

Appendix: Declarations of Incompatibility made under section 4 of the Human Rights Act, 1998

Declarations of incompatibility made under section 4 of the Human Rights Act 1998

Part 1: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, and which have not been overturned on appeal (although some remain subject to appeal – see the “comments” column). Declarations of incompatibility which have been overturned on appeal are set out in Part 2 of the table below.

Case name and description	Date	Content of the declaration	Comments
<p>R (on the application of H) v Mental Health Review Tribunal for the North and East London Region & The Secretary of State for Health (Court of Appeal) [2001] EWCA Civ 415</p> <p><i>The case concerned a man who was admitted under section 3 of the Mental Health Act 1983 and sought discharge from hospital.</i></p>	28 Mar 2001	Sections 72 and 73 of the Mental Health Act 1983 were incompatible with Article 5(1) and 5(4) in as much as they did not require a Mental Health Review Tribunal to discharge a patient where it could not be shown that he was suffering from a mental disorder that warranted detention.	<p>The legislation was amended by the Mental Health Act 1983 (Remedial) Order 2001 (SI 2001 No.3712)</p> <p>(In force 26 Nov 2001)</p>
<p>McR’s Application for Judicial Review (Kerr J) [2003] NI 1</p> <p><i>The case concerned a man who was charged with the attempted buggery of woman. He argued that the existence of the offence of attempted buggery was in breach of Article 8.</i></p>	15 Jan 2002	Section 62 of the Offences Against the Person Act 1861 (attempted buggery), which continued to apply in Northern Ireland, was incompatible with Article 8 to the extent that it interfered with consensual sexual behaviour between individuals.	<p>Section 62 was repealed in NI by the Sexual Offences Act 2003, sections 139, 140, Schedule 6 paragraph 4 and Schedule 7.</p> <p>(In force 1 May 2004)</p>
<p>International Transport Roth GmbH v Secretary of State for the Home Department (Court of Appeal, upholding Sullivan J) [2002] EWCA Civ 158</p> <p><i>The case involved a challenge to a penalty regime applied to carriers who unknowingly transported clandestine entrants to the UK.</i></p>	22 Feb 2002	The penalty scheme contained in Part II of the Immigration and Asylum Act 1999 was incompatible with Article 6 because the fixed nature of the penalties offended the right to have a penalty determined by an independent tribunal. It also violated Article 1 of Protocol 1 as it imposed an excessive burden on the carriers.	<p>The legislation was amended by the Nationality, Immigration and Asylum Act 2002, section 125, and Schedule 8.</p> <p>(In force 8 Dec 2002)</p>

Case name and description	Date	Content of the declaration	Comments
<p>R (on the application of Anderson) v Secretary of State for the Home Department (House of Lords) [2002] UKHL 46</p> <p><i>The case involved a challenge to the Secretary of State for the Home Department's power to set the minimum period that must be served by a mandatory life sentence prisoner.</i></p>	25 Nov 2002	Section 29 of the Crime (Sentences) Act 1997 was incompatible with the right under Article 6 to have a sentence imposed by an independent and impartial tribunal in that the Secretary of State decided on the minimum period which must be served by a mandatory life sentence prisoner before he was considered for release on licence.	The law was repealed by the Criminal Justice Act 2003, sections 303(b)(I), 332 and Schedule 37, Pt 8. Transitional and new sentencing provisions were contained in Chapter 7 and Schedule 21 and 22 of that Act. (Date power repealed 18 Dec 2003)
<p>R v Secretary of State for the Home Department, ex parte D (Stanley Burnton J) [2002] EWHC 2805</p> <p><i>The case involved a challenge to the Secretary of State for the Home Department's discretion to allow a discretionary life prisoner to obtain access to a court to challenge their continued detention.</i></p>	19 Dec 2002	Section 74 of the Mental Health Act 1983 was incompatible with Article 5(4) to the extent that the continued detention of discretionary life prisoners who had served the penal part of their sentence depended on the exercise of a discretionary power by the executive branch of government to grant access to a court.	The law was amended by the Criminal Justice Act 2003 section 295. (In force 20 Jan 2004)
<p>Blood and Tarbuck v Secretary of State for Health (Sullivan J) Unreported</p> <p><i>The case concerned the rules preventing a deceased father's name from being entered on the birth certificate of his child.</i></p>	28 Feb 2003	Section 28(6)(b) of the Human Fertilisation and Embryology Act 1990 was incompatible with Article 8, and/or Article 14 taken together with Article 8, to the extent that it did not allow a deceased father's name to be given on the birth certificate of his child.	The law was amended by the Human Fertilisation and Embryology (Deceased Fathers) Act 2003. (In force 1 Dec 2003)

Case Name and Description	Date	Content of the Declaration	Comments
<p>Bellinger v Bellinger (House of Lords) [2003] UKHL 21</p> <p><i>A post-operative male to female transsexual appealed against a decision that she was not validly married to her husband, by virtue of the fact that at law she was a man.</i></p>	10 Apr 2003	Section 11(c) Matrimonial Causes Act 1973 was incompatible with Articles 8 and 12 in so far as it makes no provision for the recognition of gender reassignment.	In <i>Goodwin v UK</i> (11 Jul 2002) the ECtHR identified the absence of any system for legal recognition of gender change as a breach of Articles 8 and 12. This was remedied by the Gender Recognition Act 2004. (In force 4 April 2005)
<p>R (on the application of M) v Secretary of State for Health (Maurice Kay J) [2003] EWHC 1094</p> <p><i>The case concerned a patient who lived in hostel accommodation but remained liable to detention under the Mental Health Act 1983. Section 26 of the Act designated her adoptive father as her "nearest relative" even though he had abused her as a child.</i></p>	16 Apr 2003	Sections 26 and 29 of the Mental Health Act 1983 were incompatible with Article 8, in that the claimant had no choice over the appointment or legal means of challenging the appointment of her nearest relative.	These provisions will be replaced by Part 1, Chapter 3 (clauses 24-27) of the Mental Health Bill currently before Parliament. The Bill was introduced in the House of Lords on 16 November 2006. It completed its Lords stages on 6 March 2007 and will now pass to the House of Commons.
<p>R (on the application of Hooper and others) v Secretary of State for Work and Pensions (Court of Appeal, upholding Moses J) [2003] EWCA Civ 875</p> <p>(The declaration was unaffected by subsequent House of Lords ruling [2005] UKHL 29 on 5 May 2005)</p> <p><i>The case concerned Widowed Mothers Allowance which was payable to women only and not to men.</i></p>	18 Jun 2003	Sections 36 and 37 of the Social Security Contributions and Benefit Act 1992 were in breach of Article 14 in combination with Article 8 and Article 1 of Protocol 1 in that benefits were provided to widows but not widowers.	The law had already been amended at the date of the judgment by the Welfare Reform and Pensions Act 1999, section 54(1). (In force 9 Apr 2001)

Case Name and Description	Date	Content of the Declaration	Comments
<p>R (on the application of Wilkinson) v Inland Revenue Commissioners (Court of Appeal, upholding Moses J) [2003] EWCA Civ 814</p> <p>(The declaration was unaffected by subsequent House of Lords ruling [2005] UKHL 30 on 5 May 2005)</p> <p><i>The case concerned the payment of Widows Bereavement Allowance to widows but not widowers.</i></p>	18 Jun 2003	Section 262 of the Income and Corporation Taxes Act 1988 was incompatible with Article 14 when read with Article 1 of Protocol 1 in that it discriminated against widowers in the provision of Widows Bereavement Allowance.	The section declared incompatible was no longer in force at the date of the judgment having already been repealed by the Finance Act 1999 sections 34(1), 139, Schedule 20. (In force in relation to deaths occurring on or after 6 Apr 2000)
<p>A and others v Secretary of State for the Home Department (House of Lords) [2004] UKHL 56</p> <p><i>The case the detention under the Anti-terrorism, Crime and Security Act 2001 of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without breaching Article 3. They were detained without charge or trial in accordance with a derogation from Article 5(1) provided by the Human Rights Act 1998 (Designated Derogation) Order 2001.</i></p>	16 Dec 2004	The Human Rights Act 1998 (Designated derogation) Order 2001 was quashed because it was not a proportionate means of achieving the aim sought and could not therefore fall within Article 15. Section 23 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with Articles 5 and 14 as it was disproportionate and permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status.	The provisions were repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders. (In force 11 Mar 2005)
<p>R (on the application of Sylviane Pierrette Morris) v Westminster City Council & First Secretary of State (Court of Appeal, upholding Keith J) [2005] EWCA Civ 1184</p> <p><i>The case concerned an application for local authority accommodation by a single mother (a British citizen) whose child was subject to immigration control.</i></p>	14 Oct 2005	Section 185(4) of the Housing Act 1996 was incompatible with Article 14 to the extent that it requires a dependent child who is subject to immigration control to be disregarded when determining whether a British citizen has priority need for accommodation.	DCLG are considering how to remedy the incompatibility.

Case Name and Description	Date	Content of the Declaration	Comments
<p>R (Gabaj) v First Secretary of State (Administrative Court) (unreported)</p> <p><i>The case was a logical extension of the declaration granted in the case of Morris above, except that it was the claimant's pregnant wife, rather than the claimant's child, who was a person from abroad.</i></p>	28 Mar 2006	Section 185(4) of the Housing Act 1996 is incompatible with article 14 European Convention on Human Rights to the extent that it requires a pregnant member of the household of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining whether the British citizen has a priority need for accommodation or is homeless, when the pregnant member of the household is a person from abroad who is ineligible for housing assistance.	DCLG are considering how to remedy the incompatibility.
<p>R (on the application of Baiai and others) v Secretary of State for the Home Department and another (Silber J) [2006] EWHC 823 (Admin)</p> <p><i>The case concerned the procedures, put in place to deal with sham marriages, which persons subject to immigration control are required to go through before they can marry in the UK.</i></p>	10 April 2006	Section 19(3) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act") is incompatible with Articles 12 and 14 of the European Convention on Human Rights in that the effect of this provision is unjustifiably to discriminate on the grounds of nationality and religion and that this provision is not proportionate. An equivalent declaration was made in relation to Regulations 7 and 8 of the Immigration (Procedure for Marriage) Regulations 2005 (which imposed a fee for applications). (Home Office Immigration Guidance was also held to be unlawful on the grounds it was incompatible with Articles 12 and 14 ECHR. This did not involve s4 HRA.)	<p>The Home Office did not appeal the judgment of Silber J on Article 14 and are considering how to remedy the incompatibility with Article 14.</p> <p>(A Home Office appeal to the Court of Appeal on the Article 12 findings was unsuccessful: [2007] EWCA Civ 478. They are considering whether to seek permission to appeal to the House of Lords on that issue.)</p>

<p>R (on the application of (1) June Wright (2) Khemraj Jummun (3) Mary Quinn (4) Barbara Gambier) v (1) Secretary of State for Health (2) Secretary of State for Education & Skills (Stanley Burnton J) [2006] EWHC 2886 (Admin)</p> <p><i>This case concerned the Care Standards Act 2000 Part VII procedures in relation to provisional listing of care workers as unsuitable to work with vulnerable adults.</i></p>	<p>16 Nov 2006</p>	<p>Section 82(4)(b) of the Care Standards Act 2000 was incompatible with Articles 6 and 8.</p>	<p>An appeal by the Department of Health was heard by the Court of Appeal in July and judgment is awaited.</p>
<p>R (Clift) v Secretary of State for the Home Department; Secretary of State for the Home Department v Hindawi and Another (House of Lords) [2006] UKHL 54</p> <p><i>This was a conjoined appeal in which the appellants were all former or serving prisoners. The issue on appeal was whether the early release provisions, to which each of the appellants was subject, were discriminatory.</i></p>	<p>13 Dec 2006</p>	<p>Sections 46(1) and 50(2) of the Criminal Justice Act 1991 were incompatible with Article 14 taken together with Article 5 on the grounds that they discriminated on grounds of national origin.</p>	<p>The provisions had already been repealed and replaced by the Criminal Justice Act 2003 save that they continued to apply on a transitional basis to offences committed before 4 April 2005.</p> <p>The Criminal Justice and Immigration Bill will amend the Criminal Justice Act 1991 to remove the incompatibility in the transitional cases. The Bill was introduced in the Commons on 26 June. The relevant provision in the Bill reflects administrative arrangements that have been in place since shortly after the declaration was made.</p>

<p>Smith v Scott (Registration Appeal Court, Scotland) [2007] CSIH 9</p> <p><i>This case concerned the incapacity of convicted prisoners to vote under section 3 of the Representation of the People Act 1983.</i></p>		<p>Section 3(1) of the Representation of the People Act 1983 was incompatible with Article 3 of the First Protocol to the Convention on the grounds that it imposed a blanket ban on convicted prisoners voting in Parliamentary elections.</p>	<p>The Court ruled that it was part of the Court of Session for the purposes of section 4 of the Human Rights Act, and therefore had power to make a declaration of incompatibility under that section. The Government is considering the implications of this ruling. Meanwhile the Ministry of Justice is considering how to remedy the incompatibility in the context of its current consultation on how to respond to the ruling of the European Court of Human Rights in <i>Hirst v UK</i>.</p>
<p>Nasseri v Secretary of State for the Home Department (McCombe J) [2007] EWHC 1548 (Admin)</p> <p><i>The case concerns a challenge, by a national of Afghanistan, to a decision to remove him to Greece under the terms of the Dublin Regulation. The issue was whether para.3 of Sched. 3 to the 2004 Act—which requires the listed countries (including Greece) to be treated as countries from which a person will not be sent to another State in contravention of his Convention rights—was compatible with Article 3 ECHR.</i></p>	<p>2 July 2007</p>	<p>Paragraph 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004, applied by section 33 of the Act, is incompatible with Article 3 on the grounds that it precludes the Secretary of State and the courts from considering any question as to the law and practice on <i>refoulement</i> in any of the listed countries.</p>	<p>The Home Office intend to apply for permission to appeal the judgment.</p>

Part 2: These are the declarations of incompatibility we are aware of which have been made under section 4 of the Human Rights Act 1998 in respect of provisions in primary legislation, but which were subsequently overturned on appeal.

Declarations of incompatibility made but overturned on appeal

Case name and court that made the declaration	Date of original decision	Substance of declaration of incompatibility	Court that overturned declaration
<p>R (Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions (Divisional Court, Harrison J & Tuckey L.J) [2001] HRLR 2</p> <p><i>The Secretary of State's powers to determine planning applications were challenged on the basis that the dual role of the Secretary of State in formulating policy and taking decisions on applications inevitably resulted in a situation whereby applications could not be disposed of by an independent and impartial tribunal.</i></p>	<p>13 Dec 2000</p>	<p>The Secretary of State's powers to determine planning applications were in breach of Article 6(1), to the extent that the Secretary of State as policy maker was also the decision-maker.</p> <p>A number of provisions were found to be in breach of this principle, including the Town and Country Planning Act 1990, sections 77, 78 and 79.</p>	<p>The House of Lords overturned the declarations.</p> <p>9 May 2001</p> <p>[2001] UKHL 23</p>
<p>Wilson v First County Trust Ltd (No.2) (Court of Appeal) [2001] EWCA Civ 633</p> <p><i>The case concerned a pawnbroker who entered into a regulated loan agreement but did not properly execute the agreement so that the permission of the court was required to enforce it.</i></p>	<p>2 May 2001</p>	<p>Section 127(3) of the Consumer Credit Act 1974 was declared incompatible with the Article 6 and Article 1 Protocol 1 by the Court of Appeal to the extent that it caused an unjustified restriction to be placed on a creditors enjoyment of contractual rights.</p>	<p>The House of Lords overturned the declaration.</p> <p>10 Jul 2003</p> <p>[2003] UKHL 40</p>

Case name and court that made the declaration	Date of original decision	Substance of declaration of incompatibility	Court that overturned declaration
<p>Matthews v Ministry of Defence (Keith J) [2002] EWHC 13</p> <p>The case concerned a navy engineer who came into contact with asbestos lagging on boilers and pipes. As a result he developed pleural plaques and fibrosis. The Secretary of State issued a certificate that stated that M's injury had been attributable to service and made an award of no fault compensation. The effect of the certificate, made under section 10 of the Crown Proceedings Act 1947, was to preclude the engineer from pursuing a personal injury claim for damages from the Navy due to the Crown's immunity in tort during that period. The engineer claimed this was a breach of Article 6.</p>	29 May 2002	Section 10 of the Crown Proceedings Act 1947 was incompatible with Article 6 of the ECHR in that it was disproportionate to any aim that it had been intended to meet.	<p>The House of Lords upheld the Court of Appeal decision to overturn the declaration.</p> <p>13 Feb 2003 [2003] UKHL 4</p>
<p>R (Uttley) v Secretary of State for the Home Department (Moses J) [2003] EWHC 950</p> <p><i>The case concerned a prisoner who argued that his release on license was an additional penalty to which he would not have been subject at the time he was sentenced.</i></p>	8 Apr 2003	Sections 33(2), 37(4)(a) and 39 of the Criminal Justice Act 1991 were incompatible with the claimant's rights under Article 7, insofar as they provided that he would be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison.	<p>The House of Lords overturned the declaration.</p> <p>30 Jul 2004 [2004] UKHL 38</p>

Case name and court that made the declaration	Date of original decision	Substance of declaration of incompatibility	Court that overturned declaration
<p>R (on the Application of MH) v Secretary of State for Health (Court of Appeal) [2004] EWCA Civ 1609</p> <p><i>The case concerned a patient who was detained under section 2 of the Mental Health Act 1983 and was incompetent to apply for discharge from detention. Her detention was extended by operation of provisions in the Mental Health Act 1983.</i></p>	3 Dec 2003	<p>Section 2 of the Mental Health Act 1983 is incompatible with Article 5(4) of the ECHR in so far as:</p> <p>(i) it is not attended by provision for the reference to a court of the case of an incompetent patient detained under section 2 in circumstances where a patient has a right to make application to the MHRT but the incompetent patient is incapable of exercising that right; and</p> <p>(ii) it is not attended by a right for a patient to refer his case to a court when his detention is extended by the operation of section 29(4).</p>	<p>The House of Lords overturned the declaration.</p> <p>20 Oct 2005 [2005] UKHL 60</p>
<p>Re MB (Sullivan J) [2006] EWHC 1000 (Admin)</p> <p><i>The case concerned the Secretary of State's decision to make a non-derogating control order under s2 of the Prevention of Terrorism Act 2005 against MB, who he believed intended to travel to Iraq to fight against coalition forces</i></p>	12 Apr 2006	<p>The procedure provided by the 2005 Act for supervision by the court of non-derogating control orders was held incompatible with MB's right to a fair hearing under Article 6 ECHR (right to a fair trial).</p>	<p>The Court of Appeal overturned the declaration. The judgment is subject to an appeal to the House of Lords but we understand this does not relate to the decision to overturn the declaration.</p> <p>1 August 2006 [2006] EWCA Civ 1140</p>

This table has been prepared for information by lawyers in the Ministry of Justice. We have endeavoured to make it comprehensive, but if you are aware of any omissions or errors please contact James Adutt at James.Adutt@justice.gsi.gov.uk
Last updated: 24 July 2007