
A-LEVEL LAW

7162/3B Human Rights
Report on the Examination

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Introduction

This year we returned to a typical exam experience in that no advance information had been provided. It was pleasing to see most students tackling most questions well, and managing their time effectively. A small minority did not attempt Question 6 – perhaps indicating a greater need for revision of the ELS material for this paper. The second part of Question 9 was also omitted by a significant minority of students.

On the whole, answers were better structured than last year, but some common areas of weakness to highlight are:

- An apparent lack of understanding of who is bound by the ECHR; this was particularly evident in relation to Question 8 (see comments below)
- A related area of confusion was students incorrectly asserting that individuals might be in breach of a right provided for their benefit. This was particularly evident in Question 11, where some argued that the trespassers had breached their own Article 11 rights because their protest was not peaceful
- A failure to deal first with relevant aspects of English law – eg in relation to the policing of the march and assembly in Question 11
- Confusion over the requirements stated within the ECHR Articles to entitle a State to justify *prima facie* breaches. These are very similar for Articles 8, 10 and 11, but very different for Articles 2 and 5
- Students often did not apply the law they had explained in sufficient detail to the facts of the scenario.

Question 01

The correct answer was B:

‘The right to freedom of expression under Article 10 of the ECHR is strongly protected in the case of journalists dealing with issues of public concern.’

This answer was selected by about 65% of students.

Answer A was false because, as *Guzzardi v Italy* shows, there can be a deprivation of liberty even though the applicant is not confined to a cell or very small space.

Answer C was false as the concept of ‘private life’ within Article 8 does include reputation.

Answer D was false as there are limitations on the right to life under Article 2 – for example, where death results from use of force that is no more than absolutely necessary in defence of a person from unlawful violence.

Question 02

The correct answer was A:

‘Claims can be brought in the ECtHR by individuals but not by States.’

This answer was selected by about 30% of students, indicating that it was the most challenging of the multiple choice questions. Answer A was false as States can bring a case before the ECtHR against another State (inter-state applications).

Question 03

The correct answer was A:

‘The burden of proof in a civil case is on the claimant.’

This answer was selected by about 60% of students.

Answer B was false because the burden of proof in a criminal case is on the prosecution.

Answer C was false because the standard of proof in a civil case is on the balance of probabilities.

Answer D was false because the standard of proof in a criminal case is beyond reasonable doubt.

Question 04

The correct answer was A:

‘A District Judge in the Magistrates’ Court does not decide questions of fact.’

This answer was selected by about 60% of students.

Answer A was false because in the Magistrates’ Court a District Judge sits alone and so will have to decide questions of fact and then apply the law to the facts as found.

Question 05

The correct answer was A:

‘The Scrutiny Committee (the Parliamentary Joint Select Committee on Statutory Instruments) can alter a statutory instrument.’

This answer was selected by 45% of students.

Answer A was false because the Scrutiny Committee has no power to alter a statutory instrument. It can merely draw the attention of Parliament to points that require further consideration.

Question 06

This question required students to explain two ways in which the law tries to achieve judicial independence. Judicial independence is the idea that judges should be free to decide cases based on the law and unconstrained by any improper influences that could undermine the fairness and legitimacy of their decision. This requires that judges be separate and protected from improper influence by other branches of government. Threats to such independence might lie in the location of the power to appoint and remove judges, or the power to affect their remuneration; any connection between the judiciary and other bodies exercising powers over law-making and enforcement, such as the legislature and the executive; fear of the consequences if judges could be held personally liable for their decisions; and any suggestion that a judge had a personal interest in the outcome of a case before them.

Students were expected to identify and briefly explain any two ways in which the law tries to avoid such threats to judicial independence, including:

- Security of tenure for superior judges – they can only be removed by the monarch on petition by both Houses of Parliament (Senior Courts Act 1981, Constitutional Reform Act 2005) and there is an independent office to investigate complaints (Judicial Conduct Investigations Office).
- Appointment of judges (other than justices of the Supreme Court) by the independent Judicial Appointments Commission.

- Financial security related to arrangements for determining and paying judicial salaries (including prohibition on reducing salaries and on any performance-related element).
- Immunity from suit – immunity from criminal and civil actions in relation to acts carried out in performance of judicial function, including immunity from actions in defamation (*Sirros v Moore*).
- Freedom from interference by the executive and separation from legislative law-making (separation of powers) – Constitutional Reform Act 2005 s3.
- Prohibition on participation in cases where a judge may have a personal or other special interest – *Re Pinochet*.

There were some good answers to this question, citing, particularly, security of tenure, immunity from suit, or exclusion from hearing a case on grounds of personal interest. Although an example was not required, and students could gain full marks if their two ways were clearly explained, many did provide examples that enhanced their explanations (such as *Re Pinochet* for the idea that a judge must be independent from the case, or examples of Government Ministers being held to account for lockdown breaches, showing independence from the Executive). If only one way was explained the maximum marks were 3.

Some weaker answers confused judicial independence with judicial law-making through the operation of precedent, or with statutory interpretation, or the idea of the jury being independent from the judge. Some simply asserted that judges were independent of parliament without providing any explanation of how this was achieved.

This question was not attempted by about 8% of students.

Question 07

A helpful starting point in answering this question was to explain what Article 10 protects, and most students were able to do this in varying degrees of detail. The wording of 10.1 refers to the freedom to 'receive and impart information and ideas. Discerning students were able to explain that Bekka, in arguing for the research to be completed and published, would have been seeking to 'receive' information. The relevant law here (as explained in *Guerra v Italy*) is the idea that freedom to receive information relates to information that others are willing to impart, and does not extend to imposing an obligation to create or generate, then disseminate new information. Applying this law to Bekka, she wanted Axebury City Council to undertake and publish research. So, she was seeking to oblige them to create new information and then disseminate it. This is not part of the positive obligation placed on States and public authorities by Article 10.1 and so the Council's refusal to undertake the research would not be a breach of Article 10.

The central point of law in this question related to a very specific aspect of 10.1, and credit was given for other approaches – eg the argument that the Council was not interfering with Bekka's right to freedom of expression and that she was free to express her own views on the road layout. So even if the student did not know the central point of law at issue here, they could still score at the top of band 2.

Some students lost focus on the Article 10 right signalled in the question, and instead veered into a discussion of Article 8 and whether this Article gave the Council the right to refuse to carry out and publish the research. Since these 'suggest' questions have a specific focus, it is important for students to identify this and address their answer to it.

Some students were aware of freedom of information legislation, and credit was given for reference to this.

Question 08

There were some very good answers to this question showing an understanding of the structure of the tort of misuse of private information and the requirement for Cal to sue Eden under this right of action (and not under s7 of the Human Rights Act 1998) since Eden was not a public authority and so not directly bound by the ECHR. Students taking this approach were able to explain that first Cal would need to establish a reasonable expectation of privacy, and if he did so then the court, as a public authority, would balance his Article 8 rights against Eden's Article 10 rights, often citing *Campbell v MGN* in support of this two-part structure.

In discussing whether Cal did have a reasonable expectation of privacy regarding the message and photograph, some answers used the objective test from Lord Hope's judgment in *Campbell*, explaining that what is private is to be judged from the viewpoint of a reasonable person of ordinary sensibilities in the same position as the claimant. In determining if the photograph and message in the scenario were private, some students drew helpfully on the factors identified as relevant to this question by the court in *Murray v Big Pictures*, including the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant, and the circumstances in which and the purposes for which the information came into the hands of the publisher. It was by no means necessary to discuss all of these to score high marks, but perhaps of particular relevance to the argument that the information in the scenario was indeed private was the fact that it was sent by Cal to his partner, who had accidentally shared it and had asked for it to be deleted. Some students gave examples from *Campbell v MGN* or the *Von Hannover* cases where photographs were found to constitute private information.

If a reasonable expectation of privacy is found, the court will move on to balance Cal's Article 8 right to a private life against Eden's Article 10 right to freedom of expression. Many students explained that as the rights in Articles 8 and 10 are qualified, an interference can be lawful if proportionate to a legitimate aim. So, Article 8 can be lawfully interfered with to protect another's freedom of expression (the rights and freedoms of others) and Article 10 can be lawfully interfered with to prevent disclosure of information received in confidence. Since neither right has automatic precedence over the other it is for the court (a public authority and so bound by the ECHR) to balance the competing rights on a case-by-case basis.

Many students were then able to refer to and apply criteria relevant to the balancing of these two competing rights from *Axel Springer v Germany*. Of particular relevance was the question whether the disputed information made a contribution to a debate of general interest, with many students making a strong argument that exposing Cal's hypocrisy would do so. Also relevant was Cal's status as a public figure and the subject matter of the disputed information. Some students argued that the information related to Cal's public life, since it concerned investment in animal products while he publicly supported veganism, whilst others argued that where Cal decided to invest his own money was a private matter.

Students who argued that Article 10 was likely to outweigh Article 8 often also referred to Cal's prior conduct, pointing out that he had chosen to speak out in support of veganism, so this strengthened the argument for revealing his true position. Another relevant factor was the way the information had been obtained. Some students pointed out that Della had asked her friend to delete it, suggesting it had been obtained unethically. But others questioned whether Eden would have known this. Many referred to the negative effect the publication was likely to have on Cal, with better answers recognising that the truth of the information meant it would not be defamatory. Given the time available for this question it was not necessary for students to have discussed all the above factors in order to score high marks, but the exposure of Cal's hypocrisy was of particular relevance.

Weaker answers lacked the above structure, and often failed to recognise that Cal could not sue Eden directly for breach of his Article 8 rights, and that Eden was not directly bound by the ECHR. In some cases, students also gave irrelevant information as to Della's potential liability.

Question 09

This question gave students the opportunity to deal with the relationship between law and morality, and then to consider that relationship in the context of human rights law.

It was helpful to start with definitions of law and morality (which many students did) and then to explore the relationship between legal rules and moral rules by examining some of the similarities and differences between them. This could include their origins, date of commencement, process for change, methods of enforcement, and range of application. The relationship between law and morality could be further explored through examining areas of convergence and divergence.

Many students were well-prepared for the first part of this question. There were some impressive explorations of similarities and differences between legal and moral rules, and of overlap and divergence between the two, often enhanced by pertinent examples. Murder and theft were often cited as examples of overlap, and adultery or parking offences as examples of divergence. Some students referred to matters such as the changing law relating to homosexuality, and to rights for same sex couples to marry, as examples to show changes in law and morality clearly influencing each other.

A consideration of differing philosophical views on the proper relationship between law and morality could include distinguishing between natural law theory and positivism, Mill's harm principle, and/or the Hart Devlin debate.

Many students showed a perceptive understanding of philosophical approaches, making accurate and detailed reference to natural law theory, positivism, sometimes utilitarianism, and the Hart/Devlin debate.

However, some students did not attempt the second part of the question relating to the substantive law of Human Rights, and some who did only make very generic references to the need for Human Rights law, or to the way it had developed following the Second World War.

The question allowed students to bring in any of the human rights they had studied in order to explore how Human Rights law reflects morality. Better answers focused on specific human rights such as the right to life (with some pointing out that life was seen as sacred or protected across religions and cultures). Some students were able to make the argument that human rights can be seen to stem from a fundamentally moral vision of all human beings as equal, and it being morally right to protect certain aspects of human life such as liberty, or freedom of expression, since such rights are essential to the living of a meaningful, fulfilled life.

Most students divided their time between the two parts of this question appropriately, recognising that the first part (the general discussion of the relationship between law and morality) was worth 10 marks, while the second part (how Human Rights law reflects morality) was worth only 5 marks.

Question 10

In this scenario, students were informed of the plans made by Faisal and his group to demonstrate their opposition to the views of local MP Grace, and then of the events that took place on the day of the protest. The question asked them to consider the rights, duties, liability and remedies of

those involved within a human rights perspective. As has been suggested in previous reports, it is helpful to apply the relevant domestic law first and then to consider the effects of relevant Articles of the ECHR.

The activities of the three group members who forced their way into Grace's garden, chained themselves to the fence and chanted slogans, raised the issue of liability for the offence of aggravated trespass under s68 of the Criminal Justice and Public Order Act 1994. This offence is committed when someone trespasses on land where lawful activities are being carried out and then does something intended to have the effect of intimidating persons so as to deter them from engaging in the lawful activity, or intended to disrupt or obstruct the lawful activity.

Applying this to the three people who entered Grace's garden, the fact that they had to 'force' their way in shows they did not have permission to be there, and so were trespassing. Their actions, once in the garden, of chaining themselves to the fencing and chanting slogans, would certainly have disrupted and obstructed the fundraising event and may have intimidated those lawfully there from continued participation. It was clear from the information given in the first paragraph that the intention behind this trespass was to disrupt the event, so all the elements of the offence were clearly established. S69 of the Criminal Justice and Public Order Act 1994 allows the police to direct anyone committing aggravated trespass to leave the land, and it is an offence to fail to comply with such a direction.

While many students recognised that this incident involved aggravated trespass, not all were able to explain the elements of the offence as being trespass with the intention to intimidate, obstruct or disrupt, and some merely asserted that the offence had been committed rather than identifying its elements in the facts of the scenario. Some credit was given for dealing with the forced entry simply as the tort of trespass, with a minority of students who adopted this approach being able to enhance their answer with reference to the common law of trespass.

The arrest of the three protestors 'to prevent further trouble' pointed to the common law power to arrest to prevent an apprehended breach of the peace. Some students were able to define a breach of the peace as involving a situation where harm is done, or likely to be done, to a person, or in their presence to their property, often citing *R v Howell*. The law as explained in cases such as *R (Laporte) v Chief Constable of Gloucestershire Constabulary*, or *R (Hicks) v Commissioner of Police for the Metropolis*, requires a police officer to have reasonable grounds for apprehending an imminent breach of the peace. Some students argued that given the earlier behaviour of the three protestors in breaking in and chaining themselves to the fence, there were reasonable grounds to believe there was such an imminent threat to the peace. Others argued that, in getting in, the protestors had probably achieved what they had set out to do and that there were not reasonable grounds to believe they would go on to cause any more harm.

An equally creditworthy way to deal with these arrests was to rely on the power to arrest without a warrant under s24 of the Police and Criminal Evidence Act 1984 (PACE). This requires the arresting officer to have reasonable grounds to suspect that the person arrested has committed, or is about to commit, an offence, and that the arrest is necessary for one of the specified reasons – eg to prevent the person from causing damage to property, or to allow effective investigation of the offence. The police certainly had reasonable grounds to believe the offence of aggravated trespass had been committed, and a strong argument could be made that arrest would be necessary for one of the listed reasons – eg to prevent further damage to the fence.

Some students mentioned the power of the police under s61 of the Criminal Justice and Public Order Act 1994 to direct trespassers to leave land, where the occupier has already asked them to do so, and they have either damaged the land (eg damaging the fence by chaining themselves to

it) or used threatening, abusive or insulting behaviour (eg by chanting the slogans). Failure to comply with a direction to leave is a criminal offence.

Some answers considered the possibility of the three trespassing protestors being liable under the Protection from Harassment Act 1997, with stronger responses recognising that the need for 'a course of conduct' – ie conduct on at least two occasions – would not be met by a single incident.

Moving on to the march organised by Faisal and the assembly in the park, the relevant domestic law was to be found in the Public Order Act 1986. S11 requires that the organiser of a 'public procession' promoting a cause or campaign give at least six days' notice of the march, specifying matters such as date, time, proposed route, and the organiser's name and address. Faisal had clearly failed to comply with s11 since the notice period was insufficient, being two days before the march rather than six, and he did not provide details of the time or route. This failure to give the required notice is a criminal offence for which Faisal could face prosecution and punishment.

Most students were aware of s11, though there was some confusion over the consequences of failure to comply, with some students mistakenly stating this would make the march unlawful – a failure to give notice, whilst an offence in itself, does not render the procession unlawful.

Under the Public Order Act 1986, the police have the power to impose conditions on a procession (s12), or an assembly (s14), if they reasonably believe it may result in serious public disorder, or serious damage to property, or serious disruption to the life of the community. The condition must go no further than is necessary to avoid the feared outcome. Failure to comply with such a condition is a criminal offence.

Many students recognised that the senior police officer mentioned in the scenario had the power to impose a condition as to the route of the march under s12, and as to the numbers at the assembly and the duration of the speeches under s14, but only a minority considered whether there were reasonable grounds to believe the conditions were necessary to avoid serious public disorder, or serious damage to property, or serious disruption to the life of the community.

The protestors who attempted to ignore the condition imposed as to the route of the march were committing a criminal offence for which they could be lawfully arrested under s24 PACE, as explained above.

Some students mentioned the possibility of public order offences under the Public Order Act 1986, such as violent disorder, affray, and causing harassment, alarm or distress – for which credit was given.

The human rights perspective brought into play the provisions of the ECHR, specifically Articles 10 (freedom of expression) and 11 (freedom of assembly and association). The crucial point here was that although Faisal and members of his group might have been subject to control in various ways by the police, and some of them might have committed offences under English law, the Human Rights Act 1998 s6 states that those powers must not be exercised, and those laws must not be applied, in a way that is incompatible with ECHR rights. If the police, as a 'public authority', acted incompatibly in using their powers, then under s7 they could be sued by victims of the breach for compensation or other appropriate remedy, and the breach could also be relied on in court as a defence to criminal charges.

Most students recognised that the right to freedom of expression and the right to peaceful assembly were both engaged in the scenario since the protests provided the means by which Faisal and other group members expressed their opinions of Grace's views. Many were also able

to explain that both these rights were qualified, so that under 10.2 and 11.2 an interference with the right will not amount to a breach if prescribed by law and necessary in a democratic society (corresponding to a pressing social need, and by means proportionate to the achievement of a listed aim). Some responses referred to case law in order to elaborate on the scope of the relevant Articles. So, for example, in relation to Article 11, many answers referred to the positive obligation on the State to facilitate peaceful protest (often citing *Plattform Artze fur das Leben v Austria*), and the idea that even a totally peaceful assembly can be lawfully disbanded if this is proportionate to one of the legitimate aims (as in *Cisse v France*). In relation to Article 10, a number of students referred to the extension of freedom of expression to ideas that offend, shock or disturb, often citing *Handyside v UK*, and pointing out that expression of political views was given a high level of protection.

In relation to the incident in Grace's garden, a number of students argued that although, under Article 10, Faisal and other group members could express views that offended or disturbed Grace, and that expression of political disagreement would be strongly protected, the arrests could be regarded as proportionate to the legitimate aim of protecting Grace's right to determine who came on to her private property. Many argued that the protest in Grace's garden was not peaceful because of the forced entry and so probably not protected by Article 11. Others referred to *Appleby v UK*, which held that the owner of private land can prohibit an assembly there provided there is a suitable alternative place. Some students were under the misapprehension that the protestors who trespassed were breaching Article 11, based on the argument that they had not carried out a peaceful assembly, thus failing to recognise that the obligation under s6 is on the State or public authorities and only they can violate ECHR rights.

Most students who applied 10.2 and 11.2 to the incidents in Grace's garden concluded that the arrests were in accordance with law (either under common law or PACE) and were proportionate to the aim of prevention of disorder or crime, or protection of the rights and freedoms of others (ie Grace's right to determine who entered her private property), and did not breach Articles 10 or 11.

With regard to the advance notice requirement under s11 of the Public Order Act 1986, this is clearly prescribed by law, and since it allows the police to plan for coping with any disruption likely to be caused by the protest, it is in pursuit of aims such as protecting the rights and freedoms of others (those who might be adversely affected by a march) and prevention of disorder and crime. It does not impinge on the actual march, and so is a proportionate interference with Article 11. Therefore, Faisal is unlikely to be able to rely on his Convention rights in defence to any prosecution for failure to comply with s11.

When considering the conditions imposed (regarding the route of the march, numbers at the assembly, and duration of speeches) and the arrest of those who failed to comply with these conditions, some students were able to point out that these measures were prescribed by law (ie the Public Order Act 1986 for the conditions, and PACE for arrest) and were in pursuit of a legitimate aim, such as prevention of disorder or crime, or protection of health and morals, since the safety of families in the park was at issue. Better answers then examined the proportionality issue, with some questioning whether reducing the time for the speeches to one hour, and the number attending the assembly in the park to 10, went beyond what was necessary to achieve public safety and to prevent disorder.

Some students discussed Article 5 in relation to the arrests. Those who did were often able to explain that Article 5 is only engaged if there is a deprivation of liberty, sometimes pointing out the distinction with a mere restriction of movement, sometimes explaining that the issue is one of degree and intensity of the confinement, often citing *Guzzardi v Italy*. Most, but not all, recognised that an arrest would be classed as a deprivation of liberty, but that it could be justified under Article 5.1 (c) if in accordance with a procedure prescribed by law and based on reasonable suspicion that

the person arrested had committed an offence, or that arrest was necessary to prevent them committing an offence. Since the arrests in the scenario were made under either the common law power to prevent an apprehended breach of the peace or PACE, they were in accordance with a procedure prescribed by law. And since those arrested had clearly committed offences (ie aggravated trespass, or failure to comply with conditions imposed under the Public Order Act 1986) the arrests would appear to have been justified under Article 5.1 (c).

Given the fact that the scenario centred around protests, it was expected that students, when taking a human rights perspective, would focus mostly on Articles 10 and 11. A detailed consideration of Article 5, although creditworthy, was not required.

A number of students made reference to sections 6, 7 and 8 of the Human Rights Act 1998, some in a more general way than others. Stronger answers recognised that the police, as a state agent or public authority, were bound by s6 to act compatibly with ECHR rights, that Faisal or other group members would have the right to sue for any potential breaches under s7, and that the court could award appropriate remedies, such as damages, under s8.

Question 11

The scenario here concerned two distinct incidents: first, the arrest of Hugh; and second, the fatal shooting of Ivan. As in Question 10, students were asked to consider the rights and remedies of Hugh and of Ivan's family, and the duties of the police within a human rights perspective.

Hugh had been arrested whilst jogging past a shop where a suspected armed robbery was taking place. So, the first task for students would be to examine the lawfulness of Hugh's arrest under English law. This required an explanation of the power to arrest without a warrant under s24 of the Police and Criminal Evidence Act 1984 (PACE): the arresting officer should have reasonable grounds to suspect that the person arrested has committed, or is about to commit, an offence, and that the arrest is necessary for one of the specified reasons, including to prevent the person arrested from causing injury, or loss or damage to property.

Many students were able to explain the need for a reasonable suspicion that Hugh either had committed or was about to commit an offence, and most of those went on to consider whether on the facts, as stated in the scenario, such grounds existed. An argument often given against there being reasonable suspicion was the difference in colour between Hugh's blue hoodie and the black hoodies worn by the suspects. Some students also pointed out that when arrested Hugh was on his own, whereas the reports of suspicious behaviour concerned two men. When students argued that there probably was reasonable suspicion, they tended to point out the similarity between the colours black and blue, and the fact that Hugh had continued running after being asked to stop.

Only a minority of students referred to the second part of s24: the need for reasonable grounds to believe the arrest was necessary for one of the listed reasons. Where students were aware of this requirement, however, they had no difficulty in arguing there could have been reasonable grounds to believe the arrest was necessary, either to identify Hugh, or to prevent injury or loss of property (since one of the suspected robbers was thought to be carrying a gun), or to allow for effective investigation. Some students also helpfully referred to the two-part test from *Hayes v Chief Constable of Merseyside Police*.

Many students were aware of the right of an arrested person, as set out in s28 PACE, to be told the reasons for their arrest as soon as practicable, and many discussed whether or not these had been met in Hugh's case. The scenario stated that Hugh had been arrested on suspicion of robbery, but did not clarify if he was told this or not.

A smaller number of students addressed the use of force to arrest Hugh. Of those who did, some were able to explain that the police can use reasonable force to effect an arrest. The reference in the scenario to Hugh being 'roughly detained' led some students to argue that disproportionate force had possibly been used, and a few suggested that if this was the case the arresting officer could be liable for battery. This was certainly creditworthy information, but not required.

Some students were aware that PACE limits the period of detention without charge usually to 24 hours, so that Hugh's detention for two hours fell well within the permitted period.

Taking a human rights perspective to Hugh's arrest required a consideration of Article 5, which states that everyone has a right to liberty and security of person, and that no one shall be deprived of their liberty except as stated in 5.1 (a) – (f) and in accordance with a procedure prescribed by law. Supporting requirements are stated in 5.2-5.5. Under s6 of the Human Rights Act 1998, the police as a public authority / agent of the State are bound to act compatibly with the ECHR.

Most students were aware that for Article 5 to be engaged there must have been a deprivation of liberty, as opposed to a mere restriction of movement, and used case examples to illustrate the difference. Many explained that the issue is one of degree and intensity of the confinement, often citing *Guzzardi v Italy*. Most, but not all, recognised that Hugh's arrest would be classed as a deprivation of liberty, and so Article 5 would be engaged.

When there is a deprivation, the State (in this case represented by the police) may seek to justify it under 5.1 (a), (b) or (c). Some students relied on 5.1(b) fulfilment of an obligation prescribed by law, arguing that the police had a legal duty to protect the public from crime and so Hugh's arrest could be justified on this ground. A more obvious justification was 5.1(c): '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'.

If Hugh's arrest was found to comply with PACE, then it was certainly in accordance with law and based on reasonable suspicion so would be justified under 5.1(c). If, on the other hand, Hugh's arrest had been found not to be based on a reasonable suspicion, then it would not have been lawful under PACE, and would not be covered by 5.1(c). Many students were able to explain that 5.4 states that a person deprived of their liberty is entitled to take proceedings to challenge the lawfulness of their detention, and that under 5.5 there is a right to compensation if an arrest is unlawful. They were then able to argue that if Hugh's arrest had been unlawful, he would be able to sue for breach of his Article 5 rights, pursuant to 5.4 (or s7 of the Human Rights Act 1998) and if he succeeded, he could be awarded damages compliant with 5.5 (or under s8 of the Human Rights Act 1998). Some also mentioned the possibility of challenging the lawfulness of the arrest using judicial review which was, of course, creditworthy.

Weaker answers gave confused or inaccurate explanations of the provisions of Article 5. Some mistakenly argued that any limitation of Article 5 had to comply with the requirements for a lawful interference with one of the qualified rights in Articles 8, 10 or 11 (ie be in accordance with law, necessary in a democratic society and in pursuit of a legitimate aim). Some dealt only with PACE, or only with Article 5. Lack of application of s24 PACE was a feature of some weaker answers, with no consideration given to whether the facts of the scenario actually suggested there were reasonable grounds for suspecting Hugh of having committed, or being about to commit, an offence. Some students also discussed, at considerable length, stop and search powers under PACE, when the facts did not raise this issue.

The second part of the scenario concerned the fatal shooting of Ivan by a police officer and so engaged the right to life under Article 2. The State (again as represented by the police in this

incident) is under an obligation not to deprive anyone of life intentionally. Article 2.2 permits very limited exceptions to this obligation, which include ‘the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained’. The phrase ‘no more than absolutely necessary’ was explained in *McCann v UK* to mean that the force used must be strictly proportionate to one of the aims listed in 2.2. The ECtHR in *McCann* also held that if the person using lethal force made a mistake, the force might still be justified under 2.2, if it was based on an honest belief, perceived for good reasons to be valid at the time. *Armani Da Silva v UK* confirmed that the existence of ‘good reasons’ should be determined subjectively, explaining that the court will not ‘substitute its own assessment of the situation for that of an officer at the scene who had to act in the heat of the moment to avert an honestly perceived danger to his own life or to the lives of others’. So, when the court inquires as to whether a belief was perceived for ‘good reasons’ to be valid at the time, it puts itself into the position of the person who used reasonable force, both in determining whether the person had the requisite belief, and in assessing the necessity of the degree of force used.

The interpretation of Article 2 by the ECtHR has also held that relevant considerations in determining whether force was no more than absolutely necessary include not only the immediacy of any threat to the life of police or others, but also other factors which might contribute to the risk to life. So, use of lethal force that might appear to be no more than absolutely necessary in view of the immediate risks, may yet not be justified if the risks arose from, or were exacerbated by poor training of police (eg in the use of firearms) or incompetence in the planning and conduct of a police operation (*McCann v UK*).

The positive obligation on the State under Article 2 is to take appropriate steps to safeguard lives when there is a real and immediate risk to life (*Osman v UK*), and this extends to a duty to conduct an effective official investigation when individuals have been killed as a result of the use of force by agents of the State (*McCann v UK*). The inquiry must be carried out promptly, by someone independent of the events, capable of establishing the facts and of attributing responsibility where appropriate. There must also be a sufficient level of public scrutiny and involvement of the next of kin (*Jordan v UK*). In English law, this obligation may be satisfied by a combination of criminal prosecution and coroners’ inquests.

In the scenario, the police had received a report of two men behaving suspiciously outside a jewellery shop, one possibly being armed. When officers looked into the shop, they saw customers lying on the floor while two men put jewellery into a bag. A strong argument could be made that even at this stage the police perceived there to be a real and immediate risk to life, given the possibility that one man was armed. It would be reasonable to assume that the armed officers who entered had been appropriately trained. When they told the two suspects to put their arms up, Ivan failed to comply and reached into his pocket. This gave the impression that he was about to draw a gun. The officer who shot him would therefore have had an honest belief, perceived for good reasons to be valid at the time (Ivan’s behaviour and the earlier reports) that lethal force was absolutely necessary to prevent injury to others. Although the gun in Ivan’s pocket turned out to be a fake, only capable of firing blanks, this mistake would not rule out reliance on 2.2, since the officer had good reasons to fear that Ivan was about to fire a gun.

There were many strong answers to this part of the question, showing a sound knowledge of the terms of Article 2 and of key cases such as *Osman*, *McCann*, and *Armani Da Silva*, and the ability to apply Article 2 and its related case law to the facts of the scenario. Most students argued that lethal force was justified to prevent injury to others, whilst some also argued that it could be justified to effect the lawful arrest of Ivan. Some students connected the information in the last

paragraph of the scenario – concerning the police failure to communicate and act on an earlier warning that armed robberies were being planned – to the requirement highlighted in *Finogenov v Russia* for proper planning of a rescue operation, and argued that this particular police failure could amount to a breach of Article 2. Many good answers discussed the need for an effective investigation into Ivan’s death, and were able to elaborate on what this would entail, drawing on *Jordan v UK*.

Weaker answers sometimes revealed confusion over the terms of Article 2, and a lack of knowledge of key case law (such as the law from *McCann* that use of lethal force must be strictly proportionate and based on an honest belief, perceived for good reasons to be valid at the time). Some students spent a lot of time elaborating on aspects of Article 2 that were not directly relevant to the question (such as when life begins and the idea that the right to life does not include a right to die).

A number of students were able to point out that as well as suing the police for compensation under ss7 and 8 of the Human Rights Act 1998, Ivan’s family, and Hugh, if his arrest was found to be unlawful, could complain to the Independent Office for Police Conduct.

Only a small minority of students considered the possibility of Ivan’s family suing the police in the tort of Negligence. Whilst a consideration of a negligence action was not required, it was certainly creditworthy. Some of students who did raise negligence were able to explain that the police do not have a blanket immunity from suit in respect of anything done by them in the course of investigating or preventing crime, often citing *Robinson v Chief Constable of West Yorkshire Police*. A few, relying on *Robinson*, argued that the police in the scenario had created a dangerous situation or a risk to the public by failing to communicate and act on the tip-off that armed robberies were being planned, and so would have owed a duty of care to local businesses and their customers, which they had breached, and for which they could be liable in negligence.

The final part of this question asked students to assess the extent to which the rules they had applied, in relation to Ivan’s death, achieve an appropriate balancing of the interests involved. The marks available for this part of the question made it important that students should attempt a response to it, but not all did.

It was helpful to start by identifying the interests requiring balancing in relation to Ivan’s death: on the one hand, his right to life; and, on the other hand, the right to life of the police and customers in the shop. Some students were able to provide a theoretical framework for balancing, based on ideas of philosophers such as Bentham, Von Jhering and Pound. Whilst students were not expected to explore the theory of balancing in as much detail as if this topic had come up in Question 9 (where it would have merited 10 marks), many were able to succinctly explain at least one theoretical approach – eg that under utilitarian theory balancing should be conducted to achieve the greatest happiness of the greatest number; or that Von Jhering argued that individual interests should be subordinated to those of society; or Pound’s argument that a proper balancing required a consideration of two interests on the same level (public v public, or private v private).

The question then required students to focus on the rules they had applied in relation to Ivan’s death – ie the terms of Article 2 and related case law. Some referred to the very strong protection for an individual’s life afforded by Article 2, pointing out that lethal force would only be lawful if it was ‘no more than necessary’ to achieve one of the aims in 2.2 (a) (b) or (c). Further protection is provided by the amount of force needing to be ‘strictly proportionate’ to the risk, as determined in *McCann v UK*. But the balancing of an individual’s right to life against other interests is evident in the wording of Article 2.2, which permits the use of lethal force in three limited circumstances. These exceptions are necessary in order to balance one person’s life against the right to life of

members of the public who might be in great danger from the individual subjected to lethal force. Some students went on to reflect on how the terms of Article 2 aligned with utilitarian theory, or with Von Jhering's idea that individual interests should be subordinated to those of society. A few also referred to the right to sue for compensation under ss7 and 8 of the Human Rights Act 1998, pointing out that the payment of damages by the State went some way to balancing competing interests when a life was taken in breach of Article 2.

Weaker answers often failed to identify which interests might be in conflict, or in need of balancing, and sometimes focused solely on what had happened in the scenario – the facts – without any consideration of the relevant rules of law. Some simply asserted that a fair or an unfair balance had been achieved, again without considering the operation of any legal rules. As mentioned above, a number of students did not attempt this part of Q11.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the [Results Statistics](#) page of the AQA Website.