A-LEVEL
LAW

7162/3B: Paper 3B – Human Rights
Report on the Examination

7162
June 2019

Version: 1.0

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Introduction

This was the first examination for Human Rights on the new specification for A-level Law. In view of the challenges posed by the change to linear A-levels, a new form of assessment structure, and the relative unfamiliarity of students with the law on Human Rights as a substantive law subject, it was encouraging to see many strong performances across the whole of the Paper, or at least in substantial sections of it. It is particularly pleasing to record that there was strong evidence that students managed their time well when answering questions with significantly different mark values. Where students wrote little, or perhaps didn't respond to a question, this seemed to be attributable to a general lack of knowledge and understanding at an appropriate level and not to an inability to adopt an effective strategy to stay within time limits.

There were some common weaknesses which it would be advisable to address:

- students often did not distinguish clearly between ECHR law and English law – when a question is framed in terms of violation of rights under the ECHR, English law is relevant where it helps the State to prove, say, justification but is evidently not the primary focus of the explanation, analysis and application
- students sometimes fell into the error of asserting that individuals might be in breach of rights provided for their benefit. Sometimes, they also went on to argue that the breach would itself render them liable in criminal or civil law. This was particularly evident in answers to question 10. It should be emphasised that if Chris and his followers did not engage, say, in a *peaceful* assembly, this did not make them guilty of breaches of Article 11, which imposed no obligations on them. At worst, they could not rely on the rights otherwise provided by Article 11 to challenge the legality of police activity and claim compensation or resist criminal prosecution
- students were not always sufficiently precise in identifying the requirements stated within ECHR Articles themselves to entitle the State to justify prima facie breaches (infringements) of the rights protected in the Articles. It is true that these are very similar for Articles 8, 10 and 11 (refer to Articles 8.2, 10.2, 11.2) but they are very different for Articles 2 and 5
- students often did not apply the law which they had explained and analysed with sufficient reference to the facts, so that application became rather general and superficial.

Question 1

The correct answer was C:

'The Court considers that it should attempt to interpret the Convention in a way which recognises changes in society across member states.'

This answer was selected by about 84% of students, suggesting very clear knowledge and understanding of the aims of the European Court of Human Rights in treating the European convention as a 'living instrument'. Of the small proportion of incorrect answers, B was selected most frequently. However, the Court has never had, nor has it ever tried to assume, powers to add new Articles to the Convention.

Question 2

The correct answer was B:

'A court must interpret rules of common law in such a way as to take into account relevant provisions of the Convention.'

This answer was selected by about 40% of students and follows from the Human Rights Act 1998 s2 and from the fact that a court is a 'public authority' under the Human Rights Act 1998 and so must not act incompatibly with a Convention right. Answers C and D were selected by approximately 30% and 20% of students, respectively.

Answer C was incorrect because of the Human Rights Act 1998 s3. Where a provision of a statute is incompatible with a Convention right and the court is satisfied that the incompatibility cannot be removed, the statute prevails, but the 1998 Act provides a mechanism for the court to make a declaration of incompatibility.

Answer D was incorrect because of the way in which the courts have interpreted the obligation in the Human Rights Act 1998 s3 that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. This has sometimes resulted in interpretation which was clearly never intended when the statute was originally enacted.

Question 3

The correct answer was C:

'The European Court of Justice is the final court of appeal on all law for all member states.'

This answer was selected by about 47% of students and was false because the Court is the final arbiter only of European Union law and does not act as a court of appeal, if indeed it can be said to be a court of appeal in any sense, for any domestic law which is unconnected with European Union law.

Incorrect answers A, B and D were selected in almost equal proportions. They were incorrect because both Council and Parliament have law-making powers, whilst the Commission does have an important role in enforcing law and policies in the European Union.

Question 4

The correct answer was D:

'It [the rule of law] supports attempts by governments to limit access to the civil justice system by reducing state funding for bringing claims.'

This answer was selected by about 75% of students and was untrue because, completely contrary to the sense of the statement, access to justice is an important aspect of the rule of law, so restricting funding can only be detrimental to its operation.

Answers A and C were incorrectly selected by about 10% of students each. Both were true statements. The rule of law is closely associated with judicial independence, which would be undermined by Government interference (A) and by personal interest (C).

Question 5

The correct answer was A:

'A court may declare delegated legislation invalid if it is not within powers granted to a minister by the enabling Act.'

This answer was selected by about 55% of students and was true because it is an expression of the *ultra vires* principle. The power given to the minister derives from Parliament and must be exercised in accordance with the limits imposed by Parliament. If the minister steps outside those powers, the delegated legislation may be struck down in an action for judicial review.

About 29% of students incorrectly selected B. This statement was untrue. Though by-laws are most frequently associated with local authorities, other organisations – for example, some private companies and charities (the National Trust, for instance) – may have powers to create by-laws.

D, incorrectly selected by about 13% of students, was untrue because the affirmative resolution procedure is a way but not the sole way in which statutory instruments can become law.

Question 6

This question required students to explain **two** ways in which the law tries to ensure the independence of the judges. Judicial independence implies that the judges must be free to make decisions which are not constrained by improper influences which may cast doubt on the legitimacy of outcomes in cases, including remedies awarded. Traditionally, the threat of such influences is associated with: the location of the power to appoint and dismiss judges, including also issues of remuneration; with the connection of the judiciary with other bodies exercising powers over law-making and enforcement, such as the legislature and the executive; with the consequences for judges if they could be held to account personally for their decisions; and with any suggestion that a judge had a personal interest in the outcome of a case in which he or she was involved.

Consequently, the expectation was that students would be able to identify and briefly explain any two of the following major ways in which the law seeks to protect judicial independence:

- appointment of senior judges outside of the degree of control formerly exercised by the Lord Chancellor and via an independent Judicial Appointments Commission (though the appointment of Justices of the Supreme Court is a little different)
- security of tenure for superior judges – the government cannot dismiss judges, only the Monarch can, following a petition from both Houses of Parliament, in consequence of an independent investigation of complaint(s) (Senior Courts Act 1981, Constitutional Reform Act 2005)
- freedom from interference by the executive and judicial separation from law-making by the legislature (Constitutional Reform Act 2005 s3)
- immunity from suit – judges cannot be pursued by criminal or civil action for acts carried out in relation to their judicial function, including actions for defamation (see, for example, **Sirros v Moore**)

- the rule barring judges from hearing/deciding a case in which they have a personal or other special interest (see **In Re Pinochet**)

Many answers demonstrated a clear understanding of the way in which judicial independence is guaranteed and contained brief but confident explanations of two of the methods identified above. Lower-scoring answers often contained a strong explanation of one of the methods (for which three marks were available) or perhaps a slightly confused, or less comprehensive, explanation of two of the methods. The least effective answers might still gain some credit by embarking on the explanation of one of the methods without ever supplying any significant detail. For instance, there were answers which stated baldly that judges are independent from Parliament without elaborating how or in what sense (law-making), and others which asserted the importance of separation of powers, sometimes citing Dicey, but without elaboration. However, there were also many answers which displayed no real understanding at all of judicial independence, seeking it in the operation of the doctrine of precedent, in the process of statutory interpretation, or simply in the 'fact' that judges are highly paid so as to stop them being tempted by bribes. Some answers introduced the notion of media influence. This was an interesting issue in view, for example, of recent heavy criticism of justices of the Supreme Court involved in decisions about the United Kingdom's membership of the European Union. However, the restrictions on time gave little scope for a thoughtful discussion of whether and how judicial independence is protected from such influence.

Question 7

In all cases in which a violation of an Article of the European Convention on Human Rights (ECHR) is alleged, the general form of analysis begins with the enquiry whether, on the facts, the Article was engaged. If the answer is yes, then the second stage is to ask whether the conduct in question infringed the right in the Article. This is the equivalent of a prima facie breach and is followed by an enquiry into whether there was any justification for the infringement. If a justification can be established, then the right will not have been violated and no remedy will be available. In the absence of a justification, there will have been a violation giving rise to a remedy.

Inevitably, within the limited framework of a 5 mark answer, it was not possible to pursue a detailed analysis of the possible violation of Article 8 rights, including the issue of how the state was involved. Instead, it was sufficient to focus, first, on a brief statement that Article 8 protects personal identity, including images, as part of the right to respect for private life. Since the photograph of Alicia was an image, Article 8 was engaged. Second, the proposed *use* of the photograph clearly amounted to an infringement. Third, the obvious potential justification involved the competing right to freedom of expression under Article 10. The crucial issue then was how the balance would be struck between the two competing rights, neither of which takes precedence over the other. The European Court of Human Rights (ECtHR) has discussed this issue on a number of occasions, perhaps most helpfully in **Axel Springer v Germany**. Amongst the elements that the ECtHR would identify in favour of Alicia's right to respect for private life would be that the publication of the photograph would make no obvious contribution to a general debate (it was probably unrelated to her views on social and political issues), that she had always kept her personal life private, and that the photograph was taken covertly and without her consent. This would amount to a strong argument that there was no justification for the infringement and so there was a violation.

Most students understood some aspects of the analysis presented above, even if their answers were structured and expressed in a different way. The strongest answers reproduced the analysis quite closely, emphasising the significance of the balance to be struck between the competing rights to respect for private life and freedom of expression. Many cited the factors identified by the

ECtHR in **Axel Springer v Germany** and related them to the facts in the scenario, or drew similar conclusions from the **Von Hannover v Germany** cases. A less effective but still praiseworthy variant of this approach involved a more general argument about justification which cited the list of aims in Article 8.2 which may legitimately be pursued to restrict Article 8 rights but did not focus specifically on freedom of expression. Many students gained credit at a lower level for recognising factors relevant to the right to respect for private life, such as the private occasion, the covert nature of the taking of the photograph, the content of the photograph, and a general perception that it would not be in the public interest. The essential flaw in these answers was that they did not locate the factors identified within a framework of competing rights which might justify the infringement and so prevent the conclusion that there had been a violation. At their least effective, these answers amounted to little more than a recitation, albeit perceptive, of key facts in the scenario.

Question 8

In the scenario for this question, Burak was one of 150 people whom the police had forced to wait for three hours in pouring rain in a small area in the town centre whilst they carried out an investigation into a violent incident. Burak did not match the description of any suspect for whom they were searching. Students were invited to advise Burak on whether there was a breach (violation) of his Article 5 rights.

Article 5.1 states that everyone has a right to liberty and security of person and provides that no one shall be deprived of liberty except as stated in 5.1(a)-(f) and in accordance with a procedure prescribed by law. Supporting requirements are stated in 5.2-5.5. As interpreted by the ECtHR, the crucial aim of Article 5 is to prohibit arbitrary detention/deprivation of liberty. Adopting the approach explained above in the comments on question 07, the analysis begins with recognition that Article 5 is engaged by evidence of a deprivation of liberty. Where there is an infringement, then, under Article 5.1(b), the State (in this case as represented by the police) may seek to justify the deprivation by arguing that it constituted 'the lawful arrest or detention of a person … in order to secure the fulfilment of any obligation prescribed by law'. A further possible justification is provided by Article 5.1(c), where the lawful arrest or detention is 'for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so'. As indicated above, to rely on either of these justifications, the State must show that the deprivation was 'in accordance with a procedure prescribed by law'.

So the first enquiry had to be into whether Burak was deprived of his liberty at any point during the three hours. Evidently, his freedom to move about, though restricted, was not constrained in the way that might be expected if he were placed in a prison cell or if he were otherwise closely confined. Yet, as stronger answers explained, the ECtHR has taken a more expansive view of deprivation of liberty, arguing in a case such as **Guzzardi v Italy** that the distinction between deprivation of liberty and mere restriction of freedom of movement is one of 'degree and intensity' rather than of nature and substance. In the **Guzzardi** case itself, confinement to a small island with curfew provisions and restrictions on contact with others was regarded as deprivation of liberty despite the evident freedom to move around within the island. More effective answers also identified the significance of length of restriction in cases such as **Shimovolos v Russia** and **Kasparov v Russia**. However, the key case on which more successful answers relied was **Austin v United Kingdom**, which involved the establishing of a police cordon, commonly known as 'kettling', restricting movement of a large number of people and lasting some hours to minimise the risk of further disorder resulting from public protests in central London. At least some of those 'kettled' had been innocently caught up in the restraint, having taken no part in the protests. Here,

the ECtHR permitted the State to argue that the purpose of the constraint should be taken into account at the very first stage in determining whether there was a deprivation of liberty. This was a highly unusual approach because purpose would normally be deemed relevant only to justification once a deprivation had been proved. Nevertheless, the UK succeeded in persuading the ECtHR that there had been no deprivation of liberty. This was a powerful argument in advising Burak that his rights may not have been violated, even though the ECtHR seems subsequently to have marginalised its decision in **Austin v United Kingdom**. Less effective answers identified some aspect(s) of the initial enquiry into deprivation of liberty but often lacked a clear analytical framework, so that the issue of whether a deprivation of liberty could be proved often became confused with whether there was a justification for an established deprivation. Surprisingly, many answers barely addressed the issue of deprivation of liberty at all but, rather, simply assumed that it could be proved and then focused on justification, inevitably undermining the general quality of the analysis and application.

In view of the doubts surrounding the status of the decision in **Austin v United Kingdom**, and, in any case, of how it might be applied to the facts in Burak's case, advice to Burak should certainly have encompassed some consideration of a possible justification for deprivation, should it be proved. The stronger justification was probably provided by Article 5.1(b), a provision mentioned in many answers but rarely properly explained and applied to the facts. The 'obligation prescribed by law' would have been the duty to observe lawful instructions issued by the police to enable them to carry out their own duties. In a 'kettling' incident such as in **Austin**, (had it actually been found to amount to a deprivation of liberty), the police would have been acting to prevent a breach of the peace and would have been entitled to give reasonable and proportionate instructions to the public for that purpose. Such instructions could have included dispersal or, if necessary to prevent significant disorder, confinement and gradual release. It was at least questionable whether the police anticipated any breach of the peace in Burak's case, and arguable that deprivation of liberty for three hours in pouring rain for a person who could not have been a suspect did not fall within the justification in Article 5.1(b). Many answers did emphasise these latter factors but rarely within the Article 5.1(b) framework.

Instead, most answers sought to rely on the justification in Article 5.1(c), and this was often combined with requirements under 5.2 (information to be supplied) and 5.3 (prompt appearance before a judge), as well as with sometimes very extensive accounts of stop and search and/or arrest provisions in the Police and Criminal Evidence Act 1984. This was a creditworthy approach, though it was questionable in application. In view of the fact that Burak did not match the description of any of the suspects, and that the deprivation of his liberty (if indeed it was such) was not intended by the police to enable them to stop and search him, or to arrest him on reasonable suspicion of having committed an offence or being about to commit an offence, or to prevent him from fleeing having committed an offence, it seems rather unlikely that the police could have relied on Article 5.1(c) to justify their actions. In that case, other issues such as what information should be provided, how quickly he should be brought before a judge, and the detailed provisions of the Police and Criminal Evidence Act 1984 would prove to be of little relevance. The cases of **Ostendorf v Germany** and **R (Hicks) v Commissioner of Police for the Metropolis** were also of relevance to both 5.1(b) and 5.1(c) and were often cited in answers.

As indicated above, many answers contained detailed accounts, of varying degrees of accuracy, of English law provisions. Where these were related to the Article 5 requirement that any justification for deprivation of liberty must be 'in accordance with a procedure prescribed by law', they were obviously of relevance, though they could have been expressed more briefly. However, some answers concentrated almost exclusively on English law provisions and so ignored the essence of the question, which was focused on ECHR rights.

Question 9

This question gave students the opportunity to examine the role of law in balancing conflicting interests and then to evaluate the capacity of the tort of defamation to engineer an appropriate balance between the competing interests in protection of reputation (as recognised in the right to respect for private life under ECHR Article 8), and the right to freedom of expression (ECHR Article 10).

The broad context of competing interests in the question was the potential conflict between Articles 8 and 10, but the examination of the role of law in balancing competing interests was not confined to that particular conflict and could range over any area of law, whether connected with human rights or not. A comprehensive examination of the first part of the question should have undertaken to:

- explain the meaning of the term 'interest' and explore the different categories of 'interest', especially public/social and private interests
- explain the mechanisms by which the law seeks to achieve a balance of interests, especially in the substantive law and in rules governing the legal process
- explain and analyse areas in which the law has sought to achieve an appropriate balance of conflicting interests, drawing on any relevant areas of law for illustration. Here, it was important to identify the conflicting interests involved and to demonstrate how the law had engineered a balance between them.

More effective answers generally adopted a broad-ranging approach, frequently not referring to human rights at all in this part of the answer. The most convincing tended to be those which established a theoretical framework based on the work of philosophers such as Bentham, Jhering and Roscoe Pound and then drew for illustration on rules of substantive law and procedure in crime and tort. Answers often dealt perceptively with the rules by which the balance between granting and refusing bail is mediated, with the tension between absolving an accused from criminal liability on the grounds of mental incapacity and the need for public protection, and with the balance between private and public/social interests in the tort of nuisance. Answers usually introduced discussion of **Miller v Jackson** in the context of nuisance but did not always provide sufficient analysis of the extent to which the interests were balanced, and whether the case bore out Pound's views about the inevitable primacy of public/social interests. Less effective answers taking this approach did not succeed in giving a sufficiently precise definition of the interests involved or develop any close analysis of the mechanisms by which the law achieved a balance between conflicting interests. It is also important to recognise that the role of the law is not necessarily to achieve an *equal* rather than an *appropriate* balance. It may be that, in any particular circumstances, the law should favour one set of interests over another, and so adjust the rights and remedies accordingly.

The role of law in balancing conflicting interests is, of course, especially significant in the field of human rights. Consequently, many students chose not to explore the areas outlined above but opted instead to focus entirely on human rights, usually on the balance between Article 8 and Article 10. This was entirely creditworthy but it tended to result in answers which lacked any convincing theoretical framework and, at their weakest, answers which did little more than recite the facts of prominent cases such as **Campbell v MGN** (not always with any great accuracy). A further difficulty with this approach was that answers frequently confused the English law action for misuse of private information (as represented by cases such as **Campbell v MGN** and **Ferdinand v MGN**) with an action for defamation. Inevitably, many such answers tended to confuse

examination of the general issue of the role of law in balancing conflicting interests with the requirement in the second part of the question to analyse and evaluate the tort of defamation in the context of balancing conflicting interests.

In relation to the second part of the question, the protection of reputation is not a right which is explicitly recognised by the ECHR. However, ECtHR interpretation has acknowledged that it falls within the scope of the definition of 'private life' under Article 8, since reputation is an aspect of personal identity and of psychological integrity (see, for example, **Pfeifer v Austria**). The importance of protection for reputation is further recognised by the ECHR because it appears in Article 10.2 as a justification for interference with freedom of expression. Equally, Article 8.2 recognises the importance of freedom of expression by identifying 'the protection of the rights and freedoms of others' as a legitimate aim in restricting protection for the right to respect for private life. In English law, the tort of defamation protects reputation and this part of the question asked students to analyse and evaluate the extent to which it can achieve a satisfactory balance between freedom of expression and protection of reputation. A comprehensive answer did not require detailed knowledge of the elements of the tort but, rather, a recognition that the Defamation Act 2013 takes account of the interest in freedom of expression by providing three defences to an action in defamation, namely, that the statement was:

- substantially true (s2); or
- an honestly held opinion (where the basis for the opinion was stated and any honest person could have held the opinion on the facts existing when the statement was made) (s3); or
- on a matter of public interest and it was reasonably believed that publishing it was in the public interest (s4).

So, the balance between the two conflicting interests can be adjusted by the way in which these defences are interpreted and applied in any particular case. The decision of the Supreme Court in **Lachaux v Independent Print Ltd and another** [2019] came far too late for students to be aware of it but it may be remarked for the future that it tends to tilt the balance further in favour of freedom of expression. The Defamation Act 2013 s1 provides that a statement is not defamatory unless 'its publication has caused or is likely to cause serious harm to the reputation of the claimant'. The Supreme Court has interpreted this to mean that the words cannot merely be examined for their inherent tendency to cause harm. There must be actual evidence of serious harm or the likelihood of its occurrence.

There were some very good answers to this part of the question which revealed an appropriate level of knowledge and understanding of the defences and related the defences to the capacity to engineer an appropriate balance. Also creditworthy were answers which took a more critical and cynical view of the operation of law, arguing that the cost of actions, in the absence of the availability of any public funding, inevitably ensured that only the very rich would be able to seek to protect reputation anyway, no matter how the law might then be interpreted in the pursuit of an appropriate balance. Others suggested perceptively that a person's reputation might never recover once the statement had been published, whatever the truth of the matter, so that, essentially, the law might prove incapable of protecting Article 8 rights against those in Article 10. However, there were many answers which barely addressed this aspect of the question or, as indicated above, confused the action for misuse of private information with an action in defamation. In such instances, of course, credit was attributed to the answer to the first part of the question, wherever possible.

Question 10

In this question, students were informed that Chris and his followers, who were passionately opposed to all manner of exploitation of animals, planned three kinds of protest events:

- a march through the centre of town on a very busy weekend, ending with a demonstration at a very popular zoo with a petition demanding the closure of the zoo;
- persistent obstruction and abuse of workers entering or leaving a factory processing animal products;
- invasion of land on which horse racing and similar events were being held, to try to force cancellation of the events.

The task for students was to consider the rights, duties and remedies, within a human rights perspective, if the planned events went ahead. The instruction provided assistance to students in terms of structure and content by asking them to include in the answer consideration of:

- police powers to control the march and demonstration;
- criminal offences that might be committed during the second and third events;
- the effect on the rights, duties and remedies of relevant rights under the ECHR.

Adopting the structure suggested by this sequence, the powers to control the march and demonstration were to be found primarily in the Public Order Act 1986 ss11-14. Those provisions required Chris, as organiser of a 'public procession' to promote a cause or campaign, to give at least 6 days' notice of the march, specifying matters such as date, time, proposed route, and Chris's name and address. If the senior police officer concerned reasonably believed that there might be serious public disorder, serious damage to property or serious disruption to the life of the community, or the organiser's purpose was to intimidate others to change lawful conduct, then that officer had extensive powers to issue instructions to prevent the disorder, serious damage or serious disruption, including, for example, changing the route and prohibiting entry into any place. Similar provisions applied to the demonstration at the zoo, as a public assembly, including powers to control place, maximum duration and maximum number of persons. Anyone failing to observe an instruction would commit an offence. Consideration of these provisions would have been sufficient to gain maximum marks for this aspect of the question. However, it was also open to students to gain credit by speculating on the possibility that the march and demonstration might be attended by crime and disorder, whether or not from unlawful acts in opposition, so that the police might use breach of the peace powers to control, or even disperse, the marchers/demonstrators, including arrests for breach of the peace and prosecution for obstruction of a police constable. Additionally, there might be Public Order Act 1986 offences such as violent disorder, affray, fear or provocation of violence and harassment, alarm or distress.

The 'picketing' of the factory, involving abuse and obstruction of employees, could inevitably have involved criminal offences such as assault/battery, as well as the Public Order Act offences identified above, and breach of the peace powers might also have been available. However, offences under the Protection from Harassment Act 1997 might have been most appropriate, whether harassment or stalking or the offence introduced by amendments to the Act specifically inspired by activities such as those of animal rights activists (harassment of two or more persons to persuade anyone not to do something that person is entitled or obliged to do or to do something that person is not obliged to do – for example, not to go into work). Chris and his followers would most obviously have committed aggravated trespass in invading land used for purposes such as horse racing, with the intention of stopping the activity. The offence under the Criminal Justice and Public Order Act 1994 s68 is committed when there is a trespass on any land where lawful

activities are being carried out and the intention is to intimidate persons to deter them from engaging in the activity or to obstruct or disrupt the activity. It is also an offence under s69 not to leave, having been instructed to do so.

The 'human rights perspective', apart from not requiring a detailed, criminal law-style exploration of the offences described, brought into play the provisions of the ECHR, specifically Articles 10 (freedom of expression) and 11 (freedom of assembly and association). The crucial point here was that, though Chris and his followers might have been subject to control in various ways by the police and, prima facie, might have committed a number of offences under English law, the Human Rights Act 1998 s6 states that those powers must not be exercised, and those laws must not be applied, in a way which is incompatible with ECHR rights. If the police, as a 'public authority', acted incompatibly in using their powers, then under s7 they could be sued for compensation or other appropriate remedy and the breach could also be relied on in court as a defence, say, to criminal charges. Equally, a decision of a judge (as a 'public authority') which was incompatible could be the subject of an appeal.

However, though any restrictions on the march and demonstration and on the other activities could amount to an infringement of the Article 10 and 11 rights, both Articles (10.2 and 11.2) identify aims, including 'the prevention of disorder or crime', which permit the State to argue that the infringement was justified. Additionally, Article 11 specifies a further aim as being 'for the protection of rights and freedoms of others'. If the State pursued an aim recognised by Article 10.2 or 11.2 and did so in a manner 'prescribed by law' and 'necessary in a democratic society' (corresponding to a 'pressing social need' and by means proportionate to the achievement of the aim), then it may be that no violation would have taken place. Clearly, the most powerful effect of ECHR rights might have been to render incompatible some particular exercise of police powers in relation to the march and demonstration, where, say, changing the route or the end-point, or restricting numbers, or even ordering dispersal for breach of the peace might have been challenged as disproportionate, and so not necessary in a democratic society.

Yet, even in relation to the 'picketing' of the factory or the instances of trespass, the likelihood that criminal offences would be committed does not necessarily rule out the possibility that, from an ECHR perspective, the police might overstep the mark by simply stopping the activities, arresting alleged offenders and prosecuting for offences. Chris and his followers were pursuing a serious aim themselves, and Articles 10 and 11 would support their right to do so to a certain extent. A proportionate response by the police might be to try initially to permit them to express their views at the factory and at racecourses and other locations under some form of police supervision and control, and in a less aggressive manner than suggested by the planned events. Only if that failed might more restrictive action be proportionate.

Answers to the question tended to follow one of three approaches: the approach outlined above; or, more usually, an initial explanation of Articles 10 and 11, followed by some discussion of the English law provisions relating to the march and demonstration and then of possible criminal offences in the two other events. Occasionally, the answers provided a mixture of those two approaches in which the English law provisions relating to the march and demonstration were discussed in the context of Articles 10 and 11, and then the offences were discussed in the context of the Articles. All of these approaches were equally creditworthy, though they were not necessarily equally efficient in ensuring that answers contained a coherent and comprehensive analysis/evaluation and application. Answers generally displayed a reasonable level of knowledge and understanding of the provisions in the Public Order Act 1986 ss11-14, though some were very detailed and comprehensive. However, many answers revealed an incorrect belief that the police had the power under s13 to ban any individual march, rather than the power, in certain

circumstances, to apply to the local authority for an order banning *all* marches ('processions'), or *all* marches of a certain class, for a specified period of up to three months. Many answers also gained credit by exploring issues beyond the powers in the 1986 Act, speculating on how the march and demonstration might have unfolded, and introducing concerns about breach of the peace, utilising cases such as **Howell**, **R (Hicks) v Commissioner of Police for the Metropolis**, **R (Laporte) v Chief Constable of Gloucestershire**, and **Austin v United Kingdom**. Some answers also cited **Beatty v Gillbanks** and asserted the importance of protecting those who are peacefully protesting against the actions of those who may wish to disrupt peaceful protest by instigating or provoking breaches of the peace.

Students were much less adept at dealing with the criminal offences that may have been committed in the second and third events. Answers were often very general, citing traditional offences such as assault, battery and more serious offences against the person, and identifying trespass without any reference to the possible offence(s) involved. Answers also quite commonly repeated, or perhaps introduced, discussion of breach of the peace. All of these suggestions gained some credit but they did not quite meet the human rights focus that the facts in the scenario were designed to encourage, and that discussion of offences in the Protection from Harassment Act 1997 and the Criminal Justice and Public Order Act 1994 might have promoted. Some answers also gained credit by moving into areas such as arrest and detention, relying on the provisions of the Police and Criminal Evidence Act 1984. Some students assumed that there would inevitably be trespass at the zoo and at the factory, though the facts tended to suggest that Chris and his followers intended to remain in public areas outside both. Even more surprisingly, some students interpreted the march and demonstration as encompassing the picketing and trespass events, despite their clear separation in the scenario and their evident difference in nature. This led to confusion, in particular, about the use of police powers under ss11-14 of the 1986 Act.

Once again, answers usually demonstrated a reasonable level of knowledge and understanding of Articles 10 and 11, with some especially good explanation of the rights protected, citing cases such as **Handyside v United Kingdom** on Article 10 and **Plattform 'Artze fur das Leben' v Austria** on Article 11. More effective answers provided a clear analysis of the circumstances in which infringement of the rights may be justified and linked the requirements to the facts of the scenario in application. Less effective answers commonly dealt with only part of the requirements successfully to establish justification and tended to treat application very superficially, so that the full potential effect of the ECHR rights and obligations did not emerge. Some students appeared to be writing under a rather more fundamental misapprehension that Chris and his followers could be in breach of their own Article 10 and 11 rights, and so could incur liability of some sort. No doubt this is because the right protected by Article 11 is one of 'peaceful' assembly, and the plans did not necessarily envisage 'peaceful' activities. Nevertheless, the obligation is on the State and only the State can violate it. For the same reason, discussion of the Article 8 rights of the workers at the factory was not really relevant. The actions of Chris and his followers could not make them liable for violating Article 8.

On the whole, answers did not develop explanation and application of the remedies, many simply arguing that compensation might be available without referring at all to the Human Rights Act 1998.

Question 11

In this question, students were asked to consider the application of human rights law to a series of incidents arising out of the activities of a gang engaged in drug dealing and out of the intervention,

or non-intervention, of the police. Acting on usually reliable intelligence, the police had badly mismanaged an operation to disrupt an anticipated attack on the gang by a rival gang. During the operation, the police had shot and killed Ferdy, a gang member, in unexplained circumstances, whilst Ed had taken the opportunity to stab and seriously injure Dev, a fellow gang member whom he suspected of disloyalty. Dev had previously alerted the police to his fear that his life was in danger but they had refused to protect him unless he gave them information about the gang. In driving at excessive speed to participate in the operation, a police car had collided with Gaz, an innocent passer-by, causing him serious injury.

Clearly, the police bore direct responsibility for the death of Ferdy and for the serious injury to Gaz. By contrast, Ed was directly responsible for the serious injury to Dev and the police were only indirectly responsible, if at all. However, Ferdy's death and the serious injuries to Dev and Gaz all engaged the right to life under Article 2 of the ECHR, the violation of which does not necessarily depend on an actual death if serious risk to life was clearly involved. The State (again, as represented by the police in this instance) is under an obligation not to deprive anyone of life intentionally. Article 2.2 permits very limited exceptions to this obligation, which include 'the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence, and (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained'. There is a strong subjective component in the determination of whether the force used was 'no more than absolutely necessary', so that the ECtHR will rarely find against an honest but mistaken belief that grounds are subjectively reasonable (**Armani Da Silva v United Kingdom**). However, creative interpretation of Article 2 by the ECtHR dictates that the judgment of whether the use of lethal force was 'no more than absolutely necessary' encompasses considerations not only of the immediate threat to life of police and others if lethal force is not used but also of the factors which contributed to the creation of the risk to life. Consequently, use of lethal force which might appear to be no more than absolutely necessary in view of the immediate risks may yet not be justified if the risks arose from, or were exacerbated by, poor training of police (say, in the use of firearms) or incompetence in the planning and conduct of a police operation (**McCann v United Kingdom**). The ECtHR has also developed the positive obligation on the State under Article 2 to ensure a thorough and independent enquiry into all cases of suspicious deaths in which the State may be implicated. The enquiry must be capable of establishing the facts and of attributing responsibility, where appropriate. In English law, this obligation may be satisfied by a combination of criminal prosecution and coroners' inquests, though the latter may not always function adequately (Hugh Jordan).

The scenario provided no explanation of how and why the police shot Ferdy but it did indicate that conflict between the two gangs would involve weapons, including firearms. Consequently, it was impossible to be certain whether the killing could be justified and the task for students was to explain and analyse the law and to speculate briefly on its application to realistic possible alternatives (for instance, that the police officer who shot Ferdy honestly believed his own life and/or that of his fellow officers was at risk because of Ferdy's possession and imminent use of a gun, or that the police officer shot Ferdy without properly assessing the danger or without giving Ferdy an adequate opportunity to surrender a weapon).

Further creative interpretation of Article 2 by the ECtHR has extended its scope far beyond the negative obligation not to take life and has developed a positive obligation to protect life, including in circumstances where the threat is from another person who does not represent the State, as in common instances of unlawful homicide. To fulfil the positive obligation, the State must have laws which prohibit unlawful killing and procedures for their enforcement but, in addition, the police must offer protection to individuals where they know, or ought to know, that there is a real and immediate risk to the life of an identified individual from the criminal acts of a third party. In those

circumstances, failure by the police to take measures within the scope of their powers which might reasonably have been expected to avoid the risk will be a violation of Article 2 (**Osman v United Kingdom**). The issue for students, here, was whether Dev had given the police sufficient information on which, at the very least, they ought to have known that there was a real and immediate risk to his life from Ed. This was open to argument, but the police should have taken into account his age and potential vulnerability and their decision whether or not to intervene should not have been informed in any way by Dev's own attitudes to gang membership and activities, or by their desire to take advantage of his situation to extract information about the gang.

It is possible that the serious injury to Gaz caused by police driving dangerously fast in narrow streets on their way to disrupt the gang violence could have been brought within the umbrella of possible violations of Article 2 already discussed in relation to Ferdy. However, it is more likely that the injury would be redressed by an action in the tort of negligence, following the decision in the Supreme Court in **Robinson v Chief Constable of West Yorkshire Police** that **Hill v Chief Constable of West Yorkshire** is not authority for the proposition that the police enjoy a general immunity from suit in respect of anything done by them in the course of investigating or preventing crime. Since the police are now held to be generally under a duty of care to avoid causing personal injury where such a duty would arise according to ordinary principles of the law of negligence, there was every reason to suppose that Gaz would succeed in an action for damages in circumstances where the police alone were responsible for the dangerous driving which caused his injuries.

In the cases of Ferdy and Dev, if the police conduct was in violation of Article 2, then they would be able to allege a breach of the Human Rights Act 1998 s6 under s7, and be able to sue for remedies including compensation as indicated in s8 (see the explanation above in the comments on question 10).

Answers generally recognised that the facts in the scenario raised Article 2 issues and most were able to provide some explanation of the exceptions permitted by Article 2.2(a)-(c), though in varying degrees of depth and accuracy. This meant that answers usually addressed the issue of Ferdy's death and made some claim that the police might be able to justify shooting him dead because the use of lethal force was 'absolutely necessary' in defence of others or to effect an arrest. Curiously, many made judgments on a version of the facts for which there was no evidence in the scenario. This usually took the form of an assertion that the killing was in breach of Ferdy's Article 2 rights because of various alleged failures by the police, rather than an argument based on assessment of different alternative *possible* circumstances in which the killing occurred. Many answers made perceptive reference to **McCann v United Kingdom** and **Armani Da Silva v United Kingdom** in relation to 'force absolutely necessary' but only a surprisingly smaller proportion recognised the significance of the errors made in the planning and control of the operation and concluded that those errors in themselves could have deprived the police of the claim to be justified in killing Ferdy. However, many answers correctly explained that the State would also be in violation of Article 2 if an appropriate, thorough and independent enquiry into Ferdy's suspicious death (and the serious injuries to Dev and Gaz) was not carried out.

Answers generally dealt less well with the issues concerning the stabbing of Dev. Some fully understood the nature of the positive obligation on the police and the requirements laid down in **Osman v United Kingdom**. However, more usually, students remarked upon the positive obligation but provided incomplete explanation of the requirements, or appeared entirely unaware of them. Even the more effective answers rarely bothered to examine the facts carefully enough to determine whether the requirements were met, a conclusion which was by no means certain. In relation to the serious injury to Gaz, most answers either tried to include his case within the general

umbrella of the discussion in relation to Ferdy or made rather general observations about the failure of the police to take sufficient care when driving at speed in the narrow streets. Both approaches gained some credit but not at the level available for an approach which considered the relationship between operational decisions, the general duty in negligence and human rights implications. In relation to remedies, there was perhaps a little more explanation and application of the provisions of the Human Rights Act ss6-8 than in question 10. Yet there were also many answers which relied simply on general remedies such as compensation without establishing the basis for the remedy in any specific legal action. Ironically, as indicated above, the action in negligence and possible substantial compensation available to Gaz for the injuries he suffered were not usually mentioned.

The final part of this question asked students to assess the meaning and significance of classifying the right to life as a fundamental human right. The marks available for this part of the question made it very important that students should attempt to present a response and most did so. On the whole, answers developed a practical rather than theoretical discussion of the right to life. This usually took the form of a debate about the extent to which Article 2 fully protects the right to life, in view of its failure to prohibit abortion and, conversely, of its failure to protect the 'right to die' in view of its refusal to intervene in cases of assisted dying. This was a creditworthy approach that was sometimes supplemented by arguments about the right to life being 'non-derogable' (a notion that was often misunderstood to mean that there could be no exceptions, rather than that States have more restricted powers under Article 15 than would apply to the rights protected by most other Articles), and occasionally by discussion of the determination of the ECtHR to extend the positive obligation to protect life into areas such as medicine and the environment. Some answers did attempt to consider more theoretical issues, such as the extent to which human rights are universal and inalienable. Surprisingly few answers, however, sought to argue that there may be a hierarchy of rights, with the right to life occupying the highest position since any alleged protection for other human rights would be rendered spurious by a failure to protect the right to life.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website.

Use of statistics

Statistics used in this report may be taken from incomplete processing data. However, this data still gives a true account on how students have performed for each question.