act.

The above ruling of the Court of Appeal was reversed by the House of Lords in *Wilson* v *First County Trust (No 2)* (2003) *The Times*, 11 July. The House of Lords ruled that although s 127(3) of the Consumer Credit Act 1974 led automatically and inflexibly to a ban on a court making an enforcement order if a regulated agreement did not comply with the statutory requirements about the form and content of the agreement, it was open to Parliament to decide as a matter of social policy that despite the severity of its effect that was an appropriate way to protect consumers. Therefore, s 127(3) was compatible with the Human Rights Convention.

Comment The Consumer Credit Act 2006 repeals s 127(3) of the Consumer Credit Act 1974 but not the whole section. The result is that, for the future, the previous bars to a court granting an enforcement order in respect of an agreement that is improperly executed have gone. The court is left with a discretion under s 127(1) to refuse an enforcement order if it considers it just to do so and according to the degree of prejudice to any party or person. This is in line with the thinking in the House of lords in *Wilson* because their Lordships may well have regarded s 127(3) as contrary to the Convention if all credit agreements were non-regulated. At the time of the action, a credit agreement was non-regulated only if the credit exceeded £25,000. Section 2 of the 2006 Act removes the limits so that all agreements for credit or hire will be regulated under the 1974 Act though there are exemptions, e.g. credit over £25,000 to large businesses. In future, situations like *Wilson* would be decided under the just and equitable principle of s 127(1) and there would be no absolute bar to the court granting an enforcement order so that the 1974 Act, after amendment by the 2006 Act, is not contrary to Art 6.