Chapter Nine

The European Court of Human Rights in the UK: Litigation, Rights Protection and Minorities

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1. *Introduction*

The United Kingdom, with its historic absence of a written Constitution and accompanying Bill of Rights, has traditionally paid more attention to the need to respect individual freedom than the protection of positive substantive rights.[1] However, following mounting criticism of judicial incapacity to redress human rights violations, and an increasing number of cases from the United Kingdom being heard before the European Court of Human Rights (hereafter the ECtHR or the Court), pressure for the introduction of a domestic Bill of Rights grew throughout the late twentieth century.

Prior to this, fundamental freedoms in the United Kingdom were typically upheld through a combination of legislation and judicial enforcement. Historically, legal remedies protecting civil liberties were closely linked to private law causes of action.[2] So, for example, individual liberty and freedom from arbitrary detention was guaranteed by the action for false imprisonment or trespass to the person. As a result the courts were able to protect certain liberties through individual litigation.

That said, while in many other jurisdictions rights enjoy a constitutionally protected status, permitting judicial review of the constitutionality of legislation, this has not historically been the case in the UK. Instead, it is the judges who have sought to use the common law (that is unwritten, case law) to impose limitations upon legislative power. In this regard, the judges have identified certain standards as fundamental to the historical common law and these are

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[1] D. Feldman, *Civil liberties and human rights in England and Wales*, 2nd ed. (Oxford: Oxford University Press, 2002).

[2] Ibid., p. 58.

used in the interpretation of legislation.[3] Such standards include the presumption that legislation is not intended to be retroactive, is not intended to interfere with property rights and is not intended to oust the jurisdiction of the court.[4] These presumptions, however, have not always been accorded sufficient weight as to protect individual rights with the power of the common law and judicial creativity being kept within limits. As such, a separation of powers has existed with politicians and the legislature keen to protect their freedom to enact legislation subject to a democratic mandate without interference by judges on the basis of uncodified and unlegislated rights.[5] Equally, by virtue of the doctrine of parliamentary sovereignty, Parliament has effectively been able to encroach on freedom without legal constraint.

As a result of calls for reform to strengthen the power of the judiciary in their role as the guarantors of individual fundamental and human rights, one of the most important constitutional changes ever to have been introduced in the United Kingdom came with the arrival in power of the Labour government in 1997 together with its commitment to improve human rights protection. With the passage by parliament of the Human Rights Act 1998 (HRA), a new era has begun as a distinct rights culture has come to pervade UK law, society and political life and the government has realised its ambitious project to 'bring rights home'. 'Bringing rights home', to use the rhetoric of New Labour,[6] describes the process of 'domestication' of international human rights law. More specifically, it denotes the incorporation of parts of the European Convention on Human Rights and Fundamental Freedoms (hereafter the ECHR or the Convention) into internal UK law,[7] with the effect that individuals can rely on the rights contained within the Convention before the domestic courts, thus avoiding the expense and delay of taking a case before the European Court of Human Rights in Strasbourg. Yet, while speed and cost effectiveness were given as the practical reasons for incorporation, the project was presented more broadly by New Labour as embodying an ideological commitment on the part of the government to a better protection of fundamental rights and freedoms.[8]

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[3] Ibid., p. 61.

[4] Ibid.

[5] Ibid., p. 63.

[6] This phraseology reflects the titles of the Labour Party's Consultation Paper introduced prior to the General Election of May 1997: J. Straw, MP and P. Boateng, MP, *Bringing rights home: Labour's plans to incorporate the European Convention on Human Rights into United Kingdom law*, December 1996, and the UK government's White Paper on the case for incorporation: *Rights brought home: The Human Rights Bill*, October 1997, Cm 3782.

[7] The Human Rights Act 1998 is applicable in Northern Ireland and Scotland, as well as in England and Wales.

[8] *Rights brought home: The Human Rights Bill*, para 1.17.

The commitment to give further domestic effect to the substantive rights guaranteed under the Convention resulting in the adoption of legislation in the form of the HRA 1998,[9] has been heralded as 'the most significant statement of human rights in domestic law since the 1689 Bill of Rights.'[10] Undoubtedly, the changes it introduces have important implications for the future direction and content of human rights litigation in the UK.

The HRA enjoyed a relatively smooth introduction since it was supported by more liberal members of the judiciary together with civil liberties groups such as Liberty and Charter 88 which had long campaigned for the introduction of a Bill of Rights.[11] None of these constituencies, however, pursued an agenda aimed specifically at the promotion of non-majoritarian rights and interests and this may go some way towards explaining the lack of bite of the new legislation in its equality provisions, having in particular no freestanding equality clause. Hence, rather than seeking to install a wholly newly drafted Bill of Rights, the HRA incorporates the existing European Convention on Human Rights (ECHR) (with all its existing merits and flaws) into domestic law. In line with the idea of bringing rights home, the legislation envisaged the domestic mainstreaming of human rights, making their protection a matter of routine and providing a core set of political and legal values against which the conduct of national public authorities must be measured.

The changes introduced have been of significant interest to numerous non-majoritarian communities for both their positive promise to end deeply rooted oppression based upon race, religion, gender, sexuality, etc. The Act has been welcomed in so far as it opens up a window of opportunity allowing previously unheard arguments to be put before the courts based upon alleged violations of fundamental rights. This advantage, however, has to be measured along side some significant difficulties. Inevitably, it harbours a negative capacity to provoke a backlash against minority rights claims and to further the demands of opposing interest groups. Also, as regards the scope of the legislation – both its material scope in terms of the rights guaranteed and its personal scope in terms of those to whom the act applies – this certainly detracts from its capacity to address certain types of harms.

Obviously, having incorporated the ECHR into domestic law in order to produce a national Bill of Rights, the HRA mirrors many of the deficiencies of

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[9] The Act received the Royal Assent on 9 November 1998. It came into effect in 2000, the delay in introduction being due to the carrying out of a programme of judicial education.

[10] J. Straw, MP, 'Foreword', in Wadham and Mountfield (eds.), *Blackstone's Guide to the Human Rights Act 1998* (London: Blackstone Press, 1999), p. ix.

[11] F. Klug, *Values for a godless age: The story of the UK's new bill of rights* (London: Penguin, 2000), pp. 152–163.

the Convention itself. For example, in terms of the rights it guarantees, the European Convention is typical of many international human rights instruments being premised upon the need to sanction State actions that violate fundamental rights in the public sphere. As such, it contains a familiar list of first generation civil and political rights and is notably short on the provision of second generation social and economic rights.[12] This is not to mention the absence of third generation cultural, environmental and developmental rights and an emerging fourth generation of 'bio-rights' associated with the regulation of new biotechnologies. Critics, however, have notoriously challenged the construction of such rights instruments arguing that they do not provide an effective way of tackling harms against minority and other social groups which may represent a more privatised form of injury, for example harms to the body of a sexual or reproductive nature.[13] As such, some types of injury, such as those committed upon women, have had to be reformulated in such a way as to bring them within the material scope of international human rights texts.

A further limitation and criticism of the Convention rights in this regard is that, being addressed only to States, they seem *a priori* to cover only those violations of fundamental rights which are carried out by public and not private actors. It is well established that, in principle, international law agreements do not create obligations for private parties,[14] but only for states, and the Human Rights Act itself is confined in its application to violations or rights carried out by public authorities.[15] As a result the HRA is concerned primarily with the review of *executive* action (i.e. that of public authorities and those private bodies exercising a public function) for its Convention compliance (s.6, HRA). Consequently, concern to avoid an over-simplification of the public-private divide and the recognition that the abuse of the rights of non-majoritarian minority groups may more usually occur at the hands of private individuals is not addressed by the Act's apparent lack of effect between non-state actors. That said, under the case law of the European Court of Human Rights it has been held that states may be under positive obligations to prevent harm caused by private persons and so have a duty to protect victims of rights abuses. For

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[12] K.D. Ewing, 'Social rights and constitutional law', Public Law (1999), 104.

[13] W. Brown, *States of injury: power and freedom in late modernity* (Princeton: Princeton University Press, 1995); W. Brown, 'Suffering rights as paradoxes', Constellations 7/2 (2000), 230; C. Bunch, 'Women's rights as human rights: toward a re-vision of human rights', Human Rights Quarterly 12 (1990), 486.

[14] This is not to say that the application of international human rights law to private parties has gone unexplored: A. Clapham, *Human rights in the private sphere* (Oxford: Oxford University Press, 1993).

[15] See Wadham and Mountfield, *Blackstone's guide*, chapter 5. Nevertheless, see also, M. Hunt, 'The "horizontal effect" of the Human Rights Act, Public Law (1998), 423.

example, in the case of *X and Y v. The Netherlands*[16], a sexual assault carried out upon a minor in a private institution which had gone unprosecuted led the ECtHR to find the Netherlands in violation of the right to respect for private life under Article 8 ECHR. The Court concluded that the state's positive obligations 'may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves' (para. 23). These developments do hold some promise for a more horizontal application of Convention rights in disputes between private parties in the UK.

Bearing in mind this background to the domestic protection of human rights in the UK, we now turn in section two to a consideration of the attention which has been given to the ECHR in the national sphere. This will be followed by an examination of litigation raising claims made by minority groups and by and analysis of the jurisprudence of the European Court of Human Rights in the sphere of Articles 8–11 and 14 ECHR.

2. *The Study of the ECHR: State of the Art in the UK*

The academic and legal study of the ECHR in the UK has a substantial history. The United Kingdom became a signatory to the ECHR in 1950 and the instrument came into force in 1953. The right of individual petition was recognised by the UK in 1966 and while this was originally recognised for a period of five years, it has been renewed regularly.[17] It is this right of individual petition which has provided the majority of cases coming before the European Commission and Court and thus has provided much food for academic thought in discussing the relative contribution of the Convention to the protection of individual and/or group rights. As one academic commentator, Farran, argues, the Court should be viewed as a 'bulwark against specific infringements of human rights rather than large scale violations, although individual cases may be representative of violations affecting certain sectors or groups of the population.'[18]

While the Convention is binding in international law on all its signatories, its status in relation to UK domestic law has traditionally been somewhat ambiguous and this issue too has vexed many members of the academic and legal communities. The difficulty is that, while in many countries it is an

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[16] ECtHR, *X and Y v. The Netherlands* (no. 8978/80), 26 March 1985.

[17] See further S. Farran, *The UK before the European Court of Human Rights – Case law and commentary* (London: Blackstone Press, 1996), chapter 1.

[18] Ibid., p. 2.

automatic feature of international law that the Convention becomes part of the domestic law of the signatory State in accordance with the hierarchy of norms provided by the State's Constitution, this is not so in the UK. Here, this process is not automatic. The Convention, like all other forms of international law, has not traditionally been incorporated into national law and therefore in cases of conflict between international and domestic law the courts are expected to apply the national provisions. Consequently individuals from minority and vulnerable groups have not been successful in introducing arguments based upon a violation of Convention rights in the domestic courts. This point of constitutional principle was reiterated firmly in the case of *Brind*[19] in which the House of Lords was asked to assess the legality of a decision of the Home Secretary which restrained the dissemination of opinions of 'terrorist' organisations in Northern Ireland in the media. A group of journalists challenging the decision argued that it constituted a violation of Article 10 of the Convention. Lord Ackner dismissed the application as manifestly ill founded and stated that if the Home Secretary had considered Article 10 ECHR in coming to his decision then this would have amounted to an incorporation of the Convention through the back door. Since the Convention had not been incorporated into domestic law it could not act as a source of rights or obligations.

Yet, as with other international treaty obligations, the Convention has traditionally been applicable in the interpretation of legislation. This is because of the generally recognised principle of statutory construction that Parliament is deemed not to intend to legislate contrary to international obligations. Where appropriate, therefore, the national courts endeavoured to interpret statutory law in the light of the Convention and the House of Lords, in the case of *Derbyshire County Council*,[20] expressly indicated that where the law is either unclear or ambiguous, or regards a question not already ruled upon, then the courts ought to consider the implications of the Convention upon that question.

Commentators have noted too that the Convention has also come to influence domestic law more indirectly via its incorporation into the law of the European Union. The European Court of Justice has indicated on many occasions that fundamental rights are to be respected as part of the general principles of EC law and that these rights are inspired by, inter alia, those rights guaranteed in the European Convention.[21] Since directly effective EC law is to

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[19] UK House of Lords, *R v. Secretary of State for the Home Department, ex parte Brind and Others* [1991] 1 All ER 720.

[20] UK House of Lords, *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 WLR 28.

[21] ECJ, Case 4/73, *Nold v. Commission* [1974] ECR 491. ECJ, Case 36/75, *Rutili v. Minister for the Interior* [1975] ECR 1219.

be applied automatically in UK domestic law under the terms of s.2(4) of the European Communities Act 1972 (as interpreted in *Factortame Ltd v. Secretary of State for Transport*[22]), then issues concerning those fundamental rights guaranteed by the Convention have found their way into national UK law without further parliamentary involvement, at least where they touch upon matters of EC law and policy.[23]

As a result of this picture of the relationship between international and domestic law as it pertained to the incorporation of Convention rights in the UK prior to the HRA 1998, individuals from minority and vulnerable groups seeking to assert that their fundamental rights had been violated had little option but to take their case to the Strasbourg institutions. This, alongside a strong domestic culture and tradition of asserting civil liberties claims and the UK's early signature of the Convention, has meant a substantial history of litigation against the UK before the European Commission and Court of Human Rights. For example, figures for 2005 indicate that individual petitions from the UK resulted in 1.816 Court decisions and 284 Court judgments, including 135 judgments (67 against) under Articles 8, 9, 10, 11 and 14 ECHR.[24] Other comparative studies have reached similar conclusions. For example, the study by Cheney, Dickson, Fitzpatrick and Uglow, published in 1999, indicated that up to October 1998 the United Kingdom had 135 cases against it referred to the Court, and at least one violation of the Convention was found in 52 cases. By comparison, Denmark had had 7 cases referred to the Court, with at least one violation found in 3 cases; France had 118 referrals and 59 violation cases; Germany had 35 referrals and 15 violation cases; Italy had 155 referrals and 101 violation cases; the Netherlands had 50 referrals and 30 violation cases.[25] Thus, while the UK has been the subject of more successful complaints than Denmark or Germany, it fares well by comparison with most other states.

In discussing the consequences of implementation of the Convention in the domestic arena, commentators have raised concerns over the extent to which the Act can really provide a vehicle for the promotion of fundamental rights and social justice and who exactly should be involved in these decisions.

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[22] ECJ, C-213/89, *The Queen v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433, 19 June 1990.

[23] See Farran, 'The UK before the European Court', p. 4.

[24] Among the nine states included in the JURISTRAS project, this puts the UK second behind Italy (on Court decisions), fourth behind Italy, Turkey and France (on Court judgments) and second behind Turkey (on judgments under Articles 8, 9, 19, 11 and 14 ECHR).

[25] D. Cheney *et al., Criminal justice and the Human Rights Act 1998*, 1st ed. (Bristol: Jordan Ltd., 1999), chapter 1.

One point which deserves highlighting at this stage is the reality of any rights culture which necessarily produces competing rights claims requiring the judiciary to engage in a careful balancing exercise. The increased involvement of the judiciary in this process thus also deserves mention in so far as the new rights culture has seen a shift in the balance of power between the various organs of the State charged with ensuring the protection of fundamental rights. Basically, the powers of the legislature and those of the judiciary have altered in favour of the latter. Unlike the application of Bills of Rights in other jurisdictions, the HRA maintains the core constitutional doctrine of the sovereignty of parliament - meaning that the judiciary may not directly disapply Acts of parliament.[26] This at least ensures that legislative provisions which have been hard fought over in parliament (for example, the Abortion Act 1967 and its subsequent amendments) cannot be directly overturned by an unelected judiciary. That said, legislators now face a heavy responsibility to give proper consideration to the question of Convention compatibility when proposing new statutes. Section 19 HRA requires the Minister in charge of the Bill to state either that in his/her view the Bill is compatible with the Convention rights or that s/he is unable to make a statement of compatibility but that nevertheless the government wishes parliament to proceed with the Bill.[27] The statement must be made in writing and be published. The effect of this provision is clearly to focus the mind of legislators on their obligation to act in conformity with the Convention.

In terms of the subsequent application of legislation by the courts, the maintenance of the doctrine of parliamentary sovereignty does also need to be viewed alongside the innovation that some courts (the High Court and above) may now issue a 'declaration of incompatibility' (s.4(2), HRA). The declaration acts as a signal to Parliament and to the public at large that, in the court's view, a violation of a fundamental right has occurred. While the courts strive to interpret statutory provisions in conformity with the Convention rights in order to minimise the need to have recourse to the 'declaration of incompatibility', section 3(1) of the Act also imposes an obligation on domestic courts and tribunals to interpret legislation, wherever possible, in a way which is consistent with the Convention rights and section 2(1) demands that they take account of the decisions of the Strasbourg institutions in doing so.

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[26] K.D. Ewing, 'The Human Rights Act and parliamentary democracy', Modern Law Review 62 (1998), 79; K.D. Ewing, 'A theory of democratic adjudication: towards a representative, accountable and independent judiciary', Alberta Law Review 38 (2000), 708; D. Feldman, 'The Human Rights Act 1998 and constitutional principles', Legal Studies 19 (1999), 165.

[27] See Feldman, 'Civil liberties and human rights', p. 93.

While, therefore, only public authorities are obliged to comply with the terms of the HRA, the obligation upon the courts to interpret legislation in conformity with the rights set out in the Convention has the effect that the Convention will be potentially relevant in cases between private parties and in the development of rights under the common law.[28] For example, the Article 10 right to freedom of expression might be used to suggest a particular construction of the Defamation Act in litigation between private parties even though neither of them could directly bring proceedings against the other under the HRA.

Not surprisingly, the HRA and its reorganisation of the division of powers with regard to the resolution of human rights questions in the UK has given rise to many commentaries and much speculation as to possible effects. This has produced a mixed range of responses. Many commentaries in the media, from academics and civil liberties campaigners have been positive. Leading figures such as Anthony Lester have described it as a 'brilliant Bill'[29] and a turning point in the UK's legal and constitutional history. William Wade talks of a 'quantum leap into a new legal culture of fundamental rights and freedoms'.[30] The positive responses are, however, not uniform. Other literature highlights alleged omissions, deficiencies and other general problems. This is largely oriented around the chosen model of incorporation and comes from those who argued the case for an entrenched Bill of Rights whereby the judiciary would have full powers of constitutional review and the option of overturning unconstitutional legislation.[31] The ensuing debate has produced familiar assertions as to whether parliament or the judiciary can be said to have the best record on protecting human rights.[32] While the question remains unresolved at present, what is clear is that the process of determining human rights claims in the UK must now be viewed as one of ongoing dialogue and intense decision-making. This dialogue inevitably operates not only at the national but also the supranational level, involving both domestic and international institutions, including contributions from the European Court of Human Rights.

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[28] G. Phillipson, 'The Human Rights Act, "horizontal effect" and the common law: A bang or a whimper?', Modern Law Review 62 (1999), 824.

[29] A. Lester, 'The impact of the Human Rights Act on public law', in Marshall (ed.), *Constitutional reform in the United Kingdom* (Oxford: Hart Publishing, 1998), pp. 105–107, at 105.

[30] W. Wade, 'Human rights and the judiciary', EHRLR (1998), 520, at 532.

[31] See, for example, G. Marshall, 'Patriating rights – With Reservations: The Human Rights Bill 1998' in Marshall (ed.), *Constitutional reform in the United Kingdom*, pp. 73–84.

[32] N. Whitty, T. Murphy & S. Livingstone, *Civil liberties law: The Human Rights Act era* (London: Butterworths, 2001), p. 4.

3. *Litigation in the ECtHR Regarding Claims Raising Articles 8–11/14 ECHR as well as Claims Involving Non-majoritarian Groups*

Not surprisingly, UK litigants have brought cases under all aspects of the Convention including Articles 8–11 and Article 14 ECHR, and these have had important implications for both the individuals concerned, as well as the wider groups and communities to whom these people belong. The UK data set of cases used to provide quantitative and qualitative data for this chapter comprises all the cases (judgments and decisions) in which Article 14 ECHR has been raised by litigants against the United Kingdom, as well as all judgments in which Articles 8–11 ECHR were raised.[33] This selection is necessitated by the large number of cases brought against the UK and the fact that cases raising Article 14 ECHR are particularly prominent. Our database hence contains 92 Court judgments and 471 decisions raising Article 14 issues in conjunction with allegations of breaches of other Convention rights, as well as an additional 69 judgments in which Articles 8–11 ECHR were raised with no connection to Article 14 ECHR.[34]

Litigants are often motivated to bring human rights claims on their own initiative. However, in a substantial number of UK cases litigants are assisted in their claims by various NGOs, and the interest of such organisations in human rights litigation goes some way to explain the nature and frequency of cases brought on particular issues.

As Table 1 indicates, from the foundation of the Court up to the end of 2008, one-third (34%) of cases raising Articles 8–11 and 14 ECHR, for which judgments were given, were brought by individuals who received some type of support from an NGO. Here we define support as instances where an NGO either submits to the Court written comments in support of an applicant's claims, or represents the applicant before the Court. NGO involvement ranges from a handful of organisations that have submitted written comments in support of an applicant in one case, to Liberty, a human rights NGO that has represented applicants before the Court in 15 cases, and has submitted written comments in 14 additional cases. There are, however, numerous organisations

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[33] The decision to limit the data set to these cases was taken in the light of the large amount of litigation against the UK and in order to create a manageable data set.

[34] A search of the HUDOC database reveals that most judgments and decisions relating to the specific situation of immigrants indeed involve a claim based on Article 14 ECHR. Only 1 out of 4 judgments did not (the claim was based on Article 5 ECHR) and 9 out of 19 decisions did not (claims were based on Articles 5, 6, 8, 13 and 24 ECHR). Regarding the situation of minorities more generally, again most claims involve Article 14 ECHR with only 7 out of 17 judgments not raising this Article (claims involved Articles 2, 3, 6, 8, 9, 10, 11 and 13 ECHR).

Table 1. Organisations supporting applicants (in cases raising Articles 8–11 & 14 ECHR, for which there were *judgments*) [to December 2008]

Organisation	Represented applicant	Submitted comments in support of applicant	Represented and/or submitted comments in support of applicant	Percentage of cases
Liberty	15	14	29	18.0
Child Poverty Action Group	2	0	2	1.2
Citizens Advice Bureau	2	0	2	1.2
AIRE Centre	1	3	4	
Committee on the Administration of Justice	1	1	2	1.2
European Roma Rights Centre	0	5	5	3.1
Rights International	0	4	4	2.5
JUSTICE	0	3	3	1.9
Article 19	0	3	3	1.9
Amnesty International	0	2	2	1.2
Interights	0	2	2	1.2
British Irish Rights Watch	0	1	1	0.6
Campaign for Freedom of Information	0	1	1	0.6
Joint Council for the Welfare of Immigrants	0	1	1	0.6
Privacy International	0	1	1	0.6
Programme on International Rights of the Child	0	1	1	0.6
Age Concern England	0	1	1	0.6
Voluntary Euthanasia Society	0	1	1	0.6
Society for the Protection of Unborn Children	0	1	1	0.6

(*Continued*)

Table 1. Organisations supporting applicants (in cases raising Articles 8–11 & 14 ECHR, for which there were *judgments*) [to December 2008] (*Cont.*,)

Organisation	Represented applicant	Submitted comments in support of applicant	Represented and/or submitted comments in support of applicant	Percentage of cases
Trade Union Congress	0	1	1	0.6
Post Office Engineering Union	0	1	1	0.6
Catholic Bishops' Conference of England and Wales	0	1	1	0.6
No organisation involved	140	127	106	65.8

N.B. The sum of percentages exceeds 100 because in some instances more than one organisation submitted written comments for the same case.

involved in supporting applicants; Table 1 includes only organisations that submit written comments or represent applicants; it does not include other organisations involved in Court decisions (see below) or those that offer advice and/or other types of support to ECtHR applicants.

The engagement of these human rights/welfare organisations in test case litigation makes it easy for us to identify test cases. The Child Poverty Action Group (CPAG) has a policy of seeking cases that will benefit not only the person pursuing the action, but others too.[35] One of CPAG's main test cases was *Willis v. UK*.[36] CPAG had been campaigning at least since the late 1990s to help to ensure that widowers might receive payment upon the deaths of their wives equal to that their wives would receive upon their husbands' deaths. It brought the *Willis* case to the ECtHR to challenge the British legislation that prevented men from claiming widow's payments. Brian Wilson and his wife were married in 1978 and had three daughters, born in 1980, 1981 and 1986. The applicant's wife died in 1993, aged 42. The applicant was the administrator of his wife's estate. The applicant's wife was employed as a private caterer for at least three years and, while working, she contributed to the joint income of the marriage. She paid social security contributions as an employed earner until her death. The applicant, a solicitor, continued in full-time work and had to meet the

[35] R. Smith, 'Test case strategies, public interest litigation, the Human Rights Act and legal NGOs', JUSTICE, London (2003).

[36] ECtHR, *Willis v. UK* (no. 36042/97), 11 June 2002.

expense of childcare from the existing family income. The applicant applied to the Benefits Agency for the payment of social security benefits, namely a Widow's Payment and a Widowed Mother's Allowance, payable under the Social Security and Benefits Act 1992 but was told he was ineligible because of his sex. He was finally awarded £21.084,22 pending the introduction of the Welfare Pensions Reform Act and the case was struck out of the list.

A related test case supported by CPAG was that of *Runkee and White v. UK*.[37] Similar to the *Willis* case, Mr Runkee and Mr White applied for Widow's Payment and Widowed Mother's Allowance, and the UK government was found to have violated Article 14 ECHR for discriminating against men and Article 1 of Protocol 1 to the Convention for denying the applicants their right to property on those accounts. However, this case differs because the applicants also contested the decision of the UK government to deny them payment of a Widow's Pension. On this count, there was deemed to be no violation of the ECHR. This and later cases raising the same issue were thrown out of the court as it was deemed that the Widow's Pension had a role to play in providing to women of a certain generation with supplementary income in order to correct 'factual inequalities' between older widows, as a group, and the rest of the population. The court has since ruled that this difference in treatment was reasonably and objectively justified.

In a similar, gender-related test case, *Walker v. UK*,[38] Liberty supported Mr Walker, a 60-year-old pensioner who claimed that it was unfair that he should pay National Insurance Contributions (NICs) when a woman of his age would be exempt. Retirement ages for men and women have traditionally been differentiated in the UK, women retiring at 60 and men at 65, and the payment of NICs has been tied to these ages. In this case, the Court found that there had been no violation of Article 14 ECHR because the state had taken measures to equalise the retirement age of men and women, and the five year age difference was until recently justified in order to 'correct factual inequalities', to mitigate financial inequality and hardship due to women's traditional role as carers. The ECtHR also failed to find a violation of Article 14 ECHR in this case because it considered it legitimate to link NICs to the end of working life, and because it considered that national authorities are in a better position than the ECtHR itself in determining appropriate revenues and taxes for states.

Liberty had more success in a related test case, *Grant v. UK*,[39] in which it stood up for a male to female transsexual who was disallowed a pension at the

[37] ECtHR, *Runkee and White v. UK* (no. 42949/98), 10 May 2007.
[38] ECtHR, *Walker v. UK* (no. 37212/02), 22 August 2006.
[39] ECtHR *Grant v. UK* (no. 32570/03), 23 May 2006.

age of 60 even after being granted a Gender Recognition Certificate under the Gender Recognition Act 2004. The Court granted the applicant a pecuniary award from the time elapsed between the *Christine Goodwin v. UK*[40] case (which recognised the new gender of transsexuals) and the present time, under Article 8 ECHR, as the ECtHR considered that there was no separate issue under Article 14 ECHR.

Liberty has also worked on other gender-related cases, including an unsuccessful attempt to prove sexual discrimination and harassment (*Fogarty v. UK*),[41] and upon a successful case raising Article 12 (*B. and L. v. UK*),[42] the right to marry and found a family. *B*. and *L*. were father-in-law and daughter-in-law who were prohibited from marrying under UK law initially designed to protect the integrity of the family and prevent sexual rivalry between parents and children. However, even at the time of the case, the UK government had made proposals for lifting the prohibition as it claimed that it did not serve a useful purpose in public policy.[43] On the subject of marriage, Liberty also helped *P.M*,[44] an unmarried father, to claim tax-free benefits equal to those of a married father.

The other, much-publicised, judgment case that Liberty was involved in was the case of *A. v. UK*,[45] in which Liberty was seeking to challenge the right of Members of Parliament (MPs) to parliamentary immunity. *A*. was a tenant in social housing who had been dubbed a 'neighbour from hell' for alleged drug use and miscreant children. Her precise name and address had been announced by her MP in Parliament, resulting in her identity being made public and leading to her receiving threats of a racist nature and hate mail. Liberty believed that it was inappropriate for the MP to have disclosed this information in a parliamentary debate. Nonetheless, the case failed to result in a violation partly because, in the words of Owens and White, 'where the source of grievance is the legislation itself, requiring an effective remedy would be tantamount to allowing judicial review of the legislation'.[46] Liberty was accused of trying to expose crusading MPs to the threat of the libel courts, although this was never its intention.[47]

In addition to human rights organisations using test-case litigation to support individual claimants, individuals themselves may seek support from

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[40] ECtHR, *Christine Goodwin v. UK* (no. 28957/95), 11 July 2002.
[41] ECtHR, *Fogarty v. UK* (no. 37112/97), 21 November 2001.
[42] ECtHR, *B. and L. v. UK* (no. 36536/02, 13 September 2005.
[43] C.O. White and R.C.A. White, *The European Convention on Human Rights*, (Oxford: Oxford University Press, 2006), p. 251.
[44] ECtHR, *P.M. v. UK* (no. 6638/03), 19 July 2005.
[45] ECtHR, *A. v. UK* (no. 35373/97), 17 December 2002.
[46] Ibid., p. 471.
[47] Liberty (2002), *A v. UK* and Parliamentary Privilege, Liberty website.

independent solicitors or local law centres. One firm of solicitors that is particularly active in supporting human rights cases filed against the UK is the Belfast-based Madden & Finucane, which has lent support to cases involving Irish prisoners. This firm continues to work for those who suffered from prejudice for their Catholic beliefs during the troubles in Ireland. According to Chambers, 'Madden & Finucane maintains its reputation for advising claimants on civil liberties, human rights, data protection, freedom of information issues and challenges to the decisions of public bodies'.[48]

In the 87 cases for which there are judgments against the UK government, not one solicitor, barrister, QC or legal advisor has represented more than seven cases. The most frequently used barristers are Lord Anthony Lester (QC) and Mr David Pannick (QC), both of whom work for Blackstone Chambers, a legal practice with particular expertise in human rights.

Although we have not provided a statistical breakdown of the organisations that assist individual litigants in *decisions*, it is interesting to note that amongst the decisions there are also a number of cases supported by another human rights organisation, JUSTICE. This is an all party law reform and human rights body which works to improve the legal system and quality of justice in the UK, in particular by promoting human rights, improving access to justice, improving criminal justice and raising standards of EU justice and home affairs. Legal support in decisions is also given to litigants by a number of other specialised organisations that are not as active at the judgment stage. For example, the Joint Council for the Welfare of Immigrants and the AIRE Centre have intervened in decisions to represent clients in the field of migration. Homosexual reform groups such as Stonewall and Spanner support applicants in cases involving homosexuals. The Children's Legal Centre in London and the Child Poverty Action Group support decisions involving children. Groups such as the European Roma Rights Centre, the Public Law Project, the National Gypsy Council, Hereford Traveller Support Group and the Romani Rights Association often support cases involving gypsies and travellers. The support group MIND has assisted mentally handicapped applicants. Decisions involving political or electoral issues are often supported by political parties and those involving prisoners and applicants from Northern Ireland are sometimes supported by IRA related associations and the Irish Prisoners' Support Group. Some applicants in employment related cases are assisted by representation from trade unions (e.g. NALGO – the National and Local Government Officers Association) and some in newspaper/freedom of expression cases are supported by the newspaper

[48] Madden and Finucane Solicitors, at http://dspace.dial.pipex.com/town/place/ger47/, accessed 11/4/08.

itself (e.g. *Times, Observer*[49]). The International Society supported a case concerning religious discrimination for Krishna Consciousness.

A number of cases are supported by organisations that support individuals in the community, usually by offering free legal advice. Amongst these, cases have come to Strasbourg in which litigants have been represented by the Citizens Advice Bureau as well as by local Law Centres (those in London are particularly active, e.g. Hackney, Hounslow, Camden). Occasionally individuals are represented by legal academics.

4. *ECtHR Jurisprudence in the Cases Under Review*

A survey of the outcome of cases raising discrimination claims under Article 14 ECHR together with a substantive violation of Articles 8, 9, 10 or 11 ECHR shows that the rights claims of individuals representing non-majoritarian groups are vindicated more particularly in relation to certain types of claims than others. For example, in our study, of the 42 cases in which there were found to be violations of Article 8 ECHR, seven are in respect of the rights of homosexuals and a further three are in respect of the rights of transsexuals. In *Dudgeon v. UK*[50] the relationship between homosexuals was held to be an aspect of private life and the law in Northern Ireland which criminalised male homosexual relationships was found to violate that right. Four of the cases raising rights of homosexuals are with regard to the Armed Forces' old policy of discharging homosexual employees from their posts, regardless of conduct.[51] This policy was challenged by these judgments and has subsequently been amended in line with the ECHR and the Human Rights Act 1998.

In a series of cases brought by transgender applicants, the UK law on marriage, which made it impossible for someone who had undergone gender reassignment surgery to marry a person of their new opposite sex, was unsuccessfully challenged in *Rees v. UK*[52] and *Cossey v. UK*.[53] Later, the Court reversed this earlier case law in three cases involving male to female transsexuals where the

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[49] ECtHR, *Sunday Times v. UK* (no. 6538/74), 26 April 1979, and *Observer/Guardian v. UK* (no. 13585/88), 26 November 1991.

[50] ECtHR, *Dudgeon v. UK* (no. 7525/76), 22 October 1981.

[51] See the following: ECtHR, *Lustig-Prean and Beckett v. UK* (nos. 31417/96; 32377/96), 27 September 1999; *Smith and Grady v. UK* (nos. 33985/96; 33986/96), 27 September 1999; *Perkins and R. v. UK* (nos. 43208/98; 44875/98), 22 October 2002; and *Beck, Cop and Bazely v. UK* (nos. 43535/99; 43536/99; 43537/99), 22 October 2002.

[52] ECtHR, *Rees v. UK* (no. 9532/81), 17 October 1986.

[53] ECtHR, *Cossey v. UK* (no. 10843/84), 27 September 1990.

applicants had completed gender reassignment surgery and sought to present themselves as males in society. In *I. v. UK*[54] the applicant complained because her birth certificate registered her as a male and was not changeable and this discriminated against her when she was required to show it for administrative purposes such as applying for a loan or a job. *Christine Goodwin* expressed the same grievances, but also complained about the benefits system that continued to treat her as a man, and that she was unable to marry. *Grant* complained about the benefit system not treating her as a woman. Although *Grant* was awarded a Gender Recognition Certificate in 2004, her complaint was about historical discrimination, as she had applied but been refused the benefits that would be available to a woman in 1997 and again in 2002, but failed to get a remedy in the UK Courts. 'In so far as the Government sought to argue that no breach arose after the *Christine Goodwin* judgment, this was contrary to the House of Lords' judgment in *Bellinger* itself and contrary to Convention case-law'.[55] The *Bellinger* case had been found to violate Articles 8 and 12 ECHR, but the House of Lords had 'deemed the formulation of legal norms to remedy that breach best left to Parliament'.[56]

These successful cases, in which applicants were given financial settlements pending the introduction of new legislation or backdated from the time of their initial complaint in the UK Courts to the materialisation of the Gender Recognition Act 2004, came after a couple of false starts, but with the balance of votes in the ECtHR changing gradually in favour of transsexuals. Although the *Cossey* case (1991) failed in the ECtHR, by that time, the UK government was criticised by the ECtHR 'for failing to keep the need for appropriate legal measures in this area under review in the light of scientific and societal developments and stressed the importance of all states doing so'. The trend towards acceptance finally materialised in the cases of *I* and *Christine Goodwin* in 2002. The general societal trend towards greater acceptance of transsexuals can be explained by the fact that these are 'dynamic issues', in that they can and have been 'interpreted in the light of developments in social and political attitudes'.[57]

Other significant rulings under Article 8 are the case of *Abdulaziz, Cabales and Balkandali*,[58] in which no violation of the right to family life was found where, in the context of immigration law, the right of a wife to be joined by her

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[54] ECtHR, *I. v. UK* (no. 25680/94), 11 July 2002.

[55] Paragraph 35 of the *Grant v. UK* judgment.

[56] Ibid., paragraph 13.

[57] White and White, 'The European Convention on Human Rights', p. 47.

[58] ECtHR, *Abdulaziz, Cabales and Balkandali v. UK* (nos. 9214/80; 9473/81; 9474/81), 28 May 1985.

husband was not protected in the same way as that of a husband to be joined by his wife. Also, in the case of *Buckley v. UK*[59] the applicant, a gypsy, argued that an enforcement notice against her issued by the District Council for the removal of her caravans amounted to a violation of Article 8 ECHR in so far as it prevented her from pursuing the traditional lifestyle of a gypsy. The Court found that there was no violation of Article 8 ECHR since member states should be allowed a wide margin of appreciation and in this case procedural safeguards were in place to allow for the weighing up of the respective interests of the applicant in her traditional lifestyle alongside the interest of the local authority in regulating land use.

Under Article 9, the right to freedom of thought, conscience and religion, cases have been brought by litigants representing a variety of religious and quasi-religious faiths, beliefs and practices: for example, minority faiths such as Druidism (*Chappell v. UK*[60]), pacifism (*Arrowsmith v. UK*[61]), veganism (*H v. UK*[62]) and recognised religions such as Islam (*Ahmad v UK*[63]) and religions practised by certain cults (*Church of X v. UK*[64]). Article 9 ECHR was not, however, found to extend to include the right to publish a blasphemous poem suggesting that Christ was a practising promiscuous homosexual (*Gay News Ltd v. UK*[65]).

Article 10 ECHR, freedom of expression, has equally generated litigation affecting minority and other groups, especially those seeking a form of political expression. In the case of *Arrowsmith*, the applicant, a pacifist, was convicted under the Incitement to Disaffection Act 1934 for distributing leaflets to troops stationed at an army camp, the contents of which were directed at trying to discourage them from serving in Northern Ireland. The applicant alleged that her right under Article 10 ECHR had been infringed. The European Commission of Human Rights found that there was no doubt of this and the question was whether the interference could be justified under Article 10 paragraph 2. The government argued that the Incitement to Disaffection Act was necessary to protect national security, to prevent disorder and to protect the rights of others. The Commission accepted this, saying that the applicant's sentence (seven months' imprisonment) while severe was not in the circumstances so out of proportion to the legitimate aims pursued that this severity in itself

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[59] ECtHR, *Buckley v. UK* (no. 20348/92), 25 September 1996.
[60] ECtHR, *Chappell v. UK* (no. 10461/83), 30 March 1989.
[61] EComHR, *Arrowsmith v UK* (no. 7050/75), 16 May 1977.
[62] EComHR, *H v. UK*, 16 EHRR CD 44 (1993).
[63] EComHR, *Ahmad v. UK*, 4 EHRR 126 (1982).
[64] EComHR, *Church of X v. UK* (no. 3798/68), 17 December 1968.
[65] EComHR, *Gay News Ltd v. UK* (no. 8710/79), 7 May 1982.

could render the interference in Article 10 ECHR unjustifiable. In the case of *McLaughlin v. UK*[66] the applicant claimed that he was prevented from having direct access to the broadcasting media as a result of the broadcasting ban covering any broadcast consisting of or including words where the speaker represented Sinn Fein or where the words supported or solicited support for Sinn Fein. The Commission expressed the opinion that the applicant's rights under Article 10 ECHR had been interfered with but that the aim of the restrictions was necessary in a democratic society bearing in mind the margin of appreciation permitted to States, the limited interference with the applicant's rights and the importance of measures against terrorism.

Also, regarding claims raising Article 10 ECHR, a key case is that of *Sunday Times v. UK*[67] in which the applicants complained about an injunction that prevented them from publicising a story about thalidomide and its effects on children. This had been a high profile public debate, with several pending law cases in the domestic courts between Distillers Ltd (the manufacturers of thalidomide) and parents of affected children. The *Sunday Times* wrote an apparently balanced article on the topic, which was forbidden from being published as it was seen by the government to interfere with the proper administration of justice. The House of Lords had made the decision to bring the injunction and had threatened contempt of court. The applicants claimed that this was in breach of Article 10 ECHR and that the government should introduce legislation to overrule the decision of the House of Lords in order to bring the law of contempt of court into line with the ECHR.

In UK domestic law, the Phillimore report sets out the terms of contempt of court as 'a means whereby the courts may act to prevent or punish conduct which tends to obstruct, prejudice or abuse the administration of justice either in relation to a particular case or generally' and as existing to protect not the dignity of the judges but 'the administration of justice and "the fundamental supremacy of the law." ' It draws on *Hunt v Clarke*[68] in which Lord Cotton had stated: 'If anyone discusses in a paper the rights of a case or the evidence to be given before the case comes on, that, in my opinion, would be a very serious attempt to interfere with the proper administration of justice. It is not necessary that the court should come to the conclusion that a judge or jury will be prejudiced, but if it is calculated to prejudice the proper trial of a cause, that is a contempt, and would be met with the necessary punishment in order to restrain such conduct'. Although the ECtHR agreed that the law was

[66] EComHR, *McLaughlin v. UK* (no. 18759/91), 9 May 1994.
[67] ECtHR, *Sunday Times v. UK* (no. 6538/74), 26 April 1979.
[68] UK High Court, *Hunt v. Clarke* [1889], 61 L.T. 343.

accessible and certain in this regard, it deemed that the injunction constituted illegitimate interference with the media's duty to provide the public with information in a democratic society. It claimed that the article was moderate and well-balanced and that the information it provided was not outweighed by any social need. The ECtHR not only challenged the UK law in this instance, but also sought to ensure that that the Government and the applicant reached a friendly settlement within three months of the judgment.

Two cases in which violations of Article 10 ECHR were found also related to the freedom of information. In both the *Observer/Guardian v. UK* and *Sunday Times 2 v. UK*[69] the applicants complained against injunctions that prevented them from printing details of the book *Spy Catcher*, which contained politically sensitive information on M15. The same principles of domestic law were applied to these cases: injunctions and contempt of court. Although the domestic law itself was not challenged, the ECtHR decided that, once the book had been published in the USA, without restrictions on imports, that there was little need to continue to pursue the interests of confidentiality. The UK government was challenged for seeking to maintain the reputation of M15 rather than the interests of national security and instructed to pay compensation and costs to the applicants.

Under Article 11 ECHR – the right to freedom of assembly and association – cases have been brought against the UK again regarding forms of assembly for the purposes of respecting the peaceful association of groups and minorities. In the case of *Chappell*, the right of Druids to celebrate the summer solstice at Stonehenge was claimed, although the interference in this right was found by the Commission to be prescribed by law within the meaning of Article 11 paragraph 2 for the purposes of public safety, preventing damage to the monument, preventing the risk of harm and disruption to the public, and traffic. Similar restrictions on chapel attendance for a prisoner held in a segregated unit were held to be justified under Article 11 paragraph 2.[70] In *Rai, Allmond and 'Negotiate Now' v. UK*,[71] the applicants were members of an organisation which sought to promote peace in Northern Ireland and in order to promote their views they requested permission to hold a rally in Trafalgar Square. This was refused on the grounds that it was Government policy to refuse permission for any public demonstration or meetings concerning Northern Ireland in Trafalgar Square. The applicants complained that the ban infringed their freedom to manifest their

[69] ECtHR, *Observer/Guardian v. UK* (no. 13585/88) 26 November 1991; *Sunday Times 2 v. UK* (no. 13166/87), 26 November 1991.

[70] ECtHR, *Childs v. UK* (no. 9813/82), 1 March 1983.

[71] EComHR, *Rai, Allmond and 'Negotiate Now' v. UK* (no. 25522/94), 6 April 1995.

beliefs in public, the right to freedom of expression and their right to freedom of peaceful assembly. The Commission responded that the right of the individuals to peaceful assembly had been restricted, but the restriction was sufficiently 'prescribed by law' and fell within the Government's margin of appreciation and was proportionate and justified.

Equally, under Article 11 of the Convention, in the case of *Wilson, National Union of Journalists* and *Others v. UK*[72], the applicants claimed to have been discriminated against through their refusal to relinquish collective bargaining positions through their trade unions. Each applicant was faced with the choice of relinquishing trade union membership and collective bargaining or forgoing a pay rise. All refused to accept their pay rises. The Employment Protection Act (1973) states that employees should not be prevented or deterred from joining a trade union. However, the employers seemed to breach this but without penalty, for the House of Lords had ruled that the action of the employers was not 'action (short of dismissal)'. After the House of Lords trial, the law was amended in the interests of employers via the Trade Union Reform and Employment Rights Act (1993), which implied that it was acceptable to discriminate against employees for choosing collective representation so long as the action taken was not beyond that which any reasonable employer would take. However, the Social Charter's Committee of Independent Experts and the International Labour Organisation Committee on Freedom of Association had both criticised the UK government's policy. The ECtHR ruled that bribing employees to renounce union members by offering pay rises was in breach of the Convention and the applicants were paid damages.

Article 14 ECHR, which does not confer a free standing equality guarantee, but has instead to be used in conjunction with an alleged violation of substantive right under the Convention, has been invoked on a number of occasions by UK litigants, usually without a great deal of success, since the substantive violation is normally considered to be the most important aspect of the case. Claims have involved, for example, the exclusion of a solicitor from interviews of terrorist suspects in Northern Ireland (*John Murray v. UK*[73]), transsexuals (*X., Y., and Z. v. UK*[74]), disabled persons (*Pretty v. UK*[75]), discriminatory treatment of certain forms of conduct but not others, e.g. sado-masochistic acts between consenting males compared to boxing (*Laskey, Jaggard and Brown*

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[72] ECtHR, *Wilson, National Union of Journalists and Others v. UK* (nos. 30668/96; 30671/96; 30678/96), 2 July 2002.

[73] ECtHR, *John Murray v. UK* (no. 18731/91), 8 February 1996.

[74] ECtHR, *X., Y., and Z. v. UK* (no. 21830/93), 22 April 1997.

[75] ECtHR, *Pretty v. UK* (no. 2346/02), 29 April 2002.

v. UK[76]), and a ban on broadcasting material favourable to Sinn Fein which did not apply to other political parties (*McLaughlin v. UK*).

A claim of race discrimination was successfully made out in the case of *East African Asians v. UK*[77] in which the husbands of applicants had been refused admission into the UK in circumstances in which wives would have been admitted. The applicants claimed that the immigration legislation being applied discriminated against them on the grounds of their race and colour. The Commission responded that the legislation in question did indeed discriminate against the applicants and that 'a special importance should be attached to discrimination based on race; that publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity…'.

As far as sex discrimination is concerned, in the case of *Abdulaziz*, mentioned above, the applicants argued that they were victims of a practice of discrimination authorised by Parliament because men who were lawfully resident in the UK (even if not UK nationals) were entitled to be joined by their foreign wives while in order for a husband to join his wife he had to show that she was a citizen of the UK and Colonies who was born in the UK or whose parents had been born there. The Commission noted that the Government's justification for this difference in treatment was to protect the domestic labour market in a time of rising unemployment but did not accept this view. Instead it concluded that there had been sex discrimination in securing the applicant's right to respect for family life. The Commission did not however find race discrimination, accepting that most immigration policies do differentiate on the basis of people's nationality and indirectly their race ethnic origin and possibly their colour. The European Court, giving its opinion on the case, likewise was not convinced by the Government's arguments regarding employment and the economic activity of men and women. It too concluded that the applicants were victims of sex discrimination (while agreeing with the Commission's finding of an absence of race discrimination).

Finally, there are some interesting patterns to be revealed by looking at minority rights claims over time, particularly from 1980 onwards (only 4 of the 115 cases brought by minorities preceded 1981). Just over one tenth of the judgment cases against the UK government took place in the decade 1981–1990, close to a third were in the next decade (1991–2000), and just over

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[76] ECtHR, *Laskey, Jaggard and Brown v. UK* (no. 21627/93; 21826/93; 21974/93), 19 February 1997.

[77] ECtHR Committee of Ministers Resolution, *East African Asians v. UK* (nos. 4403/70; 4419/70; 4422/70; 4423/70; 4434/70; 4443/70; 4476/70; 4478/70; 4486/70; 4501/70; 4526/70; 4530/70), 21 March 1994.

half have been since 2000. In the 1980s, religious, male, ethnic and abused minority cases were not judged in the ECtHR. Throughout the 1990s, disabled minorities were the only minority not heard. During the 2000s, though, all of these minorities were represented. In particular, there was a surge in male applicants seeking redress for the unfair benefits system.

5. *Conclusion*

The above analysis of case law emerging under the HRA and Convention Articles 8, 9 and 14 ECHR suggests that the legislation has made both winners and losers of litigants concerned to promote equality through recourse to human rights arguments. While the Act does little on its face to counter the challenge and critique of human rights discourses mirroring the typical deficiencies of other national and international human rights instruments, it has nevertheless opened up a new constitutional space. In doing so it promises an increased range of litigation strategies for complainants, both women and other non-majority groups, and has amplified the audibility of a previously unheard dialogue on minority rights before the courts. The articulation of such dialogue has clearly brought about a deeper activist engagement with legal and judicial processes.

Equally, the response of the UK government to adverse judgments has, overwhelmingly, been to accept them, and over time to make consequential changes to domestic law and practice where appropriate. It is widely acknowledged that detainees, criminal suspects, prisoners, the mentally ill, homosexuals, schoolchildren, journalists and many others in the United Kingdom can trace the strengthening or clarification of their rights and protections to decisions of the European Commission and Court.[78] In this respect, it is suggested by Farran that 'individual complaints taken to Strasbourg benefit a wider sector than simply the applicant' and that '[t]he case law of the Court and the Commission can thus be seen as a human rights lobby'.[79]

Overall, consideration of minority rights cases in the UK over time, and particularly from the 1980s onwards, reveals a striking pattern of development. Just under one-tenth of judgments against the UK government raising Article 14 discrimination claims took place in the decade 1981–1990, around a quarter were in the next decade (1991–2000), and just under two-thirds have been post 2000. Generally, as the decades progress, we see greater use of the ECtHR on a wider range of minority rights claims.

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[78] Cheney *et al*., 'Criminal justice and the Human Rights Act 1998'.

[79] Farran, 'The UK before the European Court', p. 5.

One further noteworthy positive development to emerge from the passage of the HRA and increased litigation on fundamental rights in the courts, is the greater role being given to interest groups as third party intervenors. The under-explored question of the potential for interest groups to influence judicial decision-making through third party interventions is likely to be of increasing importance in the future as such interventions offer the opportunity to build a litigation strategy which can help shape the development of case law under the Act. So much had already been recognised in the pre-HRA case of *R v. Smith*[80] which concerned the defence of provocation to murder, and in which a coalition of feminist groups successfully made a written intervention in the House of Lords in order to represent the interests of battered women. It was particularly apparent in the case of *R v. A*,[81] in which women's groups were admitted to the court as third party intervenors in a case involving a challenge to 'rape shield' law provisions which prohibited the giving of evidence and cross examination about any sexual behaviour of the complainant except with the leave of the court. In this regard, the participation of interest groups in the litigation process may be seen as a good in itself with success not being measured in terms of winning or losing a specific case but rather in raising public awareness of the extent of violence against minorities and other social groups and the need to tackle discrimination and hate-based harms.

The number of success stories does accentuate positive developments under the HRA and will continue to give hope to those concerned with broader issues of equality and the capacity of rights discourse to address these. The outcomes highlight that the promise of human rights is not false and that litigation strategies pursued before the courts may be an important mechanism for judicial enterprise which can sometimes enhance the rights of minority groups who have otherwise found themselves marginalised, or unsuccessful, before the parliamentary process. Viewed also as part of an ongoing process of national and European judicial dialogue, it is noteworthy that House of Lords cases such as *Ghaidan v. Godin-Mendoza*[82] and *Bellinger v. Bellinger*[83] had been preceded by earlier decisions of the European Court of Human Rights on the point in issue (*Christine Goodwin v. UK* on the rights of transsexuals and *Karner v. Austria*[84] on the rights of same-sex couples).

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[80] UK House of Lords, *R v. Smith* [2001] AC 146, 13 December 2001.

[81] UK House of Lords, *R v. A* [2001] 3 All ER 1, 17 May 2001.

[82] UK House of Lords, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30, 21 June 2004.

[83] UK House of Lords, *Bellinger v. Bellinger* [2003] UKHL 21, 10 April 2003.

[84] ECtHR, *Karner v. Austria* (no. 40016/98), 24 July 2003.

Furthermore, both cases fed into legislative reform proposals with the Gender Recognition Act 2004 providing for the validity of transsexual marriage and the Civil Partnerships Act 2004 providing same-sex couples with the option of registering their relationship and extending all rights currently conferred on heterosexual couples to same-sex couples. It is indeed in the area of cases involving sexuality/transsexuals, that we can see a general trend toward greater sympathy in the ECtHR, with more cases resulting in the finding of a violation, and a greater tendency for cases to be decided by unanimity rather than majority voting. Post-1999, all judgments regarding sexuality/transsexuals have found a violation and have been unanimously agreed. This reflects the political and social tendency for homosexual and transsexual activity to be regarded as acceptable, and the principle of 'dynamism' with regard to such issues. It might also reflect increased pressure group activity in the UK around issues of sexual orientation and gender identity.

Nevertheless, human rights activists, litigants and members of minority communities must be ever vigilant in tracking the ways in which the opportunities presented by the HRA are exploited by counter-claimants to women's and minority rights. Inevitably this means that valuable resources and energy have to be put into securing existing positions against an erosion of existing rights as well as seeking further advancement and equality guarantees. Yet, as the rights culture deepens and broadens and as it becomes increasingly accessible to, and owned by, hitherto marginalised sections of society, there are grounds for hope that human rights arguments will continue to be employed to ameliorate the position of those who lack power and voice in society.