Principles of Public Law

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LIBERTY OF THE PERSON

21.1 Introduction

The most basic of all freedoms is personal liberty from detention. This is recognised in Art 5 of the European Convention on Human Rights (ECHR) which states that 'everyone has the right to liberty and security of the person'. The term 'security' means simply that detention by a public authority must not be arbitrary; individuals should be secure from the unexplained and unlawful actions of the State: *Bozano v France* (1987). There are, however, circumstances in which it may be desirable for public officials – police constables, prison officers, judges, social workers, hospital managers, immigration officers and others – to deprive someone of this liberty. This is so, for example, where people are suspected or convicted of committing crimes; when people become so mentally ill that they are at risk of harming themselves or others; and also when people from overseas arrive in Britain who are suspected of being dangerous or of seeking to gain illegal entry into the country. Article 5(1) provides an exhaustive list of reasons for depriving a person of liberty, which the European Court of Human Rights has interpreted strictly. Arrests, detentions and imprisonments are constitutionally legitimate only if they are carried out in accordance with the law and if the law is fair. This, of course, begs many questions. To be constitutional, a person's detention must be both in accordance with the UK's national laws and also the ECHR: see *Loukanov v Bulgaria* (1996).

This chapter focuses mainly on the criminal justice system – the work of the police, criminal courts and the prison service – as it is within this sphere of government responsibility that people are most likely to lose their liberty. A significant proportion of people in this country will, at some time during their lifetime, be questioned by the police, charged with a criminal offence, stand trial and then be convicted. Many more are questioned and released without trial. Others stand trial and are acquitted. The constitutional system attempts to strike a balance between two competing demands. On the one hand, it facilitates the control of criminal activity by conferring powers on the police, courts and prison service; on the other, it emphasises the rights of suspects to be treated fairly. Whether the system hits the right balance is a deeply contentious question that can only be answered by examining the legal powers which public authorities have to detain people and the legal limitations placed upon those powers.

Central to those limitations is the concept of 'due process', a term which is shorthand for a package of safeguards for people detained by public

authorities. In the UK, due process is recognised and protected by statute, common law and the ECHR (especially Arts 5 and 6), which will be considered in the following pages). This country has not ratified Protocol 7 to the ECHR, parts of which are relevant to this issue. Article 1 of Protocol 7 prohibits the expulsion of aliens from the territory of a State except in pursuance of a decision reached in accordance with the law. This Article also includes the right of an alien facing expulsion to have his case reviewed and an opportunity to submit reasons against his expulsion. Article 2 obliges signatory States to provide a mechanism of review of an individual's conviction for a criminal offence, and Art 3 guarantees compensation for miscarriages of justice. European Community law has, as yet, relatively little to say on the right to liberty of the person, though this is likely to change in the future with the development of the 'third pillar' of the European Union on police and judicial co-operation on criminal matters (see above, 7.2.3 and 7.7.2).

In the following sections we look, first, at the powers of and constraints on police during the process of investigating crimes; secondly, at the constitutional requirements for fair trials of criminal cases; and thirdly, at the rights of people sentenced to imprisonment after conviction.

21.2 Police powers during criminal investigations

Before a police officer in England and Wales reaches the point of formally charging a person with a criminal offence and sends a case to the prosecuting authorities (generally, the Crown Prosecution Service) who decide whether the person should be sent for trial, sufficient evidence has to be gathered. The law permits police officers to obtain that necessary evidence in several different ways: a suspect may be stopped and searched, formally arrested and questioned. (On police powers to enter and search premises, see below, 23.2.2.) The constitutional precondition for taking such actions is that the officer has 'reasonable suspicion'. Article 5(1)(c) of the ECHR allows:

> ... the lawful arrest or detention of a person effected 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.

This does not permit arrest solely for the purpose of gathering evidence; there must be a reasonable suspicion of an offence having been committed. The production of evidence is, in other words, an incidental consequence of the arrest, not one of the conditions for it.

English law also reflects this imperative of reasonable suspicion before taking action. It is set out in the Police and Criminal Evidence Act 1984 (PACE). When this legislation was enacted, it sparked off great controversy: critics claimed that it overemphasised the importance of securing convictions

at the expense of suspects' rights. The police may only stop and search people on the basis of the officer's reasonable suspicion of an offence or the presence of stolen goods, drugs, unlawful weapons, tools to be used in a burglary, etc. PACE lays down detailed steps to be followed (ss 2 and 3 and Code of Practice A) before a police officer may lawfully conduct a search, such as the provision of his or her name and police station and the object of the search, as well as the requirement to make a record of the search to be provided to the subject. Under s 24 of PACE, police officers have a discretion to arrest people on 'reasonable suspicion' that an arrestable offence has been committed.

In English law, the test of reasonable suspicion is twofold: it requires the arresting officer to have formed a genuine suspicion in his or her own mind; but also that a reasonable person would have also reached the same conclusion based upon the information available – see the House of Lords' decision in *O'Hara v Chief Constable of the Royal Ulster Constabulary* (1997). Merely acting on the instructions of a senior officer cannot, in itself, give an arresting officer 'reasonable suspicion' to satisfy the first limb of the test; there has to be some further basis, such as the officer's own observations or a report from an informer.

The European Court of Human Rights has also had to consider the meaning of the 'reasonable suspicion' requirement in Art 5. As we have noted, Art 5(1)(c) only permits the arrest of a person when there is a 'reasonable suspicion' that he or she has committed an offence. The 'reasonable suspicion' standard is, therefore, a cornerstone requirement of Art 5(1)(c). The clearest interpretation of this standard is provided by the ruling in *Fox, Campbell and Hartley v UK* (1990), where it was held that the signatory States had to satisfy the Court that there existed sufficient evidence to establish the objective 'reasonableness' of the suspicion. The arresting constable's 'honestly held suspicion' was not sufficient, as it had been held to be by the English courts. In *Loukanov v Bulgaria* (1997), the Court ruled that the level of reasonable suspicion required by Art 5 had not been satisfied when the applicant, a minister in the previous government, was arrested and detained, allegedly for misappropriation of funds. The Commission found that the grounds of the accusations referred solely to the applicant's transfer of money in aid to the Third World, which was not an offence. Therefore, the facts invoked against the applicant at the time of his arrest and during his continued detention could not, in the eyes of an objective observer, be construed as amounting to the criminal offence of misappropriation of funds and, therefore, there was no reasonable suspicion of his having committed an offence to justify his detention. The level of objectivity required by the European Court of Human Rights depends, to a certain extent, on the length and circumstances of the detention imposed. In *Murray v UK* (1995), the Court was satisfied that evidence from the national court proceedings that the applicant had been involved in terrorist activities, coupled with evidence about these activities from Murray's family members, constituted reasonable suspicion justifying

four hours' detention, the brevity of which was clearly influential on the Court's findings. It appears, therefore, that the Court will not require external evidence as a basis for 'reasonable suspicion' in all cases, and, therefore, the standard laid down by the House of Lords in *O'Hara* (above), is probably consistent with the Convention.

There are three main sanctions for police officers who carry out searches or make summary arrests without having the sine qua non of reasonable suspicion. One is that they may eventually find themselves being sued for damages in tort by the suspect for wrongful arrest and unlawful imprisonment. Secondly, police officers ought to be aware that, if an unlawful search or questioning produces evidence which the prosecuting authorities seek to rely upon at the defendant's trial, the court may exclude such evidence (see below, 21.2.3). Thirdly, police officers may be subject to internal disciplinary proceedings by their police force.

21.2.1 Arrests

Arrest in England and Wales may either be under warrant or without a warrant. A magistrate may issue a warrant to arrest a person where the suspected offence is one which carries the sentence of imprisonment, or where the person's address is unknown so it is impossible to serve a summons requiring attendance at the magistrates' court. The police can arrest people without a warrant for a number of 'arrestable offences' set out in s 24 of PACE. They can also arrest for non-arrestable (generally, less serious) offences where the offence is in the process of being committed or where it would be impracticable to serve a summons on that person, either because their identity or address is unavailable or because they might harm themselves or someone else or cause damage to property (s 25 of PACE).

PACE also authorises 'citizens' arrests', provided the offence in question is an 'arrestable offence', listed in the Act and it has actually been committed, or is about to be committed. Members of the public are therefore at risk of being liable for wrongful arrest if their suspicions are not grounded in fact: *Walters v WH Smith and Son Ltd* (1914).

21.2.2 Police interrogation

The PACE rules require an arrested person to be taken straight to a police station, since it is only when he or she gets there that the process of monitoring the conduct of the investigation can begin. The rules on the treatment of suspects detained after arrest, but before charge, are laid out in PACE and its codes of practice (for a detailed analysis, see Zander, M, *The Police and Criminal Evidence Act 1984*, 3rd edn, 1995, London: Sweet & Maxwell). At the police station, a designated 'custody officer' has the statutory responsibility for supervising the investigative process by checking that all the

requirements of PACE are fulfilled. His or her first task is to determine whether in fact it is necessary to detain the suspect at all, or whether there is enough evidence to charge then and there and release the suspect on bail. In principle, if there is not enough evidence to charge, the suspect should be allowed to go free immediately, since there is nothing to justify their continued detention. However, PACE permits the custody officer to authorise continued detention if there are reasonable grounds for believing that pre-charge detention is 'necessary to secure or preserve evidence relating to the offence' in order to obtain such evidence from the suspect (s 37).

Provided they observe certain procedural requirements, the police may enter and search the arrested person's property for material relating to the offence and seizure and retention of items in the property (ss 18, 19 and 32). Separate provisions under PACE set up safeguards for detainees being searched in police stations (s 54); controls on the taking of fingerprints (s 61) and the conduct of intimate searches (s 55). Intimate samples such as urine, blood or pubic hair may only be taken with appropriate consent (s 65). While in detention, the suspect has the right to inform a person of their arrest (s 62).

A person detained by the police generally has a right of access to a solicitor (s 58) and for that lawyer to be present during questioning. There are exceptions, however, particularly in the context of anti-terrorism legislation. This right may be delayed on several grounds listed in PACE and in the relevant provisions of the Prevention of Terrorism (Temporary Provisions) Act 1989. In cases of a serious arrestable offence, the superintendent may delay access to a solicitor if there are reasonable grounds for believing that the exercise of such a right will lead to interference with evidence related to the offence, or physical injury to other people; or if it is likely that contacting a solicitor might alert accomplices or hinder the recovery of property obtained as a result of the offence for which the suspect has been arrested, s 58(8). Where a person has been detained for a terrorist offence, access to legal advice may also be delayed if there are reasonable grounds to believe that the exercise of such a right will interfere with the gathering of information about the commission and preparation of acts of terrorism, or will alert someone preparing to commit a terrorist act, which would make it more difficult for preventative action to be taken.

These exceptions have been held by the European Court of Human Rights, in certain situations, to be a violation of Art 6(3)(c) of the ECHR (set out below, 21.3) which guarantees the right of a person charged with a criminal offence to legal representation. This right applies to pre-trial questioning, as well as the conduct of the trial itself: in *Murray v UK* (1996), the applicant was denied access to a lawyer for the first 48 hours of his detention and after that period his solicitor had not been permitted to be present during interviews with the police. The court ruled that, in view of the fact that remaining silent had serious consequences at the trial (see below, 21.3.4), the pressure on the

accused to speak to the police was sufficiently great to warrant the presence of a lawyer. Therefore, Art 6(3)(c) had been violated.

If the police flout the safeguards contained in PACE, they run the risk that a trial judge will rule that confession and other evidence be excluded at trial. Section 76 requires the courts to exclude confessions obtained as a result of oppression, or in consequence of anything said or done which might render that confession unreliable. Judges have a common law discretion to exclude unreliable confessions: *R v Miller* (1986). Section 78 gives the judge a general discretion to exclude evidence, including confessions, which was unfairly obtained. The problem for suspects is that they have to wait until trial to find out whether the breach of PACE safeguards will lead to the exclusion of prosecution evidence; in some cases it does, in other cases it does not. In general, courts do not regard it as their duty to penalise the police by excluding evidence unlawfully obtained (see Sanders, A and Bridges, L, 'Access to legal advice and police malpractice' [1990] Crim LR 494). This position is unlikely to be changed by the Human Rights Act 1998 and the incorporation of the ECHR, Art 6(1) of which does not lay down specific rules as to the admissibility of evidence. In practice, unlawfully obtained evidence has not been found to have automatically rendered the trial unfair: *Schenk v Switzerland* (1988).

The difficult balance between efficient investigation of crime and the rights of suspects has been analysed by Ashworth ('Should the police be allowed to use deceptive practices?' (1998) 114 LQR 109), who identifies a hierarchy of police 'tricks', which may or may not amount to breaches of PACE and its Codes, but do constitute deception of one sort or another. In Ashworth's view, tape recording and electronic surveillance are lowest on the scale of objectionability. Slightly more dubious, but still justifiable in some criminal investigations, is the use of informers or agents, or 'sting' operations. The activities that should not go unsanctioned, however, are the tricks which impact upon suspects' rights, such as the failure to inform them of their right to a solicitor.

In the past, suspects have been able to refuse to answer questions in the police station, and could also refuse to give evidence on their own behalf at trial, without any adverse inference being drawn from their silence. The position was changed by the Criminal Justice and Public Order Act 1994, ss 34, 36 and 37 of which stipulate that if the defendant wishes to rely during his trial on any fact or piece of material evidence which he had failed to mention or account for to the police whilst being questioned before charge, it is open to the trial court to draw adverse inferences from his silence. Before commencing questioning, the police caution suspects in the following manner:

> You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence [Code C, para 10.4].

21.2.3 Duration of detention

Clearly, once the custody officer makes the decision to detain without charge, there must be some limit on how long this period of detention lasts. An initial period of 24 hours is prescribed by PACE, renewable for up to a period of 36 hours (ss 41 and 42). Detention may only be extended in these circumstances if it is necessary for the purposes of obtaining evidence and if the offence forms one of the 'serious arrestable offences' listed under s 116 of the Act. After the first 36 hours have elapsed, the investigating officers may only extend the detention under a magistrates' court warrant, which gives the suspect an opportunity to oppose the application in court. Magistrates' warrants may extend the total time spent in detention before charge up to a period of 96 hours.

Different, and more controversial, time limits apply to people arrested under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA). This Act permits detention without charge for 48 hours. When this period elapses, the Home Secretary can authorise another five days, making the total period of detention for terrorist offences a full week. These powers of detention have brought UK law into conflict with the ECHR. Article 5(3) provides: 'Everyone arrested or detained ... shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.' In 1988, the European Court of Human Rights held that detention under the PTA for seven days breached this requirement: *Brogan v UK* (1988). This judgment turned not on the legality of the detention itself, but on the length of time a suspect could continue to be held before having access to a judge to assess the justification for this prolonged detention. The government's response was not to amend the PTA to bring it into line with the Convention, but to serve a derogation notice under Art 15 in respect of its obligations of 'promptness' in this Article. This means that, for the duration of the derogation notice, it is not obliged to observe this particular requirement and no one can allege a violation of it before the European Court of Human Rights (see above, 19.5.1). A challenge to the terms of the derogation itself failed: *Brannigan v UK* (1994).

The ECHR does not require that the accused should be released on bail the minute he or she is charged with an offence. Article 5(3) permits detention on remand if there are 'relevant and sufficient grounds': *Wemhoff v Germany* (1979). There are four grounds which the European Court of Human Rights accepts as justification for continued detention. If, from the severity of the proposed sentence, and the detainee's own circumstances, it is likely that he or she will escape, continued detention will not breach Art 5(3). Equally, if it appears likely that the accused person will interfere with the course of justice, by destroying documents, or colluding with other possible suspects and interfering with witnesses, continued detention will be justified. The public

interest in the prevention of crime is another ground for justification; this will be relevant if there are good reasons to believe that the accused will reoffend on release. The difficulty of this argument is that the accused is presumed to be innocent until proved guilty by a court of law; this seems inconsistent with allowing the authorities to continue detention on the basis that the accused might repeat the offence of which he or she has not yet been proved guilty – see the dissenting opinions in *Matznetter v Austria* (1979). The final ground for continuing detention is the preservation of public order; this argument will only succeed if there is objective justification for the prospect of a risk to public order posed by the accused's release: *Letellier v France* (1991). In any event, this detention cannot extend beyond a reasonable time; the arrangements for trial must be reasonably expeditious, although the ECHR does not set any maximum length of pre-trial detention.

21.2.4 Ill treatment during interrogation

It was mentioned earlier (see above, 21.2.2) that, if confessions are obtained from suspects in circumstances which are 'oppressive', the judge has a discretion to exclude the evidence in the subsequent criminal proceedings (s 76(2)(a) of PACE). The burden is on the prosecution to prove beyond reasonable doubt that the police did not behave oppressively. Such oppressive behaviour was found to have taken place when suspects were subjected to 13 hours of hostile questioning in the *Cardiff Three* case (1993). The Convention prohibits 'torture, inhuman or degrading treatment' under Art 3, and many complaints under this provision are made in relation to police or prison officer brutality. A number of Turkish cases have come within the scope of Art 3, where suspects have been subject to Palestinian hanging, beating on the feet and rape (*Yagis v Turkey, Aydin v Turkey* (1998)). In less extreme cases, the European Court of Human Rights has said that, in respect of a person deprived of liberty, any recourse to physical force which has not been made strictly necessary by his or her own conduct diminishes human dignity and is in principle an infringement of the right in Art 3 (*Ireland v UK* (1978); *Ribitsch v Austria* (1995)).

21.3 The conduct of criminal trials

After a person has been formally charged with an offence in England and Wales, the decision whether to proceed with a prosecution is made by the Crown Prosecution Service which assesses the strength of the evidence gathered by the police, and also whether a trial is in the public interest. It is important that criminal trials are conducted fairly; many detailed rules of evidence and criminal procedure, which fall outside the scope of this chapter, attempt to ensure that this is so. There are also some basic constitutional

principles which need to be adhered to. They are set out in Art 6 of the ECHR (the first paragraph of which also applies to civil proceedings).

> 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

21.3.1 Criminal and civil trials distinguished

It should be noted that Art 6 places greater safeguards on a defendant's rights in criminal trials than in civil proceedings, although many of the guarantees set out in Art 6(2)–(3) have now been implied into the general concept of 'fairness' in Art 6(1) for civil proceedings. Article 6(2) and (3)(a)–(e) contain rights specific to individuals subject to a 'criminal charge'. The application of these rights depends on there being a 'criminal charge' in the first place; the European Court of Human Rights will not accept the State's definition of a case as 'civil' or 'administrative' if, in substance, it amounts to a criminal charge: *Engel and Others v The Netherlands* (1979). The characterisation of a charge as criminal rather than civil depends upon the imposition of a penalty. The more severe the sanction, the more likely it will be that the European Court of Human Rights will classify a matter as 'criminal'. Thus, the

imposition of prison sentences on people who, during the 1980s, refused to pay the Community Charge (a controversial local tax, dubbed the 'poll tax') was held to be a 'criminal charge' even though, under English law, defaulting on payment was a civil matter and the applicant ought to have been provided with free legal assistance: *Benham v UK* (1996).

21.3.2 Trial by jury

In England, the right to trial by jury is often regarded as of constitutional importance. Magna Carta 1215 (see above, 3.3) provided that 'No freeman shall be taken or imprisoned ... except by lawful judgment of his peers or the law of the land'. The ability to have serious criminal charges determined by a random selection of ordinary fellow citizens is an important safeguard against government. While some questions before a court turn on complex issues of law, appropriate only for a qualified judge to decide on the basis of the arguments and evidence before him, criminal trials usually involve questions of fact – whose story is most credible – and issues relating to public notions of morality, such as whether an item is 'degrading' in the eyes of the public for the purposes of censorship legislation (see below, 24.6). There is much to be said for a group of lay people deciding both types of question on the basis of common sense; legal learning adds little, if anything, to these issues. The judge directs a jury on the law, leaving the issues of fact for the jury to decide. But sometimes, a judge's direction is designed to lead the jury towards a conviction; on a few occasions the jury has demonstrated its independence by refusing to convict. A famous example of this was the trial of a civil servant in 1985 for breach of the Official Secrets Act 1911. Clive Ponting had supplied classified information to an MP on the sinking of the Argentine ship Belgrano during the Falklands War. In the subsequent criminal trial, the jury returned an acquittal, despite the judge's direction to the effect that they had no choice but to find Ponting guilty of the offence charged (*R v Ponting* (1985)). This – and other – celebrated instances of the jury's independence, however, have not ensured the survival of the right to trial by jury for the indefinite future. In early 1998, the government adopted proposals that had been made by the Runciman Commission on Criminal Justice five years previously that this right should be abolished for certain types of crime, such as burglary, if the magistrates recommend summary trial in a magistrates' court. There are also moves afoot to abolish lay juries in complex fraud trials, possibly substituting for them a panel of experts.

As far as the ECHR is concerned, there is no express right within Art 6 to trial by jury (most of the signatory States to the Convention do not use juries anyway). Indeed, when the so called Birmingham Six argued that new evidence of terrorist offences should not have been considered by the Court of Appeal, submitting that they could not receive a fair trial unless the evidence

was heard in its entirety by a jury, the Commission found no reason why new evidence could not be fairly and properly assessed by an appellate body of professional judges (*Application No 14739/89*).

21.3.4 Self-incrimination and the right to silence

Article 6(2) of the ECHR lays down the basic constitutional principle that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. This does not, however, bar adverse inferences being drawn at trial from an accused's decision to remain silent during police interrogation (*Murray v UK* (1996)) and the new form of police caution (see above, 21.2.3). What Art 6 does prohibit, however, is the use of compelled evidence in criminal trials. This is the so called 'privilege against self-incrimination', which has been implied into the general concept of fairness in Art 6(1), the principle being that the State should bear the general burden of establishing the guilt of the accused, and the accused is entitled not to be required to furnish any involuntary assistance by way of a confession. The privilege against self-incrimination does not apply at hearings conducted by regulatory bodies: *R v Morissey and Staines* (1997). Under the Companies Act 1985 and some other legislation, special investigators have been given powers to compel evidence, documentary or oral, in their proceedings. Difficulties have arisen in the UK when people investigated in this way have subsequently been prosecuted. In *Saunders v UK* (1996), Ernest Saunders claimed a violation of his right to a fair trial under Art 6. He had been compelled to give evidence to Department of Trade and Industry inspectors during an investigation into the take-over battle between Guinness plc and the Argyll Group for Distillers, and that evidence had been used against him in subsequent criminal proceedings. The European Court of Human Rights upheld his claim. In *Funke v France* (1993), Funke claimed that his conviction for failing to produce bank statements relevant to investigations into suspected customs offences was a violation of Art 6. The Court held that, by attempting to compel him to produce incriminating evidence, the State had infringed his right to silence. In *Saunders*, what the Court objected to was not the procedure used by financial regulatory authorities to compel evidence from a witness in their investigations – the Court acknowledged the very special difficulties of proof in these fraud investigations and such procedures are not themselves covered by Art 6 – but the subsequent criminal proceedings are, and if the compelled evidence is used as part of the prosecution's case in a criminal trial, there will be a violation of the defendant's fair trial rights under Art 6. In *Funke*, on the other hand, the Court found that the level of coercion exercised by the customs in that particular case was not justified by the economic interests of the State, and such primitive measures brought the applicant within the protective ambit of Art 6.

21.3.5 Right to cross-examination

A defendant has a right to cross-examine witnesses under Art 6(3)(d) of the ECHR. Although this right is not absolute, it may be that the Youth Justice and Criminal Evidence Act 1999 falls short of ECHR requirements here. Section 34 of this Act prohibits defendants in rape cases who represent themselves cross-examining their alleged victims about the offence itself or any other offence, of whatever nature, with which that person is charged in the proceedings. This amendment to the law was introduced as a consequence of a controversial case where a rape defendant spent six days questioning his victim, dressed in the clothes which he had been wearing when he assaulted her. This restriction of a defendant's rights of cross-examination in person has yet to be tested for its compatibility with Art 6. However, the European Court of Human Rights' case law suggests that such a challenge will not meet with success, not least because the legislation does not abolish the right to cross-examine altogether. In *Baegen v The Netherlands* (1995), the Commission found no violation where an accused was able to confront the alleged victim of sexual abuse during police investigations, but did not have the opportunity to question her during the criminal proceedings. It was significant, in the Commission's view, that the accused in this case had had the opportunity to challenge the reliability of her evidence on file, a challenge which had failed in the event. In this and another case, *Doorson v The Netherlands* (1996), the Court case law tends to recognise that States should take into account the interests of 'witnesses in general, and those of victims called upon to testify in particular'. Therefore, the rights of the defence should be balanced against those of the individuals called upon to testify, particularly if the life, liberty or security of the person is at stake. In a later case, the Court has upheld a complaint under Art 6(3)(d), where the evidence against the applicants was given by anonymous police officers to a judge in chambers. The court considered that the interrogation of the anonymous officers by the judge was not a proper substitute for allowing the defence to question the witnesses and form their own judgment as to their reliability (*Van Mechelen and Others v The Netherlands* (1997)). It is probable, in the light of the above, that courts will be less ready to find a breach of Art 6(3)(d) where the interests of the witness, who may be vulnerable in some way, can be balanced against that of the accused.

21.3.6 Imprisonment after conviction

Once a defendant has been convicted of an offence, he or she may be sent to prison. Under Art 5(1)(a) of the ECHR, imprisonment will only be authorised if it follows conviction by a competent court and with a procedure prescribed by law. The requirement that a conviction must be 'lawful' not only refers to the national laws of the signatory States, but applies to the obligations set out in Art 6, in particular, those relating to the specific protections of defendants in

criminal trials, discussed above. That means that, if the trial leading to a conviction did not satisfy all the requirements laid down in the Article, the conviction will not be lawful and the imprisonment will be outside the permitted categories of Art 5.

In England and Wales, the length of a prison sentence is, in most cases, determined by the sentencing judge within the limits imposed by the statute relevant to the offence. However, for the mandatory life sentence for murder and discretionary life sentence for other serious offences, the sentencing power is, in effect, divided between the judiciary and the executive. The judiciary recommends a minimum period of detention the convicted person must serve before his or her sentence comes up for review by the parole board; their release thereafter is down to the discretion of the Home Secretary. The judicial recommendation for the minimum period served for the first 'penal' part of the sentence for 'lifers' has been followed in the past by successive Home Secretaries when they have come to operate their release decision. However, in recent years, public demand for retribution in murder trials has led to minimal 'tariff' periods being extended by the executive in a way that departed, not only from judicial guidelines (*R v Secretary of State for the Home Department ex p Doody* (1994)), but from minimum periods proposed by previous executive statements (*R v Secretary of State for the Home Department ex p Pierson* (1997)). In both cases, the period imposed by the Home Secretary was overturned in judicial review. In *Doody*, it was held that, where the Home Secretary was carrying out a quasi-judicial role, he should give reasons for his decision, to allow the prisoner some inkling as to when he or she would be considered eligible for release. In *Pierson*, it was held, for the same reason, that the Home Secretary had no more power than a judge to increase a sentence retrospectively (see below, 22.3).

Once the prisoner starts serving a sentence, the rights available to free citizens should, in theory, continue to be available to him or her, subject to limitations that are indispensable to prison management. At its most basic, the common law protects prisoners from unnecessarily oppressive treatment during their detention. If the physical conditions under which prisoners are kept are intolerable, or if they are subject to extreme psychological discomfort, such as denial of sleep, they may apply for judicial review (*R v Deputy Governor of Parkhurst Prison ex p Hague* (1991)), although there will be no opportunity to challenge the merits of their sentence of imprisonment, only the conditions under which they are being held. One prisoner, awaiting extradition to the US, took the bold step of alleging that the conditions in which he was being held were in breach of the prohibition of 'cruel and unusual punishment' in the Bill of Rights 1689. He was successful. The court ruled that a punishment was 'cruel' within the meaning of the Bill of Rights, if it did not serve any penal objective which could not be achieved otherwise (*Williams v Home Office (No 2)* (1982)).

Apart from these basic rights of challenge to length of sentence and prison conditions, most of the conditions governing prisoners' other civil rights are contained in the Prison Rules passed under the Prisons Act 1952. An important restriction imposed by these regulations concerned prisoners' rights of correspondence. There was a time when the prison governor was entitled to censor all letters passing from prisoners to the outside world. When a prisoner challenged such an interception of his letter to a solicitor seeking advice about a proposed legal action, the European Court of Human Rights declared that such a restriction was a breach not only of his right to freedom of expression under Art 10 of the ECHR, but also an interference with his right of access to a court under Art 6 (*Golder v UK* (1975)). This case furnished an important precedent for future expansion of prisoners' rights in the UK. When a prison governor refused to forward to the High Court a prisoner's application for judicial review, the High Court ruled that his actions amounted to contempt of court, observing that 'Under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication'. Even before incorporation of the Convention with its due process safeguards, the Court of Appeal had no hesitation in declaring that the rules empowering the prison governor to intercept prisoners' letters of 'inordinate length' were *ultra vires* the Prison Act, on the basis that Parliament could never have intended to impose such an impediment on prisoners' rights to confidentiality and to legal advice (*R v Secretary of State for the Home Department ex p Leech* (1994)). A more recent development in the area of prisoners' rights was the recent decision in *R v Secretary of State for the Home Department ex p Simms and Another* (1999), where the House of Lords ruled that prison rules which banned oral interviews between prisoners and journalists concerning potential complaints about miscarriage of justice undermined a prisoner's fundamental right to free speech.

A high percentage of complaints lodged with the European Court of Human Rights come from prisoners, since they are particularly vulnerable to rights violations by the State. The relevant provisions – apart from Art 5 – are Arts 3, 6, and 10. The case law of the European Court of Human Rights has been reluctant, on the whole, to uphold allegations of degrading and inhuman treatment under Art 3, since they take the view that the minor unpleasantnesses of prison life do not fulfil the requirement of severity in that Article (*Ensslin and Others v Germany* (1976). Enforced medical treatment has not been held to breach Art 3 (*Herczegfalvy v Austria* (1992): therapeutic necessity for force feeding rendered measures proportionate). Exceptionally, the Commission or the European Court of Human Rights have found the UK in breach of the right to family life under Art 8 where prisoners have been deprived of visits from members of their families (*McCarter v UK* (1991): IRA prisoners transferred to mainland Britain away from their families in Northern Ireland).

People may lay claim to the fair trial provisions of Art 6 even after they have been convicted to a term of imprisonment. This right is particularly important in relation to disciplinary proceedings which used to take place before a 'Board of Visitors' – a panel of magistrates and other local citizens who determine sanctions for a range of offences which may lead to the loss of remission – the part of the sentence which may not need to be served, depending on the prisoner's record. The European Court of Human Rights ruled that, even within the prison walls, the basic requirements of criminal justice should be met, so that a prisoner who lost a substantial period of his remission when he was denied legal representation before the Board of Visitors was held to have suffered a violation of his Art 6 rights (*Campbell and Fell v UK* (1985). As a result of this ruling, and a number of reforms which were introduced into the prison system in 1993, all serious disciplinary offences by prisoners are now prosecuted by the Crown Prosecution Office through the ordinary criminal courts, where the normal safeguards for defendants apply.

21.4 Detention outside the criminal justice system

So far in this chapter we have examined the powers of public authorities to detain people for the purpose of controlling criminal activity, and the constitutional safeguards which exist to prevent abuse of those far-reaching powers. Powers to deprive people of their physical liberty also exist in other contexts, notably in relation to control of immigration into the UK and for the treatment of the mentally ill.

21.4.1 The detention of immigrants

Under the Immigration Act 1971 and the Immigration (Places of Detention) Direction 1996, people entering the UK may be held in custody pending a decision to remove them from the country. Persons may be detained at examination areas at ports, prisons, immigration detention centres and police cells. Only nationals and EC citizens have the right to enter the country without restriction (see below, Chapter 27). Since aliens have no such rights, either under immigration legislation, the common law or indeed the Human Rights Act 1998, this form of detention is not considered to be an invasion of a freedom recognised by law. However, the courts have set up a requirement of reasonableness on the length of time deportees may be held in detention, so that the period must not extend beyond that which is necessary to allow the process of deportation to take its course. In practice, this criterion is not very strictly imposed, so that, in a case involving the detention and proposed deportation of a Sikh separatist on grounds of national security, neither the domestic courts nor the European Court of Human Rights considered that the time he had spent in custody – five years – was unreasonable, given the

complexity of his case (*R v Secretary of State for the Home Department ex p Chahal* (1996); *Chahal v UK* (1997)). However, the European Court of Human Rights did rule that he had been deprived of his right under Art 5(4) to take proceedings to have the lawfulness of his detention determined speedily by a court.

Article 5(1)(f) permits the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The deprivation of liberty must, as always, be in accordance with the laws of the country concerned; so a person cannot be subject to a removal order if there are no conditions justifying the imposition of such an order under the municipal laws, and instead, the order is a disguised form of extradition (*Bozano v France* (1986)). If an applicant for asylum or entry is restrained to the airport holding zone and permitted only to leave on board a plane to a destination country, he may still be said to be 'deprived of his liberty' even though, in theory, he is at liberty to leave the country. In *Amuur v France* (1996), the Court found that the mere fact that asylum seekers – Somali nationals in this case – can leave the country does not exclude the deprivation of liberty, since this freedom to depart is only a theoretical freedom if no other country is prepared to take them in.

As with all forms of detention, the right to review by an independent legal authority under Art 5(4) applies; so, in *Zamir v UK* (1983), the Commission held that an illegal immigrant who had been detained pending removal from the country was entitled not only to a court hearing, but also to free legal representation, since the proceedings would have a decisive impact on his future.

21.4.2 The detention of the mentally ill

The powers of mental institutions to detain people of unsound mind are governed by the provisions of the Mental Health Act 1983. As with all statutes providing for detention, there is a tension between two conflicting ambitions. The first is to protect society from the risks posed by the mentally ill, the second is to safeguard the liberty of the subject. The conditions prescribed by the Act for lawful detention are strict, and the courts scrutinise very closely the justifications advanced for detention on the basis of mental disorder. In a case involving the legality of the admission and detention of a patient under the Act, the High Court observed:

> There is no canon of construction which presumes that Parliament intended that people should, against their will, be subject to treatment which others, however professionally competent, perceive to be in their best interests. Parliament is presumed not to enact legislation which interferes with the liberty of the subject without making it clear that this was its intention. It goes without saying that, unless clear statutory authority to the contrary exists, no

> one is to be detained in hospital or to undergo medical treatment or even to submit himself to medical examination without his consent. That is as true for a mentally disordered patient as that of anyone else [*R v Gardner ex p L* (1986)].

Given that the autonomy of the patient is paramount, even after he or she is admitted to an institution, the Mental Health Act provides for limited periods of detention for a patient's condition to be assessed (ss 2 and 4); admission and detention of patients for treatment on confirmation by two doctors that the grounds of mental impairment exist (s 3), and the continued compulsory detention of patients already receiving treatment (s 5). The social worker who applies for the patient to be admitted to hospital is responsible for observing certain statutory formalities, such as consulting the patient's nearest relative. Otherwise, the detention will be unlawful, and the patient may be able to apply for habeas corpus (see below, 21.5). Hospital managers have a continuing duty to consider whether the patient is fit for discharge, and under Part 5 of the Act the justification for continued detention may be considered by a panel of experts on a Mental Health Review Tribunal. In deciding whether they are obliged to release a patient, the tribunal has to decide whether he or she is suffering from a mental disorder which makes it appropriate for detention to be continued – the fact that the condition may be untreatable anyway does not lead inevitably to release. This means that patients can be detained simply because they pose a risk to the general population. This type of 'protective detention', not being based on any actual or threatened threat to society, is particularly in need of due process safeguards, particularly in view of the government's plans to extend this type of detention to many more cases of mental disorder (see below, 21.4.3).

Mental detainees may be searched at random without their consent, despite the fact that the Mental Health Act 1983 contains no express power for searching patients. This does not amount to a battery and tort of trespass because the courts have held that the Act, which authorises detention for treatment, implies that the authorities should have a power to control the detainees, and this includes the power of search without cause, even in the face of medical objection (*R v Broadmoor Special Hospital Authority ex p S* (1998)). Even where the statute does not imply any additional powers of detention or treatment, the common law doctrine of necessity supplements the Mental Health Act. In *R v Bournewood Community and Mental Health NHS Trust ex p L* (1998), the House of Lords ruled that a patient who was unable to express consent had been lawfully detained in a hospital even though the authorities had not invoked the compulsory powers of detention under s 3 of the Act. He was not a 'compulsory' patient for the purposes of the statute because he had co-operated on entry to the hospital; and his subsequent detention and treatment were justified by the common law doctrine of necessity. The court was influenced by the fact that the psychiatrist who admitted him said that L's behaviour of persistent self-injury persuaded him

that, if L had not co-operated, he would have invoked the compulsory powers of detention under the Act. This decision was reached before Art 5 of the ECHR became part of national law. This Article sets out an exhaustive list of conditions where loss of liberty is allowed, suggesting that any form of detention outside these categories would be in breach of the ECHR. The arrest conditions under Art 5(1) include 'the lawful detention of persons for the prevention of the spread of infectious diseases, of persons of unsound mind ... or vagrants' (5(1)(e)). The action of the authorities in *Re L* would only survive scrutiny under Art 5 if the common law doctrine of necessity were found to satisfy the requirement of 'lawfulness' under this section. According to Strasbourg case law, the notion of necessity implies that the interference corresponds to a 'pressing social need', and, in particular, is proportionate to the legitimate aim pursued. Strasbourg authorities generally accept the legitimacy of the respondent States' action if there was no alternative; it is likely, therefore, that the action taken in *Re L* would be justified under Art 5.

The obligation on the State to allow judicial review of detention under Art 5(4) has led to a number of decisions against measures in the UK relating to the detention of psychiatric patients. As we have seen from the discussion of national mental health laws above, the system has acknowledged that psychiatric conditions change over time and patients are entitled to periodic review by Mental Health Tribunals. However, until quite recently, the decisions reached by these tribunals used to be subject to the overriding opinion of the Secretary of State, who could order the continued detention of a patient, despite the fact that he or she had been cleared by the tribunal. This was ruled by the European Court of Human Rights to breach the patient's right under Art 5(4) to have recourse to review of their detention by a court of law (*X v UK* (1982)), and the law now gives these tribunals (considered to be courts of law for these purposes) the final say in the matter. More recently, in *Johnson v UK* (1997), the Court held that the detention of a mental patient had been unlawfully extended, breaching his rights under Art 5. The Mental Health Review Tribunal had recommended that he be released, but subject to the condition that he spend a period in a special hostel for rehabilitation. However, none of the hostels in the area would agree to take him because of his history of violent attacks on women. He was released on trial leave, but was returned to the hospital after assaulting another patient. All the experts agreed that he was no longer suffering from mental illness; it was just that, when he was allowed access to alcohol, he was liable to 'explode' and create a threat to the public. The Court found that the validity of continued detention under Art 5 depended upon the persistence of the mental disorder; since this did not apply in this case, his Art 5 rights had been breached.

21.4.3 Proposals for preventive detention

In July 1999, the government published a consultation on proposed legislation to 'safeguard the public from people with dangerous personality disorders', an assortment of measures applying to people re-entering the community after detention in prison or hospital under the Mental Health Act. The proposal which has created greatest concern is the plan to give the courts powers to impose indefinite detention on a person with a severe personality disorder who presented a serious risk to the public; such an order could be attached to any sentence imposed for a crime (no matter how trivial) and could be given to a person who had not committed an offence, but was believed to be a public risk. An inevitable difficulty in implementing this policy will be to find a reliable criterion of 'dangerousness' on which mental health professionals might agree, in order to submit consistent assessments to the courts.

These measures are to circumvent the provisions in the Mental Health Act that allow the continued detention of mentally ill people only on the certification of a doctor that their condition is treatable. If the government's proposals reach the statute book before the coming into force of the Human Rights Act 1998, they will inevitably be challenged under Arts 5 and 6 of the ECHR when these become part of national law. Recently, the European Court of Human Rights had the opportunity to consider the compatibility with the Convention of preventive detention of persons of unsound mind in *Eriksen v Norway* (1997). Norwegian law permits preventive detention 'if punishable acts are committed by a person with an underdeveloped or permanently impaired mental capacity, and there is a danger if the offender, because of his condition, will repeat such acts'. The applicant, who had committed a series of offences, argued that his continued detention was not justified by any of the circumstances set out in Art 5(1)(a)–(e), and, in any event, an expert psychiatric report had advised against his continued detention. The Respondent State said that the applicant's detention on special security grounds came within Art 5(1)(a), (c) and (e). The Court upheld the Respondent State's case, observing that the applicant's impaired mental state and his propensity for violence justified the detention. This decision suggests that, provided the applicant has, at some point, committed a criminal offence, challenges to the Convention compatibility of further preventive detention may not meet with success. However, where, as is envisaged, the 'dangerous' person is not before the court for any offence, detention may not be justified under Art 5 unless it satisfies the specific requirements of Art 5(1)(e).

21.5 Habeas corpus

This is an ancient prerogative remedy for unlawful detention which survives today largely in the context of immigration matters, and, to a certain extent, in

relation to detention in mental institutions. As we shall see, the Home Secretary may detain someone pending deportation if his departure from the country is 'conducive to the public good' (see below, 27.5). If the detainee wishes to contest the lawfulness of his detention in these circumstances, it is possible for him to apply for a writ of habeas corpus. This will only secure his release if the court, on examining the circumstances of the detention, concludes that the decision to detain goes beyond the discretion conferred by the relevant statute. This remedy, although somewhat limited in its scope, has the advantage over other judicial review remedies in that it is not discretionary.

The remedy of habeas corpus has, on several occasions, been held to fail to measure up to the requirements of the ECHR. In *X v UK* (1981), the European Court of Human Rights considered that an inmate in a hospital for the criminally insane had been unlawfully deprived of his right under Art 5 to have the legality of his continued detention scrutinised by a court. This was because his detention was at the discretion of the Home Secretary, and review under habeas corpus did not allow the court to examine whether the patient's disorder still persisted, or whether the Home Secretary was entitled to think that continued detention was necessary in the interests of public safety.

21.6 Assessment

Before coming to power, the Labour Party promised to be 'tough on crime, and tough on the causes of crime', and one of the ways in which it is carrying out these manifesto pledges is by widening the reach of criminal law to cover a range of activities that, until recently, have not amounted to criminal offences at all. We have seen from the foregoing sections how important it is that due process safeguards are observed in the prosecution of crime, since the accused risks losing his or her liberty if convicted. In the Crime and Disorder Act 1998, there is a new offence of 'anti-social behaviour', which blurs the distinction between civil and criminal remedies. An order may be applied for by the police or by the district council, and on a (civil) burden of proof of balance of probabilities, the court may grant the order if it is satisfied that the person in question was acting 'in a manner that caused or was likely to cause harassment, alarm or distress to two or more persons not of the same household as himself'. The order, if granted, would list a range of activities that are prohibited or restricted for a minimum of two years; if the terms of the order are breached, that individual risks being held criminally liable, with a possible sentence of up to five years' imprisonment. In essence, what is happening here is that the civil law is being used as a proxy for the imposition of criminal offences (see above, 4.4.3). 'Anti-social behaviour' could cover anything from failing to control noisy children to the waving of banners presenting dissident views. The Prevention of Harassment Act 1997 creates a

similar liability in respect of undefined behaviour which gives rise to civil liability, but is ultimately punishable in the criminal courts.

The Crime and Disorder Act 1998 has also introduced a raft of provisions to tackle youth crime by giving local authorities the power to impose local child curfews on children below the age of criminal responsibility. It will also be possible for courts to issue 'child safety orders' to require children under the age of 10 who are at risk of being involved in crime, to be at home by a certain time, or to avoid a certain area. Parents of children between the ages of 10 and 17 who have offended, or of younger children who are subject to a child safety order, may be required to attend training sessions and comply with other requirements regarding the care of their child. Breach of a parenting order will be punishable by a fine of up to £1,000. These proposals may be objected to on the grounds that they permit certain types of detention on the broad basis of risk, rather than actual behaviour.

Much of the current debate about due process in English criminal law arises out of concerns about these 'cross-breed orders'; cross-breed because they allow civil courts to identify behaviour on a civil burden of proof which may later lead to criminal penalties being imposed, thus depriving the defendant of the safeguards of the criminal law. The main objection to this merger of criminal and civil law is that it undermines legal certainty. It is the function of criminal legislation to define in very specific terms the nature of an offence, and it is only if these specific terms are fulfilled that imprisonment may be justified. 'Harassment' and 'anti-social behaviour' are the subject of civil orders, obtainable on civil standards of proof, and thus their scope remains vague and far reaching, covering a vast range of eccentric, but otherwise innocent, activities. As we have seen, the strict safeguards for defendants in criminal proceedings guaranteed by Art 6 of the ECHR apply, irrespective of whether the matter before the court is classed as 'civil' or 'criminal' (see above, 21.3.1). In view of the fact that the proposed measures for 'anti-social behaviour' and harassment carry with them criminal penalties, it is likely that any legal proceedings taken as a consequence will be tested for compatibility with all the guarantees in Art 6, not just those applying to civil cases.

A similar blurring of categories is achieved by the proposals to legislate for preventative detention of people with 'severe personality disorders', discussed above, 21.4.3; if these proposals are implemented, it will put psychiatrists and other health care workers in the position of crime prevention officers for people who do not have a certifiable mental illness, without the safeguards and guidelines of PACE. The power to deprive someone of their liberty before they commit an offence is one that is properly hedged out with carefully worked out standards of honest belief and requirements for justification (see above, 21.2). The need for such safeguards cannot be avoided by shuffling off the responsibility to the psychiatric profession; as one expert declared, on seeing the Consultation Paper:

The position of most psychiatrists is that we would be opposed to a form of preventive detention in which the notion of psychiatric treatment is used as an excuse to deprive people of their liberty.

LIBERTY OF THE PERSON

The most basic of all freedoms is personal liberty from detention. This is recognised in Art 5 of the ECHR, which states that 'everyone has the right to liberty and security of the person'. The State only has the authority to control and detain people whose activities threaten public order if the detention is 'lawful'; in other words, it must comply with the provisions of certain statutes and the basic requirements of due process. Due process is recognised in Arts 5 and 6 of the ECHR; Art 5 requires that detainees are allowed periodic access to an independent tribunal to examine the legality of the detention and Art 6 guarantees basic minimum rights to ensure that persons charged with a criminal offence are fairly tried, such as the right to legal aid and the right to cross-examine witnesses. Protocol 4 of the Convention provides additional guarantees, such as a mechanism of review of an individual's conviction of a criminal offence, and compensation for miscarriages of justice.

Police powers

Reasonable suspicion

Most of the powers of the police to stop, search and detain people on suspicion of having committed an offence are contained in the Police and Criminal Evidence Act 1984 (PACE). Both PACE and Art 5 of the Convention provide that detention is only lawful if the police have a 'reasonable suspicion' of an offence.

Procedures for detention and interrogation

Once a suspect is under arrest, PACE lays down a number of specific procedures that have to be followed by the police, such as the recording of all interrogations and the provision of reasons for continued detention by the custody officer. One of the most important safeguards is the requirement that the detainee may consult a solicitor, which may only be delayed if there is a likelihood that communication with a legal adviser will alert accomplices or interfere with evidence, or, in the case of terrorist offences, if the investigation and prevention of further acts of terrorism are impeded by the suspect contacting his legal adviser. Article 6 of the Convention entitles suspects to legal advice both during pre-trial questioning and during the trial itself, so any restriction of access to a suspect's legal adviser may fall foul of this Article.

Disregard of any of the safeguards laid down in PACE may lead the judge to exclude the evidence or confessions obtained by the police as unfair or oppressive.

The suspect's refusal to answer questions during interview may be mentioned to the jury at trial if the accused wishes to rely for his defence on any evidence that he failed to mention to the police whilst being questioned.

Length and review of detention

The police may only continue detention after the first 24 hours by application for a magistrates' court warrant, and the entire period of detention may only extend to 96 hours. Article 5(3) provides that 'Everyone arrested or detained ... shall be brought promptly before a judge': this provision was held to be breached by anti-terrorism legislation which permits the holding of terrorist suspects without judicial scrutiny for up to seven days. The UK has, therefore, derogated from the requirement of 'promptness' under the Convention for the purposes of investigation of terrorist offences.

After charge, the suspect must be let out on bail pending trial unless there are good reasons to detain him or her in custody. The State only has the authority to imprison convicted people by virtue of specific legislation; however, once a competent court has convicted an accused, he or she has no grounds to challenge the imprisonment itself apart from on limited judicial review grounds.

Criminal trials

Article 6 guarantees criminal suspects a right to be presumed innocent until proved guilty; the right to be informed of the nature of the offence; adequate time to prepare a defence; a right to free legal representation; the right to examine witnesses and the right to an interpreter. The Convention does not guarantee a right to trial by jury and in the UK such a right – laid down in the Magna Carta – is to be removed for certain types of crime such as burglary. There are also proposals to replace juries in complex fraud trials with panels of experts.

The right to be presumed innocent under Art 6 has been held to be violated when evidence that had been compelled during regulatory investigations from the applicant were used against him in subsequent criminal proceedings: *Saunders v UK* (1996).

The rights of prisoners

In certain types of life sentence, prisoners have been held by the courts to be entitled to be given reasons for the length of their sentences, and the right not

to have their sentences retrospectively increased. Other minimum rights are guaranteed to prisoners, such as the right to freedom of expression, which limits the restrictions prison governors may impose on prisoners' correspondence, and the right of access to justice: prisoners are entitled to uncensored communication with their legal advisers. The minimum guarantees for a fair trial under Art 6 apply to decisions by the Board of Visitors relating to sanctions for a range of offences which lead to loss of remission. Prisoners are now entitled to a range of due process rights in these proceedings, such as the right to be legally represented.

Detention of immigrants

Article 5 permits the detention of aliens for the purposes of extradition or deportation, or to prevent a person effecting an unauthorised entry into the country. There is no specific statutory restriction on the amount of time a non-national may be detained pending removal from the country. However, the courts have imposed a requirement of reasonableness, so that the period must not extend beyond that which is necessary to allow the process of deportation to take its course. This 'reasonableness' criterion is sufficiently flexible to extend to a period of five years in a complex case. As with all forms of detention, Art 5 requires that any illegal immigrant who is being detained has the right to review by an independent authority.

Mental patients

Article 5 permits the detention of persons of unsound mind, subject to the requirement under Art 5(4) that the detention is periodically reviewed by an independent authority. Mental health legislation in this country authorises admission and detention of mentally ill patients subject to a range of safeguards. Hospital authorities are under a continuing duty to consider whether a patient is fit for discharge and an independent panel of experts on Mental Health Tribunals will assess from time to time the necessity for the patient's continued detention. The powers of detention under the Mental Health Act are supplemented by the common law doctrine of necessity: *Re L* (1998).

Habeas corpus

If a detainee wishes to contest the lawfulness of his or her detention, it is possible to apply for a writ of habeas corpus. This will only secure the release of the applicant if the court, on examining the circumstances of the detention, concludes that the decision to detain goes beyond the discretion conferred by the relevant statute.

New proposals

A number of measures to combat crime introduced by the present government have raised concerns that people accused of certain crimes will be deprived of the due process safeguards normally available in criminal prosecutions. The offence of anti-social behaviour, for example, may be established on a civil burden of proof, but the breach of an order imposed to prohibit such behaviour will lead to a sentence of up to five years' imprisonment. Similar issues arise in respect of the new offence of harassment and the jurisdiction of the courts to issue 'child safety orders' imposing obligations on parents to restrict the activities of their children.