

# Contents

<i>Table of cases</i>	xxi
<i>Table of statutes</i>	lvii

<b>PART I: THE HUMAN RIGHTS ACT</b>	<b>1</b>
<b>1 Background and Interpretation</b>	<b>3</b>
1. The Protection of Human Rights Prior to the Human Rights Act	3
2. Background to the Human Rights Act	4
2.1 The Incorporation Debate	4
2.2 The Human Rights Bill	6
3. Purpose of the Human Rights Act	8
4. Structure of the Human Rights Act	9
5. Convention Rights Given Further Effect	10
5.1 The Nature and Scope of the Convention Rights	10
5.2 The Convention as a 'Living Instrument'	12
5.3 The Non-absolute Nature of the Majority of the Convention Rights	13
5.4 Derogations and Reservations	14
6. Principles of Interpretation	15
7. The Relationship with Strasbourg Jurisprudence	17
7.1 Section 2 of the Human Rights Act	17
7.2 The Obligation to Take into Account <i>and</i> Follow?	18
7.3 A More Generous Interpretation of Convention Rights	21
7.4 A Conflict between Domestic Authority and Subsequent Strasbourg Authority	23
8. Other Aids to Interpretation	23
8.1 Judgments of the Privy Council in Devolution Cases	23
8.2 Case Law and Instruments from Other Jurisdictions	25
8.3 Reports of the Joint Committee on Human Rights	26
<b>2 The Benefit and Burden of the Human Rights Act</b>	<b>27</b>
1. Introduction	27
2. The Benefit of Convention Rights: Victims	28
2.1 Section 7 Human Rights Act	28
2.2 The Victim Test and Sections 3 and 4 of the Human Rights Act	29
2.3 Categories of Victim	31
2.3.1 Core Public Authorities	31
2.3.2 Potential Victims	31
2.3.3 Relatives of a Victim	32

2.3.4 Those Who Have Brought Proceedings Before the European Court of Human Rights	33
2.3.5 Non-nationals and Those Living Outside the United Kingdom	33
2.3.6 Representative Bodies	34
3. The Burden of Convention Rights: Public Authorities	35
4. Core Public Authorities	36
4.1 Definition	36
4.2 Courts and Tribunals	38
4.3 Parliament	39
4.4 Which Core Public Authority is Responsible?	39
4.5 Application: Core Public Authorities	40
5. Hybrid Public Authorities	42
5.1 Definition	42
5.2 Ensuring HRA Protection when Contracting Out	44
5.3 Application: Hybrid Public Authorities	45
5.3.1 Enforcement of Chancel Repairs	45
5.3.2 Seeking Possession of a Property	46
5.3.3 Care Home Closures and Management	46
5.3.4 Denying Application to Participate in a Farmers' Market	48
5.3.5 Regulation of Membership	48
5.3.6 Approving Minority Buy-outs	49
6. Private Bodies	49
6.1 Interpreting Primary Legislation in Accordance with Section 3 of the HRA	50
6.2 The Development of the Common Law	52
<b>3 The 'Acts' to which the Human Rights Act Applies</b>	<b>55</b>
1. Introduction	55
2. Retrospective Effect	56
2.1 Criminal Proceedings	56
2.2 Civil Proceedings	60
2.3 The Application of Sections 3 and 4 of the Human Rights Act	60
2.4 Section 22(4) of the Human Rights Act	63
2.5 Getting Around the Problem of Retrospective Effect	64
2.5.1 Ongoing Violation of Convention Rights	65
2.5.2 The 'Act' is Not Yet Complete	66
2.5.3 Utilising the Pre-HRA Position	66
2.5.4 Modified Common Law	67
2.6 Judgments of the European Court of Human Rights	67
3. Acts which Occur Outside of the United Kingdom: Extra-territorial Effect	69
3.1 Acts of non-UK Actors	69
3.2 Acts of UK Public Authorities	71
3.2.1 Jurisdiction as Defined by the European Court of Human Rights	71
3.2.2 Exceptions to Territorial Jurisdiction	71
3.2.3 Application: Entry Clearance	73
3.2.4 Application: Activities of British Embassies	73

3.2.5 Application: Activities of the British Armed Forces	74
3.3 The Channel Islands and the Isle of Man	75
3.4 British Overseas Territories	75
4. Failure to Act: Positive Duties	76
5. Satellite Litigation	77
5.1 Criminal Proceedings	77
5.2 Civil Proceedings	78
<b>4 Determining Incompatibility</b>	<b>79</b>
1. Introduction	79
2. Prescribed by Law	80
2.1 Sufficiently Accessible and Precise	81
2.2 The Common Law	82
2.3 Codes and Guidelines	83
3. Necessary	84
4. Proportionality	85
4.1 Definition	85
4.2 The Shift from <i>Wednesbury</i>	86
4.3 Merits Review?	87
5. Deference	88
5.1 Definition	88
5.2 Reasons to Defer	89
5.3 Reasons Not to Defer	90
5.4 When is Deference Required?	91
5.5 Problems with Deference	93
6. Deference in Practice	98
6.1 Criminal Justice	98
6.1.1 Prevention of Terrorism	98
6.1.2 Drug Trafficking	99
6.1.3 Road Traffic Offences	99
6.1.4 Prevention and Detection of Serious Crime	100
6.1.5 Rape Complainant's Prior Sexual History	100
6.1.6 Sentencing	101
6.1.7 Policing	101
6.1.8 Prisons	101
6.2 National Security	103
6.3 Immigration and Asylum	104
6.4 Pensions and Welfare Benefits	108
6.5 Housing	109
6.6 Taste and Decency in Broadcasting	109
6.7 Conclusion	110
<b>5 The Defence of Primary Legislation</b>	<b>113</b>
1. Introduction	113
2. Section 6(2) Human Rights Act	114
2.1 Introduction	114
2.2 Section 6(2)(a) Human Rights Act	115

## xii CONTENTS

2.3 Section 6(2)(b) Human Rights Act	117
3. Section 3 Human Rights Act	119
3.1 Introduction	119
3.2 The Nature of Section 3	120
3.3 What is Not Possible	121
3.4 What is Possible	122
3.5 The Application of Section 3 in Hypothetical Cases	123
3.6 The Application of Section 3 in Practice	124
3.6.1 Criminal Justice	125
3.6.2 Sentencing	126
3.6.3 Parole Board	126
3.6.4 Coroner's Inquests	127
3.6.5 Family Law	127
3.6.6 Housing	128
3.6.7 Civil Procedure	129
3.6.8 Other	129
4. Section 4 Human Rights Act	131
4.1 Interpretation	131
4.2 A Reasonable Period within which to Amend Domestic Law	132
4.3 A Declaration where the Government already Has Plans to Legislate	133
4.4 Failure to Legislate	134
4.5 The Use of Section 4 in Hypothetical Cases	135
4.6 The Application of Section 4 in Practice	135
4.6.1 Sentencing	136
4.6.2 Gender Reassignment	136
4.6.3 Prevention of Terrorism	136
4.6.4 Mental Health	137
4.6.5 Immigration	137
4.6.6 Housing	138
5. The Use of Hansard and Other Materials in Compatibility Cases	138
6. Section 19 Human Rights Act: Statements of Compatibility	141
<b>6 Remedies</b>	<b>143</b>
1. Introduction	143
2. Just and Appropriate	144
3. Effective	144
4. The Power to Award Damages	146
5. Court Must Have the Power to Award Damages	147
6. Just Satisfaction	147
6.1 Any Other Relief or Remedy Granted	148
6.2 The Consequences of Any Decision	148
6.3 Other Circumstances	149
7. The Principles Applied by the European Court of Human Rights	151
7.1 Introduction	151
7.2 Pecuniary Damage	153
7.3 Non-pecuniary Damage	154
7.4 Exemplary Damages	156

8. The Level of Damages	157
9. Application: Article 5	159
9.1 Section 9(3) Human Rights Act and Article 5(5)	159
9.2 Article 5(4): Delay	160
9.3 Article 5(4): Independence and Impartiality	162
10. Application: Article 6	163
10.1 Article 6(1) Reasonable Time: Post Conviction	163
10.2 Article 6(1) Reasonable Time: Pre Conviction	163
10.3 Article 6(1): Independence and Impartiality	165
11. Application: Article 8	168
12. Application: Article 14	170
<b>PART II: THE CONVENTION RIGHTS</b>	<b>173</b>
<b>7 Article 2: The Right to Life</b>	<b>175</b>
1. Introduction	175
2. Scope	177
3. Definition of 'Life'	178
4. Intentional Deprivation of Life	181
5. Positive Duty to Safeguard Life	183
5.1 Nature of the Duty	183
5.2 Assessing a Risk to Life	184
5.3 Reasonable Measures	186
5.4 Application	186
5.4.1 Protection of Identity	186
5.4.2 Witness Protection	188
5.4.3 Care Home Closures	189
5.4.4 PVS Patients and Medical Treatment	189
5.4.5 No Condoms Policy	190
6. Duty to Investigate	191
6.1 Nature of the Duty	191
6.2 When Does the Duty Arise?	192
6.2.1 Death or Life-threatening Injuries	192
6.2.2 Intentional or Non-intentional Killing by an Agent of the State	192
6.2.3 Intentional or Non-intentional Killing by a Non-state Agent	193
6.2.4 Exculpating Factors	194
6.3 Form of the Investigation	195
6.3.1 Authorities Must Act of their Own Motion	195
6.3.2 Investigation Must be Effective	195
6.3.3 Independence	195
6.3.4 Public Scrutiny	196
6.3.5 Involvement of Next of Kin	196
6.3.6 Outcome of the Investigation	197
6.4 Application	198
6.4.1 Deaths in Custody	198
6.4.2 Deaths in Hospital	200
7. Exceptions	201

<b>8 Article 3: Prohibition of Torture and Inhuman or Degrading Treatment or Punishment</b>	<b>203</b>
1. Introduction	203
2. Severity of Ill-treatment	205
3. Negative and Positive Duties	206
3.1 Distinguishing Negative from Positive	206
3.2 Positive Duty	209
3.2.1 When Does the Duty Arise?	209
3.2.2 Knew or Ought to Have Known	210
3.2.3 Reasonable Measures	211
4. Illness and Medical Treatment	211
4.1 Responsibility of a Public Authority	212
4.2 The Right to Die and the Right to Die with Dignity	212
4.3 Medical Treatment	213
5. Conditions of Detention	214
6. Violence	216
7. Sentencing	217
8. Criminal Law	219
9. Social Security and Support	219
10. Deportation and Extradition	222
10.1 Nature of the Duty	222
10.2 Application	224
10.2.1 Illness	224
10.2.2 Conditions of Detention	226
10.2.3 Legal Restrictions on Homosexuality	227
10.2.4 Ill-treatment by Non-state Actors: Sufficiency of State Protection	227
11. Duty to Investigate	229
<b>9 Article 5: The Right to Liberty and Security</b>	<b>231</b>
1. Introduction	231
2. What Constitutes a Deprivation of Liberty?	232
2.1 Restrictions on Liberty of Movement	232
2.2 Parents and Children	233
2.3 Stop and Search	234
3. Article 5(1)	235
3.1 Procedure Prescribed by Law	235
3.2 Lawful	235
3.2.1 Lawful under Domestic Law	236
3.2.2 Prescribed by Law	236
3.2.3 Not Arbitrary	237
3.3 Article 5(1)(a): Conviction by a Competent Court	237
3.3.1 Causal Link	237
3.3.2 Disproportionate Period of Detention	238
3.4 Article 5(1)(b): Non-compliance with the Lawful Order of a Court or to Secure the Fulfilment of any Obligation Prescribed by Law	240

3.5 Article 5(1)(c): Reasonable Suspicion of Having Committed an Offence	240
3.6 Article 5(1)(d): Minors	242
3.7 Article 5(1)(e): Persons of Unsound Mind	242
3.7.1 Minimum Conditions	242
3.7.2 Public Safety	244
3.7.3 Treatment	245
3.8 Article 5(1)(f): Unauthorised Entry, Action Taken with a View to Deportation or Extradition	245
3.8.1 Unauthorised Entry: Detention of Asylum Seekers	245
3.8.2 Deportation: Detention of Deportees	246
3.8.3 Deportation: Length of Detention	247
3.8.4 Extradition: Meaning of Lawfulness	248
4. Article 5(2): Reasons for Arrest	248
5. Article 5(3)	249
5.1 The Right to be Released on Bail	250
5.2 The Right to be Tried within a Reasonable Time	250
6. Article 5(4)	251
6.1 Introduction	251
6.2 Access	252
6.3 Review of Lawfulness	252
6.3.1 Introduction	252
6.3.2 Unsound Mind	253
6.3.3 Indeterminate Sentences	253
6.4 Attributes of a Court	255
6.5 Independence and Impartiality	256
6.6 Fairness	258
6.6.1 Introduction	258
6.6.2 Burden of Proof and Evidence	258
6.6.3 Oral Hearing	259
6.6.4 Equality of Arms	260
6.7 Decided Speedily	261
6.7.1 Principles	261
6.7.2 Application: Mental Health	263
6.7.3 Application: Life Sentence Prisoners	264
7. Article 5(5): Enforceable Right to Compensation	265
7.1 Principles	265
7.2 Relationship with the HRA	267
<b>10 Article 6: The Right to a Fair Trial</b>	<b>269</b>
1. Introduction	269
2. Article 6(1) Application: Determination of Civil Rights and Obligations	272
2.1 Civil Rights and Obligations	273
2.2 Determination	275
2.3 Administrative Decisions: the Two-stage Process	276
2.4 Examples	277
3. Article 6(1) Application: Determination of Any Criminal Charge	278

xvi CONTENTS

3.1 Determination	278
3.1.1 Pre-trial Decisions	279
3.1.2 Sentencing	280
3.2 Criminal Charge	280
3.2.1 Domestic Classification	280
3.2.2 Nature of the Offence	282
3.2.3 Severity of the Potential Penalty	283
3.3 Examples	284
4. Access to Court	285
4.1 Substantive and Procedural Bars	286
4.2 Limitation Periods	287
4.3 Security for Costs	288
4.4 Vexatious Litigants	289
4.5 Immunity from Suit	289
4.6 Prisoners	291
4.7 Absence of Legal Representation	291
4.8 Striking Out	292
5. Fair Hearing	293
5.1 Equality of Arms	294
5.2 Self-incrimination	297
5.3 Right to Silence	299
5.4 Presumption of Innocence	300
5.5 Representation	301
5.6 Oral Hearing	301
5.7 Conducting a Proper Examination	302
5.8 Evidence	302
5.8.1 Evidence Obtained by Entrapment	303
5.8.2 Illegally Obtained Evidence	304
5.8.3 Hearsay Evidence	304
5.8.4 Dock Identification Evidence	305
5.8.5 Exclusionary Rules	305
5.8.6 Trial in Absentia	307
5.9 Reasons	308
6. Public Hearing and Public Pronouncement	309
7. Reasonable Time	310
7.1 Criminal Proceedings	311
7.1.1 Start of the Time Period	311
7.1.2 Determining a Reasonable Time	312
7.1.3 Application	313
7.2 Civil Proceedings	314
7.2.1 Start of the Time Period	314
7.2.2 Determining a Reasonable Time	314
7.3 Remedy	315
7.3.1 Criminal Proceedings: Pre-conviction	315
7.3.2 Criminal proceedings: post conviction	317
8. Independent and Impartial Tribunal	317
8.1 Test for Independence and Impartiality	318

8.1.1 Subjective Test	318
8.1.2 Objective Test	319
8.1.3 Rehearing: Generally	319
8.1.4 Rehearing: Administrative Decisions	320
8.2 Separation of Powers	321
8.3 Waiver	323
8.4 Application	323
8.4.1 Judiciary	324
8.4.2 Juries	326
8.4.3 Courts Martial	326
8.4.4 Government Ministers	327
8.4.5 Local Authorities	328
8.4.6 Professional Bodies	328
9. Tribunal Established by Law	329
10. Article 6(2): Presumption of Innocence	330
10.1 Burden of Proof	331
10.2 Application	332
10.2.1 Confiscation Orders	333
10.2.2 Drugs Offences	334
10.2.3 Road Traffic Offences	335
10.2.4 Trade Marks Offences	335
10.2.5 Terrorism Offences	336
11. Article 6(3)(a): Informed of the Nature and Cause of the Accusation	337
12. Article 6(3)(b): Adequate Time and Facilities for Preparation of Defence	338
13. Article 6(3)(c): Legal Assistance	338
13.1 Process of Investigation	339
13.2 Effective Representation	339
13.3 Legal aid	340
13.4 Application	340
14. Article 6(3)(d): Witnesses	341
15. Article 6(3)(e): Interpreter	342
<b>11 Article 8: The Right to Respect for Private Life</b>	<b>343</b>
1. Introduction	343
2. Private Life	345
2.1 Information	346
2.2 Identity	348
2.3 Physical and Psychological Integrity	349
2.4 Autonomy (Self-determination)	351
2.5 Social Life	352
2.6 Correspondence	353
3. Positive Duties	353
4. Deportation and Extradition: 'Foreign' Cases	355
4.1 Medical Treatment	355
4.2 Homosexuality	356
5. Who Has a Private Life?	356
6. Who Must Respect Private Life?	357

7. Permitted Interferences	358
8. National Security	360
9. Economic Well-being of the Country	361
9.1 Deportation and Extradition: 'Domestic' Cases	361
9.2 Other	363
10. Prevention of Disorder or Crime	363
10.1 Evidence Obtained by Secret Filming or Recording	363
10.2 Fingerprints and DNA Samples	364
10.3 Stop and Search	365
10.4 Disclosure of Allegations	365
10.5 Offender Naming Schemes	366
10.6 Prisoners	367
11. Protection of Health	368
12. Protection of Rights and Freedoms of Others	368
12.1 Fair Trial	368
12.2 Right to Life	369
12.3 Private Life	369
12.4 Freedom of Expression	369
12.5 Children	371
<b>12 Article 8: The Right to Respect for Family Life</b>	<b>375</b>
1. Introduction	375
2. Family Life	375
2.1 Definition	375
2.2 Parents and Children	376
2.3 Adoptive Relationships	377
3. Interference	378
3.1 Children	379
3.1.1 Generally	379
3.1.2 Procedural Rights	379
3.1.3 Positive Duties	380
3.2 Social Security and Support	382
3.3 Deportation and Entry Clearance	383
4. Permitted Interferences	384
5. Economic Well-being of the Country	384
5.1 Deportation	384
5.2 Dispersal of Asylum Seekers	387
6. Prevention of Disorder or Crime	388
6.1 Prisoners	388
6.2 Parenting Orders	389
6.3 Compellable Witnesses	390
7. Protection of the Rights and Freedoms of Others	390
7.1 Children: Care Orders	390
7.2 Children: Contact Orders	392
7.3 Children: Adoption	392
7.4 Children: Removing a Child from the Jurisdiction	393
7.5 Children: Paternity	394

<b>13 Article 8: The Right to Respect for Home</b>	<b>397</b>
1. Introduction	397
2. Home	398
3. Interference	399
3.1 Planning	399
3.2 Proceedings for Possession	400
3.3 Care Homes	400
3.4 Environmental Pollution	401
3.5 Criminal Justice	402
4. Positive Duties	402
5. Permitted Interferences	403
6. For the Prevention of Disorder or Crime	403
7. Economic Well-being of the Country	404
7.1 Care Home Closures	404
7.2 Standards of Public Housing	405
7.3 Management of Sewage and Drainage	406
8. Protection of the Rights and Freedoms of Others	407
8.1 Generally	407
8.2 Public Interest in Preserving the Environment	408
8.3 Proceedings for Possession	409
<b>14 Article 10: The Right to Freedom of Expression</b>	<b>415</b>
1. Introduction	415
2. Expression	417
3. Medium, Manner and Timing of Communication	418
4. Freedom to Receive and Impart Information and Ideas	419
5. Interference	420
6. Positive Duties	422
7. Permitted Interferences	423
8. General Principles	424
8.1 Section 12 HRA	424
8.2 Importance of Freedom of Expression	425
8.3 Importance of Freedom of the Press	426
8.4 The Public Interest	427
8.4.1 Defining the Public Interest	427
8.4.2 Public Figures	429
8.4.3 Commercial Expression	430
9. National Security	430
10. Prevention of Disorder or Crime	431
11. Protection of Health or Morals	432
12. Protection of the Reputation of Others	433
13. Protection of the Rights of Others	436
13.1 Articles 2 and 3	436
13.2 Article 8	437
13.3 Article 1 Protocol No 1	439
13.4 Right Not to be Insulted and Distressed	440
14. Preventing the Disclosure of Information Received in Confidence	442

14.1 Generally	442
14.2 Disclosure of a Journalist's Source	444
15. Maintaining the Authority and Impartiality of the Judiciary	446
<b>15 Article 14: Prohibition of Discrimination</b>	<b>449</b>
1. Introduction	449
2. Application: No Independent Existence	451
3. Without Discrimination	454
3.1 Difference in Treatment: Direct Discrimination	455
3.2 No Difference in Treatment: Indirect Discrimination	455
4. Positive Duty	455
5. Grounds	456
6. Analogous Position	458
7. Objective and Reasonable Justification	461
7.1 Social and Economic Factors	461
7.2 Protection of the Traditional Family Unit	463
7.3 Detection and Prevention of Serious Crime	464
7.4 Protection against Terrorist Acts	464
8. Remedy for Breach	465
8.1 Just Satisfaction	465
8.2 Reasonable Time for Change	466
<b>16 Article 1 Protocol No 1: Protection of Property</b>	<b>467</b>
1. Introduction	467
2. Possessions	468
2.1 Generally	468
2.2 Personal Possessions	469
2.3 Business Possessions	469
3. Interferences with the Peaceful Enjoyment of Possessions	470
3.1 Deprivation	471
3.2 Control	473
4. Justifying Interferences	474
4.1 Generally	474
4.2 Compensation	475
4.3 Procedural Rights	477
5. Consumer Protection	477
6. Planning and the Environment	478
7. The Rights of Others	479
7.1 Freedom of Expression	479
7.2 Peaceful Enjoyment of Possessions	480
7.3 Other	482
8. Prevention of Crime	482
9. Economic Well-being of the Country	483
9.1 Taxes and Duties	483
9.2 Clandestine Entrants	485
9.3 Child Support	486