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# A-LEVEL LAW

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

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## Introduction

Due to the special arrangements for 2020 and 2021, this is the second Human Rights examination taken by all students entered for option 3B. There were many strong performances across the whole paper, not only as might be expected on topics that appeared in the Advance Information, but also on Article 11 for Question 7, and on Article 8 for Question 10. As was the case in 2019, students generally managed their time well, adjusting to the different mark values of questions, and where a question was not attempted, or where a student wrote very little, this seemed to be attributable to lack of knowledge and understanding rather than due to shortage of time.

Some common areas of weakness that it would be helpful to address were:

- confusion or vagueness as to who is bound by the ECHR – not all students were able to distinguish between the direct or vertical effect of the ECHR on the State and its agents (the Police), and the indirect or horizontal effect that comes into play when a case reaches the court through an existing right of action, such as the tort of misuse of private information, and which then results in relevant articles of the ECHR being considered by the court, itself a public authority, in determining the dispute before it
- stemming from the above, confusion about who might sue whom and for what. Some students thought Hakeem in Q10 could directly sue Julian for breach of Article 8, not realising that for Hakeem to sue Julian he would need to use an existing cause of action, such as the tort of misuse of private information, but that Hakeem could sue the Police as agents of the State for breach of his Article 8 rights
- not dealing with all elements of the 30 mark questions, for example, not discussing the stop and search of Julian in Q11, or the behaviour of the journalists and members of the public who surrounded Hakeem's house in Q10.

## Question 1

The correct answer was B:

'The European Court of Human Rights has generally interpreted Convention obligations very restrictively.'

This answer was selected by approximately half of students. It was false because the ECtHR treats the ECHR as a 'living instrument' and aims to interpret it in line with current attitudes and values of member states.

## Question 2

The correct answer was C:

'An excessively large award of damages by a court may violate the right to freedom of expression under Article 10 of the Convention.'

This answer was selected by a small proportion of students, suggesting that generally students did not recognise the chilling effect a large award of damages might have on freedom of expression.

A was false because a claimant must first exhaust their domestic remedies before taking a case to the ECtHR.

B was false because English courts can and must apply statutes, even if incompatible with the ECHR. Though the Supreme Court and the Court of Appeal can make a declaration of incompatibility under s4 HRA 1998, this does not affect the validity of the legislation in question.

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D was false because of judicial immunity from suit.

### Question 3

The correct answer was C:

‘Public officials should be given maximum freedom to make decisions affecting the legal rights of citizens.’

This answer was selected by approximately 90% of students, showing that most understood that giving wide discretionary powers to public officials would lead to arbitrariness in decision making. The rule of law requires that rights and liabilities be decided by the application of law, not the exercise of individual discretion.

### Question 4

The correct answer was C:

‘Judges in superior courts cannot easily be removed from office.’

This answer was selected by nearly 60% of students.

A was false because if a High Court judge took advice from a government minister this would undermine judicial independence and the separation of powers.

B was false because judicial immunity from suit only extends to the exercise of the judicial function. If a judge commits a crime they can be prosecuted.

D was false because although security of tenure is not as strongly protected for inferior judges, it is nonetheless important for justice and the rule of law that all judges decide cases independently.

### Question 5

The correct answer was B:

‘It is generally well-publicised.’

This answer was selected by nearly 60% of students. Most delegated legislation is not debated in Parliament, so for this reason, and perhaps also due to its often technical and detailed nature, it does not attract the same level of publicity as parliamentary bills and primary legislation.

### Question 6

This question required students to explain two characteristics of the common law as a source of law in a simple and straightforward way, and to provide an example of one of them. It was not intended to invite complex explanations of the mechanisms by which the common law had developed, though, of course, explanations of the operation of the doctrine of precedent were creditworthy. In this simple sense, the essence of the common law as a source of law is that it consists of rules of law developed by judges in decisions made in actual cases to resolve issues to which no legislation yet applies.

Since, traditionally, statute (legislation) and common law are the two major sources of law, an important second characteristic of common law is that its rules are subservient to statute, by which

they can be abolished or amended in any way determined by Parliament. Further characteristics include that its development is dependent on the chance that an appropriate issue arises and that there are parties determined to bring it to court, that it tends to be narrowly focused on the specific terms of that issue, is retrospective in its effect, and is inappropriate as a vehicle to promote large scale change such as can be achieved by statute.

Students with at least a basic understanding of the common law succeeded in capturing its essence as dependent on the decisions of judges in cases that laid down rules to be followed by judges in subsequent cases. Unfortunately, answers did not often explain a second characteristic, and so were limited to marks in the mid-range. The most cited example of common law rules identified the offence of murder. However, some students referred to the notion of the duty of care in negligence as developed by *Donoghue v Stevenson*, and others to the law on the non-availability of duress as a defence to murder or attempted murder. Sometimes, only the example was creditworthy.

There were many answers in which the choice of characteristics was wrong, or in which explanations were confused, incomplete or inaccurate, some common examples of which were:

- explanations that made no reference whatsoever to the role of judges making decisions in cases, and so could provide no hint as to how the rules were established and applied: for example, that common law is simply based on some generally accessible, universally understood ‘common sense’ - (‘everyone knows that murder should be a crime’)
- explanations that assumed that all decisions by judges must involve interpretation and application of the common law (rather than, for instance, of legislation)
- explanations that asserted that common law can be created and adjusted quickly and easily, and at little cost
- explanations that described common law in terms of primary and secondary legislation
- the choice of examples of cases interpreting the common law that were, in fact, examples of statutory interpretation

Most surprising, however, was the rather high proportion of students who were unable to attempt any answer at all, despite the fundamental nature of the common law as a source of law.

### **Question 7**

Students generally recognised the central issue in the question as one of whether the interference by the Police with Ava, Brett and Cian’s peaceful assembly could be justified under Article 11(2). There were some excellent answers, with many students explaining that under Article 11(1) there was a right to peaceful protest, which Ava Brett and Cian were exercising, and that the State had a positive obligation to support this right. Many were also able to explain the justifications for interference with this right set out in 11(2) and to refer to case law from the European Court of Human Rights holding that while there may be public order justifications for restricting this right, the mere fact that a demonstration offends others, or causes a counter demonstration, is not a justification for stopping it. The strongest answers made reference to the wording of 11(2) and often with relevant cases, but a weakness in some answers was concentration almost exclusively on application. A minority of students spent rather too long on this question giving peripheral information that was not needed.

### **Question 8**

In the scenario for this question, 75-year-old Dora had been subjected to verbal abuse and had had her property damaged by a group of youths. However, despite her having informed the Police

about these incidents, no action was taken by them, other than the making of a few ineffectual inquiries. Students were asked to advise Dora as to her rights and remedies against the Police under the Human Rights Act 1998 ss 6-8.

There were some very good answers to this question, showing excellent knowledge of the law on Article 2, the right to life. Stronger answers went on to identify that the scenario covered the State's positive obligation to protect life and that under s 6 of the Human Rights Act 1998 the Police, as agents of the State, owed Dora a positive duty to protect her life. Many students were aware of relevant cases such as *Osman v UK* and *Commissioner of the Police of the Metropolis v DSD*. These students focused on whether the Police had or should have had a knowledge of the threat (clearly on the facts of the scenario they had such knowledge), whether Dora was in real and immediate danger, and if she was whether the Police had done what was reasonable to protect her. Stronger answers made use of the scenario to suggest either that bearing in mind Dora's age and health there was a real and immediate risk to her life, or alternatively that the threat being confined to verbal abuse and property damage did not meet this threshold. Both views were creditworthy. The strongest answers showed awareness that Article 2 was relevant even when a life had not been lost, and of the provisions of ss 6, 7 and 8 of the Human Rights Act 1998; but weaker answers made no reference to ss 6-8 despite their inclusion in the question.

A minority of students discussed issues such as abortion, euthanasia, or inquests into deaths that were not really relevant to the scenario.

### Question 9

This question gave students the opportunity to examine the role of law in balancing conflicting interests and then to evaluate how Human Rights law might operate to balance conflicting interests.

In order to answer the first, non-substantive part of the questions, students could have:

- explained the meaning of 'interest' and identified different categories of interest, eg public/social and private
- explained some of the mechanisms by which the law seeks to achieve a balance of interests, especially in substantive law and in rules governing the legal process
- explained and analysed relevant areas of law for illustration, identifying the conflicting interests involved and the mechanisms the law uses to achieve a balance between them.

Better answers adopted a broad-ranging approach for this part of the question, often starting with an examination of the ideas of philosophers such as Bentham, von Jhering and Pound, then drawing for illustrative purposes on areas of substantive law such as the tort of nuisance, the defence of voluntary intoxication, sentencing or bail. The best answers examined how the relevant rules of law went about achieving a balance – eg in *Miller v Jackson*, despite the claimant succeeding in establishing nuisance, the discretionary nature of the equitable remedy of an injunction meant it could be refused, and damages awarded instead to recognise the public interest in the playing of cricket.

Less successful answers often made only a vague reference to the importance of balancing, with no or little attempt to identify the interests that might be in conflict, and with no consideration of how an appropriate balance might actually be achieved.

For the second, substantive part of the question, students needed to choose one or more areas of Human Rights law to discuss. Articles 8 and 10 were a popular choice, with the better answers explaining how the Article 8 right to a private life might be in conflict with the Article 10 right to

freedom of expression, and how cases such as *Axel Springer v Germany* provided factors to be considered and weighed in order to reach an appropriate balance between the two rights. Other popular choices to show conflicting interests in Human Rights law were Articles 2 and 5, or Articles 11 and 5.

Some students lost marks because they concentrated almost exclusively on balancing within Human Rights law, the 5 mark substantive law part of the question, writing very little or nothing for the broader 10 mark non-substantive part.

### Question 10

In this question, students were informed that following an anonymous complaint to the Police, Hakeem, a famous campaigner on consumer rights, had been investigated for fraud, and that the Police had leaked details of a raid on Hakeem's house to Julian, a reporter. Julian had taken photographs of the raid and had written an article about it that was published in 'The Tempest', a national newspaper, with the photographs. The publicity led to Hakeem's house being surrounded by journalists and members of the public and to him being followed. Hakeem, who protested his innocence, was suspended from his job and lost book contracts.

Students were asked to consider the application of English law and the ECHR to the incidents described. This required students to consider:

- what action Hakeem might be able to take against Julian and 'The Tempest'
- what action Hakeem might be able to take against the Police
- the behaviour of the public and journalists who surrounded Hakeem's house

With regard to Hakeem's rights against Julian and 'The Tempest', the tort of misuse of private information was relevant. Since neither Julian nor 'The Tempest' is a public authority, neither is bound directly by the ECHR so Hakeem must find an existing cause of action under English law in order to hold Julian and The Tempest to account. This tort has a two-part structure: first the information leaked must be information in which the claimant had a reasonable expectation of privacy (factors for judging this are set out in *Murray v Express Newspapers*) and secondly if the information is deemed private then the court will have to balance the parties' Article 8 and 10 rights. This is because once an action involving Convention rights reaches the courts, since the courts are themselves a public body, they will, when applying English law, take into consideration any relevant Convention rights (see *Venables v MGN*).

Applying the factors from *Murray v Express Newspapers*, a strong argument could be made for Hakeem having a reasonable expectation of privacy regarding the information about and the photographs of the raid on his house: Hakeem did not consent to the photographs and, as shown by cases such as *Von Hannover v Germany* and *Campbell v MGN*, photographs may be more sensitive than prose; the information was wrongly leaked to Julian by the Police; the consequences of the publication were very serious for Hakeem. In addition, *Richard v BBC* made clear that a person subject to a police investigation may have a reasonable expectation of privacy regarding information relating to the investigation.

If Hakeem did have a reasonable expectation of privacy, then his Article 8 rights had to be balanced against the Article 10 rights of Julian and 'The Tempest'. The ECtHR has stated on a number of occasions that neither of these rights has automatic precedence over the other. Each can be lawfully interfered with provided the interference comes within the terms of 8(2) or 10(2) as appropriate. So, for example, under 8(2) the right to a private life can be lawfully interfered with if the interference is a proportionate response to the aim of preventing and detecting crime – the aim 'The Tempest' and Julian are likely to rely on in justifying publication. Equally, under 10(2), Freedom of Expression can

lawfully be interfered with if the interference is a proportionate response to the aim of protecting the rights and freedoms of others – the aim Hakeem is likely to rely on when arguing that Julian and ‘The Tempest’ have misused his private information. So the court when hearing Hakeem’s action for misuse of private information will have to balance these conflicting Article 8 and 10 rights. Relevant factors to consider when conducting such a balancing exercise have been set out in a number of cases, perhaps most helpfully in *Axel Springer v Germany*. One such relevant issue would be whether a public interest argument could be made for revealing the information about the investigation into Hakeem, and the impact of s12 of the Human Rights Act 1998 recognising the significance of freedom of expression in relation to journalistic material. Other relevant factors are the seriousness of the consequences of publication for Hakeem, the inclusion of photographs and the fact that nothing has actually been proven against him.

A successful action by Hakeem against Julian and the Tempest for misuse of private information could result in an award of damages for any loss suffered and an injunction prohibiting further stories on this matter – with regard to a possible injunction, the impact of s12 of the Human Rights Act 1998 might be considered.

In relation to Hakeem’s rights against the Police, Hakeem can sue the Police for breach of his Article 8 rights since the Police, as agents of the State, are bound by the ECHR under s6 of the Human Rights Act 1998. Under s7 of the Human Rights Act 1998 Hakeem as the victim of the alleged breach can take action against the Police. There was a strong argument to be made that the Police, by revealing the details of the proposed arrest and search, as well as failing to intervene to control the conduct of the journalists and public, did breach Hakeem’s Article 8 rights since the latter covers both personal information and physical integrity (see for example *Wainwright v UK*). If a breach of Article 8 is found then under s8 of the Human Rights Act 1998 the court may award such remedy as is deemed appropriate, most likely an award of damages.

Finally the behaviour of the crowd that gathers outside Hakeem’s house and those who follow him may have amounted to offences of harassment under the Protection From Harassment Act 1997.

There were some excellent answers to this question where students clearly understood the tort of misuse of private information, and through this developed the discussion of the conflict between Articles 8 and 10. Such students applied the factors from cases such as *Axel Springer v Germany* to the scenario, discussing issues such as public interest, Hakeem’s fame and how the pictures were obtained, with varying but equally creditworthy conclusions. Some students identified that there may be a difference between the article and the pictures and that the police might also be liable for misuse of private information.

Despite the tort of misuse of private information being listed in the Advance Information, and the wording of Question 10 referring first to the application of English law and only second to the law of the ECHR, many students did not start with English law, but instead started by discussing Articles 10 and 8. While this route still allowed for very successful answers, it sometimes led to the mistaken claim that Hakeem could sue Julian and ‘The Tempest’ directly for breach of Article 8.

Many students looked at a variety of other issues such as the tort of Defamation, possible breaches of Article 5 in the arrest and of Article 2 from the Police’s failure to protect Hakeem.

Weaker answers sometimes missed the key issues raised by the scenario. Some became side-tracked by discussion of Hakeem’s right to freedom of expression in relation to the articles he had written criticising companies and individuals for fraud. In others there seemed to be no awareness that an individual cannot be sued directly for breach of a Convention right. There were many vague



references to what 'the State' would do in relation to Julian's newspaper article and a failure to recognise that the Police, as agents of the State, were potentially liable for breaches of Convention rights, but that Julian and 'The Tempest' could not be sued directly for breach of such rights. Some students lost time by discussing at length the legality of Hakeem's arrest and sometimes the Police's authority for searching his house – neither being central issues in the scenario.

### Question 11

In this question students were asked to consider the application of Human Rights law to a series of incidents at a theme park where robberies and other violent incidents had been reported, and then to assess the extent to which justice may have been achieved by the application of the law to the incidents described.

In relation to the incidents in the theme park, the central matters were:

- the containment/kettling of visitors
- the stop and search of members of the crowd, and in particular of Luca
- the arrest and detention in a police car of Luca's wife, Kelsey.

In relation to the containment of visitors in the park for two to three hours by the Police, Article 5, the right to liberty was relevant. Since the Police are agents of the State, under s6 of the Human Rights Act 1998, they are bound by Article 5. Article 5 prohibits deprivation of liberty, unless justified under 5(1)(a), or 5(1)(b) or 5(1)(c). The ECtHR has distinguished between mere restraints on movement that do not engage Article 5, and deprivation of liberty that does (see for example *HM v Switzerland*). In deciding if a measure amounted to deprivation of liberty, or mere restraint on movement, the court can take into account the type of measure and its manner of implementation: kettling is not necessarily a deprivation of liberty (*De Tommaso v Italy*). Relevant considerations are the following:

- Was the containment unavoidable?
- Was it necessary to avert a real risk of serious injury or damage?
- Was it kept to the minimum required?

In relation to the scenario, there was a strong argument that the kettling was a mere restraint and not a deprivation of liberty engaging Article 5: the containment of the visitors in the theme park for two to three hours was arguably unavoidable in order to try to stop the robberies and prevent further violence; the length of time is likely to be seen as reasonable given the numbers that would be in a theme park, and the fact that refreshment venues were not closed increases the likelihood of the measure being deemed the minimum required.

In relation to the searches of Luca and other visitors, ss 1,2,3 of the PACE Act 1984 were relevant. S1 sets out the power to stop and search a person/vehicle to look for stolen items (relevant to the robberies at the theme park) or prohibited items such as offensive weapons. A police constable must have reasonable grounds for suspecting they will find stolen or prohibited items. This is an objective test – personal suspicion is not enough – so intelligence of some kind is required. The officer must have these grounds before stopping a person; they cannot stop someone in order to find grounds. Sections 2 and 3 of the PACE Act 1984 set out the information a police constable should provide to the person being searched and the details of information to be recorded.

While the Police could argue they had reasonable grounds to stop and search people in the same age group as the suspects, Luca would have had a strong argument that the thorough search he was subjected to was unlawful as it was not based on reasonable grounds for suspecting he was

carrying stolen or prohibited items: he was 45, therefore significantly older than the suspects, and at the park with a family group.

In relation to the arrest and detention of Kelsey, S24 of the PACE Act 1984 was relevant. This gives a police constable a power of arrest without a warrant where a person:

- Is committing
- Is about to commit
- Has committed a criminal offence

and

The officer has reasonable grounds for believing the arrest is necessary to achieve one or more of the following:

- Identify the suspect (check name / address)
- Prevent injury to the suspect or others, or damage to property
- Allow effective investigation
- Prevent the suspect from disappearing

Since an arrest involves a deprivation of liberty, Article 5 is engaged. Under Article5(1)(c) an arrest can be justified if it is:

- The lawful arrest of someone for the purpose of bringing them before the competent legal authority on reasonable suspicion of them having committed an offence

Or

- Where it is reasonably considered necessary to prevent them committing an offence, or fleeing after having done so.

Applying the above to Kelsey, since she has been arrested and detained in a police car, Article 5 is engaged. The police would probably seek to justify her detention under Article5(1)(c) on the grounds that she was committing the offence of obstructing a police officer since her loud protesting was obstructing the search of Luca and that her behaviour gave reasonable grounds to believe she might cause injury.

Alternatively, it might also have been argued that the police officer searching Luca was not carrying out a lawful search due to lack of reasonable grounds to suspect him of carrying stolen or prohibited items, and therefore that Kelsey was not actually obstructing an officer since the officer was not carrying out a lawful duty.

The last part of the question required an explanation of the concept of justice and some evaluation of whether the law that had been applied to the scenario achieved justice. This could be achieved by students explaining some theories or views of justice and then considering how these might relate to the law applied to the scenario.

As with Q 10, some students struggled to structure their response to Q11, and some missed central issues, such as the stop and search of Luca, or the containment of the crowd. Some did not attempt justice.

With regard to the control of the crowd, many students realised this raised issues of restriction and deprivation of liberty, and went on to discuss this with reference to cases such as Austin. Some students were able to develop their discussion by referring to questions such as whether the Police

actions were necessary and a last resort and whether the response was proportionate, reaching varying conclusions based on the facts given in the scenario such as the length of detention time and the availability of refreshments. A common misconception was that since a containment period of seven hours was acceptable in Austin, this meant that any lesser period was automatically acceptable.

Surprisingly, the stop and search of Luca was overlooked by a number of students. But stronger answers recognised the relevance of Article 5 and explained and applied the provisions of ss1, 2, and 3 of the PACE Act 1984. There was a lack of precision in some answers in relation to the provisions of ss 1-3 of the PACE Act 1984, with rather vague references to suspicion or reasonable suspicion, but without an explanation as to what that suspicion needed to be about. Better answers clearly explained the rules and went on to discuss whether the Police had a reasonable suspicion based on Luca's age, the confused reports etc. Some students looked at the possible use of S60 Criminal Justice and Public Order Act 1994 powers.

With regard to the arrest and detention of Kelsey, stronger students realised that this required a discussion of Article 5 and its relationship with police powers of arrest under s24 of the PACE Act 1984. A number of students made good use of the two-part test from *Hayes v Chief Constable of Merseyside Police* to decide if the arrest was lawful.

Two common problems were:

- many students did not seem to realise that obstructing a police officer was an actual criminal offence and thus went on to look at possible breach of the peace. While this was a valid way to tackle the question, it probably made the answer more complex
- Some students did not have a clear idea of the difference between arrest and charge and this led to some confusion.

On the final non-substantive element of this question, stronger answers generally started with a definition of justice, often with reference to theories such as utilitarianism or Aristotle's ideas of distributive and corrective justice. They went on to consider aspects of the law that had been applied to the scenario from the perspective of such theories – eg could kettling, or stop and search be justified on Utilitarian grounds? Could corrective justice be achieved by Luca suing the Police? Unfortunately, many answers, rather than looking at the legal rules, did little more than assert that various people may have been fairly or unfairly treated with little to support these statements, gaining only limited credit. Unfortunately, some students simply ignored this part of the question, again limiting their mark.

### **Mark Ranges and Award of Grades**

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