Liberty's response to the Joint Committee on Human Rights:

LIBERTY

PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

"Implementation of Judgments of the European Court of Human Rights and Declarations of Incompatibility"

November 2010

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

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Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

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Introduction

1. On 10th September 2010 the Joint Committee on Human Rights (JCHR) announced that it had decided to continue the practice of its predecessors in reviewing the Government's response to adverse human rights judgments in UK courts under the *Human Rights Act 1998* (HRA) and in the European Court of Human Rights (ECtHR).[1] It called for evidence in relation to (i) the Government's response to enhancing Parliament's role in relation to human rights judgments; (ii) any of the cases considered in the Committee's last Report, including any updated information provided by the UK to the Committee of Ministers; and (iii) any cases which have become final since January 2010 in which the European Court of Human Rights found a violation of the European Convention on Human Rights (ECHR) by the UK or where a declaration of incompatibility has been made by a UK court.[2]

2. Liberty welcomes the news that the JCHR will continue to scrutinise the Government's response to declarations of incompatibility from UK courts and findings of violations by the ECtHR. Rather than giving the courts the final say, the HRA retains an important role for the Executive and Parliament in determining how rights are protected. The JCHR, in continuing to scrutinise Executive and Parliamentary responses to adverse human rights judgments, ensures that this role is properly performed, for example by (i) bringing adverse decisions of the Strasbourg and UK courts to Parliament's attention; (ii) pressuring the Executive to respond to such judgments in an appropriate and timely manner; and (iii) scrutinising proposed new laws to limit the risk of future adverse decisions.

3. In this response, we focus on the cases where Liberty has been involved, either by way of legal representation or interventions, or by lobbying Parliament, and on those cases that we consider raise particularly important issues.

[1] Announcement available at http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news/human-rights-judgments-call-for-evidence/.

[2] See the Announcement of 10th September 2010, ibid.

Implementation of ECHR Judgments

Gillan and Quinton v United Kingdom[3]

4. In June 2010[4] Liberty won a hard fought victory in the European Court of Human Rights for both our clients, the applicants Gillan and Quinton, and for all past and potential future targets of stop and search by the police with no basis of suspicion under section 44 of the *Terrorism Act 2000*.

5. Both Kevin Gillan, a peace protester, and Pennie Quinton, an accredited journalist, were stopped and searched by police when travelling to a peaceful demonstration at an East London arms fair. In January 2010 the European Court of Human Rights held that section 44 of the *Terrorism Act 2000* breaches the right to privacy under Article 8 of the ECHR. The Court considered that the use of coercive powers to require a person to submit to a *"detailed search of his person, his clothing and his personal belongings"* amounted to a clear interference with the right to respect for private life. The Court went on to note that the fact that the search was carried out in public did not mean that the right to privacy in Article 8 did not apply. It stated that *"the public nature of the search may, in certain cases, compound the seriousness of the interference with the right because of an element of humiliation and embarrassment"*.[5]

6. Article 8 is not an absolute right: it can be limited if the limitation is in accordance with the law, pursues a legitimate purpose and is necessary and proportionate. In this case the Court held that the *Terrorism Act 2000* contained insufficient safeguards *"to constitute a real curb on the wide powers afforded to the executive so as to offer the individual adequate protection against arbitrary interference".*[6] The Court also held that this wide discretion afforded to police officers meant there was a high risk that the power would be misused in an arbitrary and discriminatory way and, further, that it could be used, as in this case, against peaceful protestors in breach of the right to free speech under Article 10 and/or the right to protest under Article 11.[7] The Court concluded that the powers *"are neither*

[3] Application No. 4158/2005, 12 January 2010. [4] On 30 June 2010 UK's attempt to have the European Court of Human Rights decision of 12 January appealed in the Grand Chamber was rejected. [5] See paragraph 63 of *Gillan.* [6] See paragraph 79 of *Gillan.* [7] See paragraph 87 of *Gillan*.

sufficiently circumscribed nor subject to adequate legal safeguards against abuse".[8] As a result the Court declared there was a breach of Article 8 (right to privacy) on the basis that the interference with that right was not even in accordance with law.

7. We were delighted but not surprised that the ECtHR recognised the unlawfulness of the section 44 powers as currently drafted. We were also very pleased when the Home Secretary, the Rt Hon Theresa May MP, announced in Parliament on 8th July 2010 that interim guidance had been produced for the police providing that pedestrians could only be stopped using reasonable suspicion powers and people in vehicles stopped and searched under section 44 "*only if they have reasonable suspicion of terrorist activity*".[9] Amendments to PACE Code A have recently been proposed which would give effect to the Home Secretary's statement and give guidance to the police on their use of section 44 stop and search. In addition, on 13th July 2010 the Home Secretary announced a review of some key areas of counter-terrorism policy, including section 44. In a letter to the Chair of the JCHR on 7th October 2010 the Home Secretary stated that this review "*is considering the issue of proportionality of any future authorisations under section 44 or amended power, as well as the geographic and time limits of any such authorisations*."[10] Liberty was expressly invited by the Home Secretary to contribute to this review and we provided a detailed response which was also circulated to parliamentarians earlier this month.[11] We are currently awaiting the outcome of the review.

8. It is extremely welcome that the operational use of this power has, for the time being, been rolled back. In addition to its heavy handed use at peaceful demonstrations, section 44 has been used disproportionately against ethnic minority communities and has badly damaged trust and confidence. At the same time it has not proved to be an effective tool in fighting the terrorism threat. Figures released by the Home Office on 28th October 2010 reveal that a total of 101,248 stops and searches were made under section 44 of the Terrorism Act 2000 in 2009/10, but only one in every 200 led to an arrest and none of these were terror-related.

[8] See paragraph 87 of *Gillan*. [9] See *Commons Hansard*, 8 July 2010, Column 540, statement by The Secretary of State for the Home Department (Mrs Theresa May). [10] See letter available at: http://www.parliament.uk/documents/joint-committees/human-rights/HRJ_Gillan_HomeSec_071010.pdf

[11] See "From 'War' to Law: Liberty's Response to the Coalition Government's Review of Counter-Terrorism and Security Powers 2010", August 2010, available at: http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf

9. However, while the temporary suspension of section 44 is welcome, operational suspension and/or better police guidance will not be sufficient to satisfy the European Court of Human Rights judgment which requires amendments to be made to the law itself. Liberty believes that the *Terrorism Act 2000* must be urgently amended to strictly limit the power to use section 44. At a minimum, we believe the Act should be amended to:

- Require that a section 44 authorisation is only given if:
  the event being held in a specific area,
  the nature of a place, or

  c. specific information received, mean that the person giving the authorisation reasonably believes it is necessary to prevent acts of terrorism.
- Require that authorisations for an area or place are no larger than is reasonably necessary to enable an effective response to a terrorism threat and no more than one square kilometre in total.
- Require that authorisations can be made only by a chief officer of police.
- Require that authorisations do not last longer than is reasonably necessary and must not exceed 24 hours.
- Require that authorisations are not renewed for the same area within 7 days unless renewed in writing by the Secretary of State.
- Require that if the Secretary of State renews an authorisation on six or more occasions he or she must lay a copy of the renewed authorisation before both Houses of Parliament as soon as reasonably practicable.
- Require that notice of an authorisation must be published as soon as reasonably practicable and not later than 7 days after the authorisation is given.

10. We understand that the recommendations to emerge from the counterterrorism review will feed into the 'Freedom Bill' which the Government pledged to introduce in this parliamentary session. We urge the Government to ensure that section 44 is sufficiently tightened on its face in order to ensure that it complies with the *Gillan* judgment.

11. While the *Gillan* judgment necessarily requires a review and reform of section 44 it also has much wider implications for another power which allows stop and

search without suspicion. Section 60 of the *Criminal Justice and Public Order Act 1994* (CJPOA) gives a police officer of the rank of inspector or above the power to authorise an area as one in which any police officer can stop and search a person for dangerous instruments or offensive weapons without the need for suspicion for up to 24 hours (which is renewable). The authorisation can be given whenever it is considered 'expedient' (just as with section 44) because there are reasonable grounds to believe that an incident involving serious violence may take place; or serious violence has taken place in the past and it is believed that dangerous instruments or weapons are being carried; or there is reason to believe people may be carrying dangerous instruments or weapons in the area without good reason. While to date the powers have not been used on the same scale as with section 44, the law itself grants an extremely broad discretion to police officers on the grounds of expediency, and just like with section 44, the powers "*are neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse*".[12] Further, if section 44 is going be either scrapped or amended there is a risk that police use of section 60 will increase.

12. Our concerns over the lawfulness of section 60 are heightened by the proposal in a recent Home Office consultation to amend PACE Code A in respect of how police should use section 60 powers. The draft amendments to PACE Code A (which gives guidance to police officers in the exercise of their powers) state:

> *if the authorisation relates to anticipated serious violence or the carrying of offensive weapons involving large numbers of individuals with a recognisable particular overall general appearance, such as being supporters of rival football teams or being within a particular age range, neither of which factors alone would be sufficiently distinctive to support reasonable suspicion (see paragraph 2.6), then only those falling within that general appearance should be stopped and if necessary, searched …Officers must also take particular care not to discriminate against members of minority ethnic groups in exercising the powers. There may be circumstances, however, <u>where it is appropriate for officers to take account of an individual's ethnic origin in selecting persons</u> and vehicles to be stopped in response to a specific threat or incident, but this must not be the sole reason for the stop. For example, when the authorising officer reasonably believes that*

1 *Gillan* at paragraph 87.
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those likely to be responsible are associated with particular ethnic identities and *passes that information on to the officers exercising the powers*.[13]

13. Under section 1 of PACE police officers have the power to stop and search with suspicion. Ethnicity along with all manner of other characteristics such as hair colour, height, description of clothing may of course form part of information which leads to a reasonable suspicion that satisfies section 1 stop and search criteria. However stopping and searching an individual on account of their ethnic origin when there is no good intelligence and therefore no suspicion is another proposition entirely. This would mean stopping and searching on the basis of crude stereotypes (e.g. that an incident involving violence is presumed to involve, for example, young Black men) and raises real questions over compliance with race relations legislation. Even if stopping someone on the basis of ethnicity is not the sole determinate, if it is a significant factor in the stop this is likely to be discriminatory.

14. We already know that Black and Asian men are disproportionately more likely to be stopped and searched, raising major concerns about the operational implementation of section 1 of PACE, section 44 of the TA and section 60 of the CJPOA. Indeed, Ministry of Justice statistics for 2008/9 reveal that Black people are 26 times more likely to be stopped and searched by police under section 60 in England and Wales than White people.[14] As the European Court of Human Rights said in *Gillan*: "*While the present cases do not concern black applicants or those of Asian origin, the risks of the discriminatory use of the powers against such person is a very real consideration*".[15] The breadth of the power under section 60, and the current statistics for section 60 use, leave it vulnerable to legal challenge. The revised draft guidance to officers under PACE Code A, makes it extremely likely that this power breaches the *Equality Act 2010* and Articles 8 (right to privacy) and 14 (non-discrimination) of the *Human Rights Act 1998*.[16] We believe that the principles stated in *Gillan* apply equally to section 60 and that amendments must therefore also

[13] See Draft amendments to PACE Code A as circulated for consultation on 20 September 2010,at paragraph 2.14A (emphasis added). See also *Liberty's consultation response to the proposed amendments to the Codes of Practice under the Police and Criminal Evidence Act 1984*, October 2010, available at: http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-pace-codes-consultation-october-2010.pdf

[14] See *The Observer* "Black people are 26 times more likely than whites to face stop and searc" 17th October 2010 available at: http://www.guardian.co.uk/uk/2010/oct/17/stop-andsearch-race-figures

[15] *Gillan* at paragraph 85. [16] Articles 8 and 14 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

be made to section 60 to strictly confine its use. We also believe that the changes to section 60 guidance currently being consulted on need to be urgently abandoned.

Financial Times v United Kingdom[17]

15. In March 2010 the European Court of Human Rights held that a decision to require disclosure of journalistic sources was a breach of Article 10 of the ECHR – the right to freedom of expression. In 2001 a journalist at the Financial Times (FT) received a copy of a leaked document about a possible company takeover by Interbrew. The FT published the document and three other newspapers (The Times, The Independent and The Guardian) and the news agency Reuters also reported on the issue and referred to the leaked document. Interbrew brought proceedings against the news groups seeking to identify who leaked the document to the FT. The UK Court of Appeal ordered the FT's journalistic source to be disclosed to Interbrew, using a common law principle (the Norwich Pharmacal principle) and the *Contempt of Court Act 1981*.

16. The newspapers and news agency applied to the European Court of Human Rights, relying on the Article 10 right to freedom of expression. The Court unanimously held that the disclosure order interfered with the right to freedom of expression. The Court considered that the protection of journalistic sources was crucial to safeguarding the freedom of the press, which is a central tenet of the right to freedom of expression. The Court emphasised the chilling effect of journalists being seen to assist in the identification of anonymous sources. It found that Interbrew's interest in finding the source of the leak did not outweigh the public interest in the protection of journalistic sources.

17. This is a significant legal decision that demonstrates the importance of the right to freedom of expression to journalistic freedom. The right to freedom of expression is crucial in a democracy – information and ideas help to inform political debate and are essential to public accountability and transparency in government. Freedom of the press is an integral part of the right to free expression. While this freedom can be limited when it is necessary and proportionate to do so, this case highlights the importance of the right and the fact that the public interest in a free press (and as part of that the protection of journalistic sources) should be paramount

[17] Application No. 821/2003, 15 March 2010.

in considering whether a journalist can legitimately protect his or her sources. This is an extremely important decision particularly for UK newspapers and agencies. In the past, certain sections of the press have been particularly critical of the *Human Rights Act 1998* and the European Convention on Human Rights. In the main this seems to arise from suspicion of and contempt for Article 8 – the right to a private and family life – which demands that intrusions in this sphere be justified for protecting the right to privacy. Clearly there will be cases where the right to privacy and the right to freedom of expression will come into conflict. When they do, a balancing exercise is required – an exercise that has so far been left principally to the judiciary in the absence of any clear guidance from Parliament on this issue. When it is in the public interest that certain information is disclosed, the right to freedom of expression will apply over that of the right to privacy. However, if there is no, or little, public interest in disclosure and to do so would infringe on a person's private and family life, Article 8 is likely to apply.

18. *Financial Times v UK* is a timely reminder of the importance of human rights protection to journalists and we hope that it might be recognised as such by those who rely on free speech and protection of sources for so much of their work. Of course, this case is by no means the only time in which human rights law has helped to protect journalistic sources. In November 2008 a UK court threw out a case against the journalist Sally Murrer who had been arrested for using leaked police-material.[18] In giving the ruling the judge held that the investigation into Ms Murrer beached Article 10 of the *Human Rights Act 1998*[19] as her right to do her journalistic job had been interfered with. Further, in June 2009 a judge ruled that journalist Suzanne Breen was not required to hand over journalistic sources, in part because of Article 10 protection of journalistic sources.[20]

[18] Sally Murrer was arrested in May 2007 and was charged with three counts of the offence of aiding and abetting misconduct in a public office. She was accused of helping Mark Kearney, a former detective for Thames Valley Police, to leak police secrets over the period. Kearney was charged with eight counts of misconduct in a public office. The case was eventually thrown out by Judge Edward Southwell in November 2008. The judge held that police surveillance and search operations mounted to identify the reporter's sources, which did not touch on national security or serious crime, breached the right to freedom of expression. See "Judge throws out 'leak' case against journalist Sally Murrer and her police source", *The Times*, 28 November 2008, available at: http://www.timesonline.co.uk/tol/news/uk/crime/article5251192.ece

[19] Article 10 of the *European Convention on Human Rights* as incorporated by the *Human Rights Act 1998*.

[20] See http://www.journalism.co.uk/news-commentary/suzanne-breen-victory-doesn-t-end-the-fight/s6/a534843/

19. We hope that the decision in *Financial Times v UK* will be given due weight by UK courts in future considerations about orders for disclosure. The courts, as public authorities, are bound by Article 10 of the *Human Rights Act 1998*, which for the first time incorporated the right to freedom of expression into UK law. This is an important decision that demonstrates the very clear benefits of human rights law to journalists and news outlets.

AW Khan v United Kingdom[21] **and** ***Omojudi v United Kingdom***[22]

20. In January and February 2010 the European Court of Human Rights held that deportation proceedings against two people who had established family life in the UK breached Article 8 – the right to a family life. In the case of *Khan v UK* the applicant had moved to the UK from Pakistan at the age of three and had not returned since. In his 20s the applicant was convicted of involvement with drug importation and sentenced to seven years imprisonment. One month after his release from prison the Home Secretary ordered his deportation to Pakistan. The applicant had formed a relationship with a British citizen and had had a child in the UK. In *Omojudi v UK* the applicant came to the UK in 1982. He was married in 1987 and had three children who all became British citizens. In 1989 the applicant was convicted of theft but was still given indefinite leave to remain. In 2005 the applicant was convicted of sexual assault after touching a woman's breast without her consent. He was sentenced to 15 months imprisonment. In 2008 the applicant was deported from the UK for 'the prevention of crime and disorder and the protection of health and morals'.

21. The ECtHR held in both cases that there had been a breach of the applicants' family life under Article 8. It considered the offences for which the applicants had been convicted of, but balanced these against the fact that both applicants had lived in the UK for a very long time. In relation to *Khan* the applicant had lived in the UK since he was three and had no ties to his country of birth, whereas he had strong ties to the UK, and he had not re-offended since his release. In *Omojudi* the court also looked at the fact that the applicant had lived in the UK for 26 years, had set up his family life here and his youngest children would face real difficulty if relocated to another country. It also considered the severity of the offences committed (which were held not to be at the serious end of the spectrum for such offences) and found there wasn't a pattern of consistent serious offending. As such, when all these

[21] Application No. 47486/06, 12 January 2010, *Khan v UK* (2010) 50 E.H.R.R. 47
[22] Application No. 1820/08, 24 February 2010, *Omojudi v UK* (2010) 51 E.H.R.R. 10.

factors were weighed in the balance the Court held that it was disproportionate to deport the applicants.

22. The issue of deportation of foreign criminals has had a rocky history in recent times. Deportation became an issue in April 2006 when the Home Office admitted more than 1,000 foreign prisoners were released on completion of their sentence between 1999 and March 2006 without any being considered for deportation. The then Home Secretary Charles Clarke said in a statement to the House of Commons that the law would be changed to create a "*clear presumption… that deportation will follow unless there are special circumstances why it cannot*."[23] Instead of correcting an administrative error so that deportation must be considered in cases where it might be appropriate, the Government opted for a blanket rule based on a presumption in favour of deportation. This was enacted in the *UK Borders Act 2007* (UKBA) which provides for automatic deportation for those convicted of certain offences for which a sentence of 12 months imprisonment or more is imposed. The list of offences to which this applies is specified in an Order made by the Secretary of State and includes a broad number of offences, including, for example, theft and property damage. When these provisions were introduced Liberty expressed the concern:

> *that the message being sent out by automatic deportation is contrary to the approach traditional to both crime and immigration matters. That is that each case is judged on its merits. It now appears that where foreigners are concerned a one size fits all approach will suffice.*[24]

23. The cases of *Khan* and *Omojudi* serve as a reminder that automatic deportation of foreign nationals who have a conviction is not appropriate – each deportation must be judged on the individual merits of the case taking into account the severity of the offence, the length of time the person has been in the UK, the ties they have to the UK or their country of birth and their family life. While deportation may be appropriate in certain circumstances it will not be appropriate in all circumstances, and regard must be had to the importance of human rights. The

[23] *Commons Hansard*, 3 May 2006, column 972, available at: http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060503/debtext/60503-04.htm

[24] See Liberty's Second Reading for the House of Lords on the UK Borders Bill, May 2007, available at: http://www.liberty-human-rights.org.uk/pdfs/policy07/borders-bill-2nd-reading-lords.pdf

UKBA needs to be urgently amended to remove the presumption in favour of deportation. We also hope that as a result of these cases the Government will ensure that appropriate guidance is given when decisions are made regarding deportation to ensure proper consideration is given to Article 8 considerations.

24. Finally, there is an urgent need to review the actual practice of deportation generally, not least to ensure that the Government fulfils its obligations to protect the right to life under Article 2. A number of recent high profile cases have shone a spotlight on the manner in which deportations are conducted by those contracted by the Home Office to undertake them. In early October 2010 Jimmy Mubenga, an Angolan refugee being deported by private security firm GS4, collapsed and died while a British Airways plane prepared for takeoff after being heavily restrained by the security officers accompanying him.[25] The guards were consequently arrested and released on bail.[26] Since Mr Mubenga's death, further reports of the use of heavy restraint have emerged. It has been reported that in January of this year two passengers who protested at the 'violent restraints' imposed on a clearly distressed deportee by security officers, who they believed to be in pain, were removed from a Virgin Atlantic plane, questioned for several hours under counter-terrorism powers, and finally escorted out of the airport.[27] The Metropolitan police is also investigating a number of separate allegations of unlawful force used against deportees. In October it was reported that there are currently three Metropolitan police investigations into allegations of mistreatment by GS4 guards, two of which involved the alleged use of restraint techniques which caused the deportee to experience breathing difficulties.[28]

25. In late October it was reported that immediately after Mr Mubenga's death the Home Office banned private security firms from forcing detainees on to flights and using restraint to do so. The moratorium was then abruptly lifted 10 days later when written guidance from the UKBA was issued to security officers on how to conduct a safe deportation. It was then subsequently reported that the Home Office refused to release this updated guidance on the basis that it is an operational and sensitive

[25] See "Security guards accused over death of man being deported to Angola" *The Guardian*, 14 October 2010, at http://www.guardian.co.uk/uk/2010/oct/14/security-guards-accused-jimmy-mubenga-death. [26] See "Chaos over restraint rules for deportees" *The Guardian*, 27 October 2010 http://www.guardian.co.uk/uk/2010/oct/27/deportation-restraint-rules-chaos, [27] See "Witnesses 'thrown off plane' during deportation flight, *The Guardian* 31 October 2010, at http://www.guardian.co.uk/uk/2010/oct/31/witnesses-thrown-off-deportation-flight, [28] See "Chaos over restraint rules for deportees" *The Guardian*, 27 October 2010 http://www.guardian.co.uk/uk/2010/oct/27/deportation-restraint-rules-chaos,

document.[29] Shadow Home Secretary Ed Balls has called for transparency surrounding the policy,[30] as has the Home Affairs Committee which conducted a one day inquiry into the policy and practice of removals on 2nd November 2010. Mr Mubenga's family has also called for a broader inquiry into how forced removals are carried out generally and not just in relation to this particular case.[31] In considering the ramifications of the *Khan* and *Omojudi* cases we urge the Committee to address not only the very important question of taking Article 8 into consideration when deciding to deport someone, but also the systemic problems running through the entire approach to the deportation process which potentially raise these crucial Article 2 and 3 concerns. Whilst we do not pre-judge the outcome of any criminal investigation, the number of serious complaints in relation to deportation, and the lack of transparency around Government guidance on how deportation is carried out in practice, indicate that there is an urgent need for a wide ranging inquiry to eradicate any systemic problems which are endangering the health and safety of individuals in the Government's care.

Declarations of Incompatibility

26. Under section 4 of the *Human Rights Act 1998* (HRA) a UK court is able to make a declaration of incompatibility where it finds legislation is incompatible with any of the rights the HRA protects. A declaration of incompatibility has no legal effect and does not bind Parliament. This is a system which recognises that in British democracy it is not only the courts but also the other two limbs of state, the legislature and executive, which have responsibility to protect human rights. A declaration is, however, a strong and clear signal to Parliament that it must take steps to repeal a legislative provision or entire act to ensure that it is compatible with the protection of the human rights encompassed by the HRA. The JCHR plays a crucial role in reminding the Government of the need for a timely response to a section 4 declaration.

***R (on the application of F) (by his litigation friend)) and Thompson (FC) v Secretary of State for the Home Department*[32]**

[29] Ibid. [30] Ibid. [31] See "Jimmy Mubenga family call for inquiry into deportation system", *The Guardian,* 2 November 2010, at http://www.guardian.co.uk/uk/2010/nov/01/jimmy-mubenga-familydeportation-inquiry.

[32] [2010] UKSC 17.

27. In this judgment the Supreme Court declared the indefinite notification requirements of the *Sex Offenders Act 2003* to be incompatible with Article 8. The two separate claimants had been sentenced to 33 months and five years' imprisonment, respectively. Both sentences automatically triggered notification requirements under the *Sex Offenders Act 2003*, which involve the offender keeping the police informed of personal details, such as his or her name, current address and any arrangements to stay away from home for qualifying periods of time. The notification requirements are very disruptive, requiring the person affected to comply by reporting in person to their local police station. Persons who have been sentenced to 30 months or more imprisonment are required to comply with the notification requirements for an indefinite period, without any right of review. One of the applicants in this case was 11 at the time of his offence, for which he was sentenced to 33 months. Under the current system he will remain on the register for life.

28. The Supreme Court held that the notification requirements interfered with offenders' right to privacy under Article 8, but that such interference was in accordance with law and directed at the legitimate aim of the prevention of crime. However, the notification requirements for life were considered to be a disproportionate means of achieving this aim. The Court held that as it had not been shown that it was *not* possible for any ex-offender *not* to be capable of re-offending, the imposition of notification requirements for life without review could not be proportionate. This was particularly so where the ex-offenders had been children at the time of the commission of the offence. Additionally, the Court considered that registration requirements of ex-sex offenders in other jurisdictions carried a right of review. Accordingly, the Court held that a tribunal would be able to judge, against a suitably high threshold, whether the risk of an individual re-offending was negligible enough for the notification requirements to be unjustified. On this basis, the Court made a declaration of incompatibility.

29. The Chair of the JCHR wrote to the Home Secretary on 9th September 2010 in relation to this judgment, noting that the Committee was aware that the Government was 'considering how to respond' and referring to the JCHR's Guidance to departments responding to declarations of incompatibility.[33] The Government

[33] *Guidance for Departments on Responding to Court Judgments on Human Rights*, annexed to the JCHR Report *Enhancing Parliament's role in relation to human rights judgments*,

responded to the JCHR on 7th October 2010, stating its commitment to general measures to remedy the incompatibility, but outlining that the policy detail of its approach was yet to be finalised and therefore it could neither outline what the measures will be nor stick with the Committee's suggested timetable.[34] The letter states that the Remedial Order process will be used to remove the incompatibility by way of the non-urgent procedure. The policy will be developed by the end of February 2011, a proposal for the draft Order will be laid around February or March 2011 with a view to laying the final draft Order to be approved by the end of June 2011.[35]

30. Liberty welcomes the Government's commitment to remedying the incompatibility and we hope that as well as working with police and the Ministry of Justice, as indicated in the letter of 7th October, there will be full public consultation. The extended timetable set out by the Home Secretary should allow for this. There is, as the Home Secretary states, a balance to be struck between individual rights and public safety in the context of this case. In light of the Supreme Court judgment, Liberty would expect a robust review mechanism of the notification register which will make certain that only those posing a risk to society will be subject to the most stringent requirements and that those no longer considered to pose a risk will not. This will ensure both that the interference with an ex-offender's private life is proportionate, and also that the public is best protected.

31. After this case was heard in the Court of Appeal and just before the case was heard in the Supreme Court earlier this year, Liberty became concerned about the way that the case, and the sensitive and emotive issues to which it relates, were being understood by politicians and reported on by the media. The case was heard in the Court of Appeal in July 2009 and before Peter Chapman was sentenced for the brutal rape and murder of a teenage girl he had met on the social networking site Facebook. Chapman was on the sex offenders' register at that time and subject to notification requirements, but his whereabouts had not been known by the police who

especially at para's 15 to 24. Available at http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf.

[34] See *Letter to the Chair of the Joint Committee on Human Rights from the Home Secretary (7 October 2010)*, available at http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/human-rights-judgments/r-f-and-thomson-v-secretary-of-state-for-the-home-department-/

[35] Letter from the Home Secretary, ibid.

were tasked with the job of keeping track of this obviously high risk offender.[36] The *Thompson* human rights challenge to the indefinite notification requirement was reported as being the reason why police had been unable to monitor Chapman's online activities. The argument went that the HRA had prevented police monitoring Chapman, leaving him free to contact his victims without detection and to murder.[37] While Home Office plans to monitor the online activities of convicted sex offenders had previously been shelved – this was nothing to do with human rights concerns and everything to do with the ease with which email addresses and online accounts can be created and the inherent problems in monitoring such activity effectively.

32. The conflation of the issues allowed yet another myth about the HRA to be perpetuated, and sidelined real and important concerns relating to police decisions and the monitoring of Chapman, as well as the significant flaws which make the current framework for the sex offenders register unworkable. The judgment does not state that the existence of the sex offenders register is a breach of Article 8 nor that the imposition of more onerous requirements for serious offenders would be problematic or necessarily constitute a breach. It simply states that the *indefinite* imposition of the notification requirement is a disproportionate way to achieve a legitimate aim. Indefinite notification without review also means – perversely – that unnecessary expense may be incurred monitoring those who no longer pose a risk, diverting funds that are better spent monitoring those who do. This is simple common sense. The idea that police forces will be able to monitor an ever expanding database of information about the movement of offenders in an effective manner is unrealistic. Offenders who are at high risk of reoffending should be monitored. But the way this unwieldy system currently works means that the capacity of police to keep track of high risk offenders is compromised by the number of low risk offenders who have been sentenced for less serious crimes and who may have been rehabilitated. The flaws inherent in the current framework were tragically demonstrated in the appalling crime of Peter Chapman.

Updates on previous cases

Hirst v UK (No.2)[38]

[36] http://www.independent.co.uk/news/uk/crime/facebook-fears-after-sex-offender-logged-on-to-murder-1918330.html

[37] See, for example, http://www.telegraph.co.uk/news/uknews/law-and-order/7406462/Human-rights-laws-stopped-Home-Office-tracking-sex-offenders-emails.html

[38] (Application No 74025/01) European Court of Human Rights, 6 October 2005.

33. The *Hirst v UK (No. 2)* decision in the ECtHR held that the blanket ban under UK law on voting for prisoners was in breach of Article 3 of the First Protocol of the ECHR. The decision set out a number of criteria which provided that disenfranchisement can only be imposed on a strictly narrow group; that there should be a direct link between the crime of which the prisoner has been convicted and the sanction of disenfranchisement; and that preferably the removal of the right to vote should be done by the decision of a judge following judicial proceedings.[39] The judgment was considered in the previous JCHR implementation of cases review and Liberty has written much on the implications of the ruling in the five years since judgment was handed down.[40] In short, Liberty believes that all prisoners should retain the right to vote. Sadly, the previous Government exhibited a lack of political will for implementing the judgment, instead undertaking two flawed consultations which failed to lead to any reform of the impugned law. This resulted in an estimated 73,000 people being denied the right to vote at the May 2010 General Election.

34. We therefore greatly welcomed the recent announcement that the new Government is to implement the decision in *Hirst*. At the time of writing there was no detail yet available on exactly how the policy will be implemented,[41] although speculative reports have indicated that the vote may not be extended to all prisoners.[42] We understand from the Justice Minister in the House of Lords, Lord McNally, that work is still continuing on the policy and the Government will report to the European Council of Ministers at its meeting on 30 November 2010.[43] It is now almost five years since the ECtHR ruled that the UK's current laws disenfranchising all people serving prison sentences at the time of an election is in breach of the right

[39] Ibid, at para's 77 to 78.

[40] Liberty responded to the previous Government's December 2006 consultation on prisoners' voting rights: *Voting Rights of Convicted Prisoners Detained within the United Kingdom;* CP 29/06, December 2006 and our response can be found at: http://www.liberty-humanrights.org.uk/pdfs/policy07/prisoners-voting-rights.pdf. We also responded to the 2009 consultation also conducted by the previous Government: *Voting Rights of Convicted Prisoners Detained within the United Kingdom,* April 2009, Consultation Paper CP06/09 and our response can be found at: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-the-prisoner-voting-consultation-2.pdf

[41] See statements made by The Parliamentary Secretary, Cabinet Office, Mr Mark Harper in House of Commons *Hansard*, 2 November 2010 at column 771.

[42] See, for example, media reporting suggesting the vote could be retained for murderers and others serving life sentences: http://www.telegraph.co.uk/news/uknews/law-and-order/8103580/Prisoners-to-get-the-vote-for-the-first-time.html.

[43] House of Lords *Hansard,*18 October 2010, Column 708

to vote under the ECHR. Liberty has long maintained that full enfranchisement is right in principle and in practice.[44]

35. A more recent ECtHR case has elaborated on the test set out in *Hirst*. In *Frodl v Austria*[45] the Court considered the disenfranchisement of a prison detainee who had been convicted of murder. The Court reiterated the underlying principle of Article 3 of the first Protocol: where any conditions are imposed on voting in a democracy these

> *must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates.*[46]

The Court went on to explain that the *Hirst* decision not only ruled out automatic and blanket restrictions on voting, but also held that it is an essential element that the disenfranchisement decision be taken by a judge, and *"there must be a link between the offence committed and issues relating to elections and democratic institutions".*[47] The decision in *Hirst*, the Court held, was to establish disenfranchisement as an exception even in the case of a convicted prisoner, ensuring any such decision is based on specific reasoning explaining why it is necessary in the individual case.[48]

36. In any proposed implementation the Coalition parties must honour their election commitment to promote civil liberties for all; it is unacceptable for elected representatives to disenfranchise an entire segment of the population. As pointed out in *Frodl*, prisoners continue to enjoy all the fundamental rights and freedoms under the Convention save for the right to liberty where lawfully imposed, and any loss of this status is *"inconceivable"*.[49] Nor will there be any place under the Convention

[44] See *Liberty's response to the Department for Constitutional Affairs' Consultation on the Voting Rights of Convicted Prisoners Detained in the United Kingdom* (March 2007), available at http://www.liberty-human-rights.org.uk/pdfs/policy07/prisoners-voting-rights.pdf.

[45] (Application No. 20201/04) European Court of Human Rights, 8 April 2010.

[46] Ibid, at para 24.

[47] *Hirst* at para 82; *Frodl* at para 34.

[48] Ibid, at para 35.

[49] Ibid, at para 25.

"where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion".[50] We urge the JCHR to push the new Government to step away from the former Government's proposals to extend the vote to only some, but not all, prisoners. Universal enfranchisement is what our strong democratic traditions demand.

S and Marper v United Kingdom[51]

37. *S and Marper* related to the UK's policy of indefinite retention of DNA profiles and samples of all persons arrested for a recordable offence. Both S, a child, and Marper had their DNA and fingerprints retained indefinitely by the police despite not ever being convicted of a charge laid against them. Represented by Liberty, S and Marper submitted to the ECtHR that the retention of the samples interfered with their right to a private life pursuant to Article 8 of the ECHR. The Court found a violation of Article 8, holding that the protection of personal data was of fundamental importance to a person's right to respect for private life. In particular, the ECtHR, held that the *'blanket and indiscriminate nature'* of powers of retention of fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, failed to strike a fair balance between competing public and private interests. The retention of such information was held to constitute a disproportionate interference with the applicants' right to respect for private life.

38. The former Government's response to the *S and Marper* decision, following a rushed consultation on the matter in 2009,[52] was to provide for the retention of DNA and other samples of innocent adults and children for up to six years.[53] These provisions have not yet been enacted. Liberty welcomed the Coalition Government's commitment to change the law by adopting the Scottish model of DNA retention (outlined below)[54] which was cited with approval in *Marper* and recommended by

[50] Ibid, at para 25. [51] Application Nos. 30562/04 and 30566/04, 4 December 2008. 52 *Keeping the Right People on the Database: Science and Public Protection, May 2009*. See Liberty's response to the consultation, August 2009, available at: http://www.liberty-human-rights.org.uk/pdfs/policy-09/liberty-s-response-to-dna-database-consultation.pdf

[53] See sections 14 to 20 of the *Crime and Security Act 2010*. These provisions have not yet been brought into force.[54] The Coalition *Programme for Government* stated that the new Government *"will adopt the protections of the Scottish model for the DNA database"*, page 11. Available at http://programmeforgovernment.hmg.gov.uk/files/2010/05/coalition-programme.pdf.

the JCHR in its last report.[55] The Government has indicated that it will bring forth these changes in the "Freedom Bill", which is yet to be tabled in Parliament. We regarded the former Government's response to the decision in *Marper* as disappointing and inadequate. We set out these detailed concerns in our response to the JCHR's 2009 inquiry into the implementation of human rights decisions.[56]

39. Liberty has never taken an absolutist approach to DNA retention. We consider that DNA evidence can be a highly effective crime detection and prosecution tool. We therefore take no issue with the collection of DNA from suspects for the purposes of a criminal investigation. Our concerns relate to the permanent retention of DNA of people arrested for any recordable offence, even if no charge or conviction follows. We have always accepted that public protection is incredibly important, but so is respect for a person's private life. It is for these reasons that we are broadly supportive of the Scottish model which we consider to be a more proportionate approach to DNA retention. The Scottish model provides that the DNA of a person who is arrested but not charged, or charged but not convicted, to be destroyed as soon as possible, and in the case of a sexual or serious violent offence be retained for three years following conclusion of the proceedings.[57]

40. The model also provides for the retention of DNA beyond this three year period for a further two years on application to a Court (and as there is no limit on the number of Court applications this means that DNA could conceivably be retained indefinitely). Liberty has serious concerns about this extension of part of the Scottish model. We therefore proposed amendments to the Crime and Security Bill when it was passing through Parliament which accorded with the Scottish model but differed in one important respect: the removal of the procedure for a Court application for further retention.[58] We have set out our detailed concerns and recommendations

[55] CM 7892, at page 11. [56] Available at http://www.liberty-human-rights.org.uk/pdfs/policy09/jchr-evidence-on-implementation-of-strasbourg-judgments.pdf. [57] See para 13 of *Liberty's response to the Home Office's 'Your Freedom' consultation* (October 2010), available at http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-your-freedom-consultation-october-2010.pdf. [58] At para's 9 to 23: *Liberty's Report Stage Briefing on the DNA provisions in the Crime and Security Bill in the House of Commons* (March 2010), available at http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-report-briefing-on-crime-and-security-bill-dna.pdf.

about this aspect of the model, and DNA retention after *Marper* generally, in our detailed briefing to the Home Office 'Your Freedom' consultation.[59]

41. Liberty also shares the concerns set out in the Committee's letter to the Government of 9 September 2010, in which it outlines the Government's obligation to immediately implement the ECtHR decision in *Marper* and calls for interim guidance to implement the decision while waiting for the Freedom Bill to be introduced.[60] Given the length of time since the decision in *Marper* and the fact that the Freedom Bill is yet to be introduced, we similarly call on the Government to introduce interim guidelines, until the passage of that legislation, in order to ensure immediate protection for the Article 8 rights of individuals potentially subject to these provisions.

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Isabella Sankey

[59] See *Liberty's response to the Home Office's 'Your Freedom' consultation* (October 2010), available at http://www.liberty-human-rights.org.uk/pdfs/policy10/liberty-s-response-to-the-your-freedom-consultation-october-2010.pdf.

[60] Available at http://www.parliament.uk/documents/joint-committees/human-rights/HRJMarper_HomeSec_090910.pdf.