

DEMOCRATIC AUDIT **ECONOMIC AND SOCIAL RIGHTS FOR THE UK**

THIS PAPER IS BASED ON AUDIT EVIDENCE TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS Inquiry into the UN Committee on Economic, Social and Cultural Rights on the Fourth Periodic Report On Economic and Social Rights in the UK

The submission was coordinated by Professor Weir and Judith Bueno de Mesquita (Senior Research Officer, Human Rights Centre, University of Essex) in response to the call for evidence of the Joint Committee on Human Rights relating to the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights (CESCR) on the UK's Fourth Periodic Report under the International Covenant on Economic, Social and Cultural Rights.¹ The submission responds to a number of the key criticisms and recommendations made by CESCR in its concluding observations and the areas of interest of the Joint Committee. It focuses on:

1. Incorporation of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
2. The rights-based approach;
3. Non-discrimination; and
4. The reporting process.

Before discussing CESCR's criticisms and recommendations, we would like to draw attention to observations made in its concluding observations on positive developments for economic, social and cultural (ESC) rights in the UK (paragraphs 4-8). These developments include the enactment of the Human Rights Act (1998), the adoption of the Care Standards Act (2000) and the establishment of the Northern Ireland Human Rights Commission under the Northern Ireland Act (1998). They also include measures such as the New Deal programme, the adoption of a national minimum wage and new cell standards in prisons. Other positive developments for economic, social and cultural rights in the UK, but which were not highlighted in CESCR's concluding observations, include the Race Relations Amendment Act (2000).

1. Incorporation

The Committee deeply regrets that, although the State party has adopted a certain number of laws in the area of economic, social and cultural rights, the Covenant has still not been incorporated in the domestic legal order and that there is no intention by the State party to do so in the near future.²

The Joint Committee asks, "Is there a case for incorporation of economic, social and cultural rights in UK law?" While the ICESCR neither prescribes incorporation nor stipulates how it should be given effect in the domestic legal order, its ratification engenders a duty, which is binding in international human rights law,

¹ Democratic Audit wishes to thank Iain Byrne (Commonwealth Officer, Interights, and Research Fellow at the HRC), Tufyal Choudhury (Lecturer in Law, University of Durham) and Ellie Palmer (Lecturer in Law, University of Essex) for their assistance and input.

² CESCR concluding observations on the UK, UN doc. E/C.12/1/Add.79, paragraph 11.

to give domestic effect to its provisions. Moreover, CESCR has noted that: "the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place" (paragraph 2, General Comment 9).

The democratic principle of equal citizenship requires that no person should be allowed to fall below a minimum acceptable level of economic and social existence. Economic and social security is vital to the enjoyment of civil and political rights in this country as elsewhere.

Incorporation would undoubtedly provide a more satisfactory and consistent guarantee for economic and social standards through the protection and promotion of economic, social and cultural (ESC) rights in the UK. Currently, UK policy and legislation is mainly designed to promote and protect ESC rights programmatically and without explicit reference to a human rights framework. In many cases there are no adequate mechanisms for redress in practice. Current standards of protection vary and are often inadequate. Evidence of unsatisfactory protection of ESC rights was provided in the shadow submissions of NGOs, including Democratic Audit, to CESCR. By way of example, unsatisfactory protection is manifested in:

- *De facto* discrimination, which continues to undermine the enjoyment of ESC rights by some ethnic/racial groups, women, people with disabilities and the elderly; and legal protection of "minority" rights which is patchy and inconsistent;
- UK legislation which often gives people a right of appeal to tribunals in the event of denial of social and economic entitlements, but to tribunals that are not always independent and have limited powers to provide redress. Inadequate provision of legal aid is an impediment in practice to redress. The government is currently consulting on the recommendations of the Leggatt Review of Tribunals,³ and Democratic Audit urges the Joint Committee to keep the human rights implications of the continuing process under scrutiny;
- Legislation which, while conferring economic and social provisions and entitlements, gives the relevant authorities a wide measure of discretion making it very difficult for people denied social and economic services or facilities to obtain redress from the courts that are anyway reluctant to intervene on what they perceive to be programmatic/political matters;
- Poverty and inequality, which runs deeper in the UK than in any comparable EU state. Public investment in economic and social well-being has lagged behind needs for several decades.

Another issue to consider is the significant shift in social and economic protection in the UK away from universalist public programmes towards individual, private and means-tested provisions, in particular in areas such as pensions and housing. Democratic Audit believes that a corresponding shift in the political and legal framework towards individual protection should accompany these changes. Such a shift would put into the hands of ordinary citizens means of obtaining redress and providing information on defects and gaps in provisions from a grassroots perspective, thus over time encouraging realignments of existing policies and programmes towards protection of more vulnerable members of British society, as necessary.

³ *Tribunals for Users: One System, One Service*, Report of the Review of Tribunals by Sir Andrew Leggatt, The Stationery Office, March 2001

We are not suggesting that the protection of economic, social and cultural rights would or should wholly rely upon the courts. We recognise the limits to what can be achieved through the judicial process; and the extent to which such rights should be justiciable must strike a balance between, on the one hand, democratic legitimacy and the will of Parliament and the provision of a fundamental floor for the protection of basic rights on the other. Yet incorporation could provide a human rights framework of shared values within which government and the public could develop and review policies and the allocation of resources for economic and social well-being in the UK and for improving the quality of public services.

We touch later on the need to develop a human rights culture in the UK. However, here we should draw the Joint Committee's attention to opinion survey evidence that shows that selected economic and social rights figure high among those which varying majorities of the public believe should be incorporated in a British Bill of Rights; and that over time (between 1991 and 2000), popular support for both economic and social, and civil and political, rights rose.⁴

Democratic Audit recalls that many countries, including Finland, Norway and South Africa, have incorporated the Covenant into domestic law, or provided equivalent domestic guarantees of economic, social and cultural rights. ICESCR and CESCR's concluding observations have explicitly guided legislation in other jurisdictions relating to economic, social and cultural rights (see Annex 1).

Democratic Audit also recalls the largely positive experience in the UK of incorporating civil and political rights into domestic law through the enactment of the Human Rights Act. This Act has also represented a small step towards increasing protection of ESC rights in the UK through the courts. A variety of cases involving a range of issues provides evidence that some ESC rights are justiciable in the UK domestic legal system, contradicting the claim often made by courts and government that ESC rights are inherently non-justiciable.

We review some cases of this kind in Annex 2 below. If we distinguish the idea of *justiciability* from the *enforcement* of ESC rights, it is clear that socio-economic rights have increasingly been the subject of litigation through the ordinary principles of judicial review for the past two decades. Therefore, contrary to claims that such rights are non-justiciable, it can be seen that in practice the courts do at times deal with of resource allocation and socio-economic policy-making. They do (as Annex 2 shows) because they are obliged to as part of their duty to interpret statutes. However, it would be better if they did so openly, wherever possible in accordance with open textured standards, such as respect for the dignity and integrity of the person, rather than within existing narrow and often unspoken bounds.

Thus Democratic Audit argues that ESC rights should be afforded full protection, in accordance with maximum available resources, as in the South African courts. The UK could offer such protection through, for example, the incorporation of the ICESCR. In addition, Democratic Audit also urges the UK government to incorporate other relevant UN treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination and the Convention on the Rights of the Child; to sign the 1995 Additional Protocol to the European Social Charter; to ratify the 1996 revision of the Charter; and to pass a Single Equality Act to tackle discrimination in a comprehensive way.

⁴ See *Voices of the People: popular attitudes to democratic renewal in Britain*, Dunleavy et al, Politico's. 2001

If there is no decision to incorporate ICESCR and other human rights instruments, Democratic Audit asks how the UK government intends to afford a higher and more consistent level of protection of ESC rights in accordance with its international obligations?

2. A rights-based approach

The Joint Committee requests information on how a rights-based approach could be used to address various concerns. There are some broad elements of a rights-based approach which apply in all circumstances.⁵ For example, the outcomes and processes of all policies, programmes and actions should be based explicitly on norms and values enshrined in international (and domestic) human rights law. Principles including universality, non-discrimination and equality, participatory decision-making processes and the interdependence of human rights are fundamental components of rights-based approaches.

Mechanisms of accountability and redress are also essential to the promotion and protection of all human rights, including ESC rights. Rights-holders must be able to hold the state to account for upholding its human rights obligations and seek redress through transparent, accessible and effective accountability mechanisms. Accountability and redress mechanisms are also important instruments for assessing and refining policies in the light of individual or group experience.

3. Non-discrimination

The Committee is concerned about the persistence of de facto discrimination in relation to some marginalised and vulnerable groups in society, especially ethnic minorities and persons with disabilities, in various fields, including employment, housing and education. The Committee regrets the unwillingness of the State party to adopt comprehensive legislation on equality and protection from discrimination, in accordance with articles 2.2 and 3 of the Covenant.⁶

The UN Committee's concern is mirrored by growing calls in the UK for the government to adopt comprehensive legislation on non-discrimination and equality. The Race Relations (Amendment) Act 2000 obliged all public authorities in the UK to eliminate unlawful racial discrimination and to promote equality for ethnic minorities. The government has committed itself to extending this duty to the protected grounds of sex and disability, but has taken no further steps to implement this commitment. Under EC directives flowing from Article 13 of the EU Amsterdam Treaty, the government is obliged to prohibit discrimination in employment on grounds of sexual orientation, religion or belief, and age, and the government has recently published a batch of consultation documents and draft legislation and regulations to meet these obligations.

The plethora of separate provisions leaves significant gaps and inconsistencies in the protection against discrimination afforded to minorities. For example, even after the EC Article 13 Directives are implemented, there will be no protection from discrimination on the grounds of religion or belief, sexual orientation or age in the provision of goods, services or facilities or in education and housing. The Hepple Review of anti-discrimination laws in 2000 strongly recommended a single

⁵ For further information see OHCHR, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (2002). Available online at www.unhcr.ch/development/povertyfinal.html

⁶ Concluding observations, paragraph 14.

Equality Act.⁷ Lord Lester of Herne Hill introduced an Equality Bill in the House of Lords, based on the Hepple Review. The bill, which moved to the Commons this month, does not have government backing, but shows that a “big bang” approach of comprehensive protection is achievable. The government is considering merging the Commission for Racial Equality, the Disability Rights Commission and the Equal Opportunities Commission into a single anti-discrimination body. We strongly urge the Joint Committee to insist that a Single Equality Act is an essential backdrop towards such a merger to ensure across-the-board protection.

Further, we urge the Joint Committee to insist that any such act addresses discrimination in relation to economic, social and cultural rights, in line with the concluding observations of CESCR and the UK's obligations under Articles 2.2 and 2.3 of the ICESCR. New legislation should be supported by public funding for all discrimination cases under the new strands for protection. Such funding is necessary while the case law beds down.

Asylum

One area where there is serious concern is the government's treatment of those seeking asylum. Evidence from refugee organisations indicates that many refugees experience severe deprivation and poverty.⁸

4. The reporting process

The Joint Committee asks, “What more could be done to increase awareness of the reporting process? What steps could be taken to make the reporting process more useful or relevant to government or wider civil society?”

Democratic Audit believes that it is essential to create a “human rights culture” in public life and popular understanding in the United Kingdom. There is a great need for an ethical rights-based framework for public policy-making and service delivery; for the expectations and understanding of their rights and responsibilities among people as a whole; and for a society of shared values. Within such a culture, issues of economic and social well-being, social exclusion and deprivation demand full and well-informed public debate. The reporting process, with the government rendering account for its stewardship of ESC rights in the UK and the concluding remarks of the UN Committee (CESCR), has the potential to make such debate comprehensive and authoritative.

Raising awareness of the reporting process, and making it more useful and relevant, demands action from a wide range of actors from government, civil society organisations, academia and the media. As the ICESCR is not incorporated into British law and there is no right of individual petition in the UK under the Covenant, the examination of the government's periodic report is the primary mechanism of accountability in this country.

We are concerned about the general lack of publicity and debate on the ICESCR reporting process within all sectors, as well as the general ignorance about ESC rights in the UK. Indeed, the concluding observations highlighted CESCR's concern that “human rights education provided in the State party to school children, the judiciary, prosecutors, government officials, civil servants and other actors responsible for the Covenant does not give adequate attention to economic, social and cultural rights” (paragraph 13).

⁷ *Equality: a New Framework, Report of the Independent Review of the Enforcement of UK Anti-Discrimination Law*, Hepple, B, Coussey, M, Choudhury, T, Hart Publishing, Oxford, 2000

⁸ *Poverty and Asylum in the UK*, Penrose, J, Refugee Council and Oxfam, London, 2002

We believe that government fails to take seriously enough its responsibilities under either International Covenant to ensure that the public are fully informed about the reporting processes. In this regard, we are concerned about the implicit disdain shown for the idea that the International Covenant (ICESCR) could make a relevant contribution to public policy in the UK. Certain members of the UK delegation reporting to CESCR in May 2002 showed no inclination to engage in a constructive dialogue with members of CESCR.⁹ Some UK delegates lacked understanding of ESC rights and, contrary to the widely understood universality and justiciability of ESC rights, denied their justiciability and relevance in the UK context.

Some comments indicated that the UK government did not consider CESCR's concerns to be serious problems. For example, the Summary Records of CESCR's examination of the UK report record the following comment by a member of the UN delegation: *M. FIFOOT: (Royaume-Uni de Grande-Bretagne et d'Irlande du Nord) dit que son Gouvernement a à cœur de s'acquitter des obligations qui lui incombent en vertu du Pacte international relatif aux droits économiques, sociaux et culturels mais considère que les droits qui y sont consacrés ne sont pas justiciables et qu'il n'appartient pas aux magistrats britanniques d'interpréter les dispositions dudit Pacte.*¹⁰

We are concerned that such preconceptions hampered a dialogue which could have been more constructive and beneficial for the UK in the fulfilment of its international and domestic obligations in the longer term.

In these circumstances, we recommend that government should, as the Joint Committee has recently advised, establish a Human Rights Commission to promote understanding and knowledge of human rights in the UK and to foster the creation of a human rights culture as the bedrock for their protection.¹¹ We agree with the Joint Committee that the commission could act as an "honest broker" in the scrutiny of the UK's performance of its various reporting obligations under UN covenants and conventions, their follow-up and publicity; and that there would be ample opportunity for collaboration between the commission and Parliament, through the Joint Committee, in this important work.¹² We also believe that training for government officials from relevant departments and the judiciary on ESC rights and the UK's international obligations would increase the use and relevance of the reporting process.

Dissemination

We are assured by government sources that the concluding observations have been disseminated by the government to all concerned and that follow-up is being engaged. However, Democratic Audit welcomes the call for evidence of the Joint Committee on Human Rights and hopes that the Committee will be able to monitor the dissemination and follow-up processes.

⁹ Similar official detachment was evident in July 1995 when the UN Human Rights Committee considered the Fourth Periodic Report of the UK on the International Covenant on Civil and Political Rights (ICCPR). Democratic Audit commented then, "According to one's inclination, one can describe the attitude of the authorities towards the international instruments for human rights as one of complacent ignorance or arrogant contempt on the one hand, or as a modest desire to 'do good by stealth' on the other". See "The British Way of Doing Things: the UK and the International Covenant of Civil and Political Rights, 1976-94", Analysis, *Public Law*, Winter 1995 504-512.

¹⁰ UN doc. E/C.12/2002/SR.11. This translates roughly as "Mr Fifoot (United Kingdom of Great Britain and Northern Ireland) said that his government took seriously the fulfilment of its obligations under the ICESCR but considered that the rights contained within this treaty are non-justiciable and that it is not within the remit of British magistrates to interpret its provisions."

¹¹ *The Case for a Human Rights Commission*, Joint Committee on Human Rights, Sixth Report of Session 2002-03, HL Paper 67 & HC Paper 489., TSO, March 2003

¹² *op cit*, paras. 114-118.

Beyond this initiative, we do not know of other examples of sustained follow up. For example, is there to be a House of Commons or Lords debate on the Committee's concluding observations? How far are relevant government departments, including the Departments of Health, Education and Skills, Work and Pensions and the Home Office, taking the ICESCR and CESCR's concluding observations into account in the development of policy and legislation.

It is not clear from the Fourth Periodic Report of the UK whether the UK government took action on the basis of CESCR's concerns and recommendations. In contrast, the periodic reports of a number of other states demonstrate sustained follow-up and policy or legislative changes in response to the Committee's concluding observations (see Annex 1).

There is no accessible (if any) information about CESCR's concluding observations on the UK's Fourth Periodic Report on government websites, including those of the Foreign and Commonwealth Office and the Lord Chancellor's Department. The concluding observations are posted on the United Nations website, but we believe that this and any related information should be posted on the government's website. *We also recommend that the Joint Committee updates its own website.*

Media coverage

The media are not a reliable means for disseminating dispassionate and informed information about human rights; and, indeed, fear of a backlash from tabloid newspapers inhibited the government from publicising the coming into force of the Human Rights Act as positively and fully as the occasion demanded. Democratic Audit found media coverage of the ICESCR reporting process in the UK only in the press. This coverage was extremely limited and it tended to misrepresent the nature of ESC rights and the reporting process. Following the publication of concluding observations, one daily newspaper reported:

What business is any of this of the UN? The organisation was founded in October 1945 with the principal aim of maintaining international peace and security. A subsidiary purpose was to promote respect for human rights and fundamental freedoms. But what its founders had in mind was discouraging governments from chopping their citizens' limbs off or torturing them to death. It was no part of the plan that the UN should start poking its nose into the finer points of British education policy.¹³

To our knowledge, positive press coverage was limited to the issue of corporal punishment of children (see concluding observation, paragraph 36),¹⁴ a human rights issue which has also been raised in the context of civil and political rights by the Committee on the Rights of the Child, the Human Rights Committee and the European Court Human Rights.

Two Annexes follow:-

Annex 1: Domestic Legislation and Policy Measures Guided by CESCR Concluding Remarks and the International Covenant

Annex 2: The Justiciability of Socio-Economic Rights in the UK

¹³ *Editorial*, Daily Telegraph, 21 May 2002.

¹⁴ See Guardian, *UN rebukes Britain over smacking*, 21 May 2002.

Annex 1: Domestic Legislation and Policy Measures Guided by CESCR Concluding Remarks and the International Covenant

Finland

In keeping with Committee recommendations, an important legislative initiative was introduced whereby provisions relating to principal economic, social and cultural rights were incorporated into the Constitution of Finland. In June 1999, these fundamental rights provisions were transferred nearly unaltered from the Covenant to the Constitution, becoming effective on 1 March 2000 (see UN doc. E/C.12/4/Add.1, Finland Fourth Periodic Report, 09/12/99).

Committee recommendations may have also assisted in ensuring that human rights issues are one of the standard subject matters in judges' further training courses which have included economic, social and cultural rights and the administration of justice. Further, in 1995, a separate fundamental rights and human rights section comprising the texts of the principal human rights agreements was included in the Laws of Finland. Prior to this innovation, international agreements ratified by Finland were published only in a separate Treaty Series of the Statute Book. Thanks to this change, it has become easier for both civil servants and lawyers to take note in their work of human rights agreements that are a part of legislation applied in Finland (see UN doc. E/C.12/4/Add.1, Finland Fourth Periodic Report, 09/12/99).

Also in keeping with Committee recommendations, the Ministry of Labour has undertaken to develop the principle of gender mainstreaming in its own branch of the administration, particularly in its employment policy. The gender perspective is taken into account, for example, in the development of labour legislation, vocational guidance and projects related to the European Union (EU) structural funds (see UN doc. E/C.12/4/Add.1, Finland Fourth Periodic Report, 09/12/99).

Finally, the Committee recommended that Finland consider the introduction of a general minimum wage system which would also cover employees who are not protected by collective agreements. In response, a Finnish Tripartite Contracts of Employment Act Committee is currently preparing a proposal for a general reform of the Contracts of Employment Act (see UN doc. E/C.12/4/Add.1, Finland Fourth Periodic Report, 09/12/99).

Germany

Germany is at present actively promoting economic, social and cultural rights both nationally and internationally through recent positive developments concerning said rights, such as: the March 2001 consultation organised by the state on the right to food; the state party's efforts at the United Nations Commission on Human Rights to establish the mandate of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; and its revised and more favourable position on a draft Optional Protocol to the Covenant (see UN doc. E/1994/104/Add.14, Germany Third Periodic Report, 17/10/96).

In keeping with Committee recommendations, the Federal government departed from its previous practice and involved the NGO forum "World Summit for Social Development in the preparation for its fourth periodic report to the Committee on the implementation of the Covenant (see UN doc. E/1994/104/Add.14, Germany Third Periodic Report: Germany, 17/10/96).

Finally, the reintroduction of the continuation of full wage payments in the event of sickness announced in November 1998 is mentioned as a positive example of

the new Federal government's policy of implementing Covenant obligations (see UN doc. E/1994/104/Add.14, Germany Third Periodic Report, 17/10/96).

Portugal

Portugal has extended efforts to implement Committee recommendations in particular through legislative measures to promote equality between men and women (see UN doc. E/1990/6/Add.6, Portugal Second Periodic Report, 22/07/94).

Sweden

In its concluding observations the Committee expressed its concern over the problem of child pornography and the lack of information on this issue in Sweden. It urged the government to intensify its efforts to combat child pornography and to increase measures for monitoring and the registration of all such cases. It also referred to the need to ensure that appropriate penalties are imposed for such offences. Further to Committee recommendations, new Swedish legislation extending criminal liability for association with child pornography was brought into force on 1 January 1999. Here, virtually all association with child pornography images, including possession, constitutes a criminal offence. The legislation applies to media of all kinds including the electronic environment (see UN doc. E/C.12/4/Add.4, Sweden Fourth Periodic Report, 08/08/2000).

Cyprus

Most of the economic, social and cultural rights embodied in Part II of the Covenant are now safeguarded by the Constitution of Cyprus. Further, the Covenant forms part of the municipal law of Cyprus and has thus acquired superior force to any other municipal law (see UN doc. E/1994/104/Add.12, Cyprus Third Periodic Report, 06/06/96).

Canada

In keeping with Committee recommendations, the Federal government reinstated the Court Challenges Program which provides funding for constitutional test cases promoting the rights of official language minorities and equality-seeking groups (see UN doc. E/1994/104/Add.17, Canada Third Periodic Report, 20/01/98).

Tunisia

Many new laws and modifications of existing laws were inspired by the obligations assumed under the Covenant as the enshrined rights form part of Tunisian law by virtue of the constitutional provision that an international treaty ratified by Tunisia becomes part of domestic law (see UN doc. E/C.12/1/Add.36, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Tunisia, 14/05/99).

Egypt

The Constitutional Court of Egypt invoked the provisions of the Covenant to acquit rail workers who were prosecuted for going on strike in 1986 and declared that the Penal Code should be amended to allow the right to strike (see UN doc. E/C.12/1/Add.44, Concluding Observations of the Committee on Economic, Social and Cultural Rights, Egypt, 23/05/2000).

Annex 2: The Justiciability of Socio-Economic Rights in the UK

Democratic Audit evidence to the UN Committee contained a table setting out relevant case law on economic and social rights which demonstrated not only their justiciability but also the relatively narrow limits within which such cases are considered. We reproduce the table here for the convenience of members.

Justiciability: Judicial Review of Cases Involving Economic and Social Rights – recent cases, 1997-2001

Economic or social right	Circumstances of the case	Legal and resources Questions	The court's decision
Disability rights and community care (<i>the Barry case</i> , 1997, 2 All ER 1)	Gloucester council withdrew laundry and cleaning services from an old immobile man on grounds that it did not have sufficient resources to meet his needs	Could a council take its resources into account in determining whether to meet a disabled person's needs under section 2 of the Chronically Sick and Disabled Persons Act 1970 that apparently creates legally enforceable rights for the disabled to receive to meet their individually assessed needs?	Though section 2 is apparently mandatory, the House of Lords narrowly concluded that a council could take its resources into account, both in assessing someone's needs and deciding what was necessary to meet them. Otherwise councils would be liable to open-ended budgetary commitments. However, once a local authority had deemed it <i>necessary</i> to make certain arrangements to meet someone's needs under section 2, it had an absolute duty to supply the services. They could not be withdrawn without a reassessment.
Residential housing for the elderly (<i>the Blanchard case</i> , 1997, 4 All ER 449)	Sefton borough refused to pay for residential accommodation for an elderly resident in line with nationally agreed guidelines	Could a council take its own resources into account in assessing an applicant's needs under the National Assistance Act 1948 and making arrangements to meet them under National Assistance regulations?	The Court of Appeal reluctantly accepted the Gloucester precedent (above), but held that once it had recognised the man's need for residential accommodation, it could not refuse to meet its lawful obligation to fund his future care
Family housing (<i>the Tammadge case</i> , 1998, 1 CCLR 581)	Wigan borough refused to provide a larger home for a single mother with three severely mentally disabled sons and a daughter, all of whom had serious behavioural problems	Could a council refuse on resources grounds to give larger accommodation to a family at the care planning stage after having already recognised the family's housing needs under the Children Act 1989.	No. Since Wigan had already recognised the family's housing needs, it could no longer take its own resources into account at a later stage. The court ordered the council to identify suitable housing within three months and provide it within another three months.
Special educational needs (<i>the Tandy case</i> , 1998, 2 All ER 770)	Sussex reduced home tuition for a sick child who had been off school for seven years from five to three hours weekly under a new blanket policy	Could a local education authority take its own resources into account when assessing what a "suitable education" would be under the arguably resource-sensitive section 298 of the Education Act 1993?	The House of Lords unanimously interpreted the section as imposing an absolute mandatory obligation to deliver home tuition that met a child's individual "age, ability and special needs" and refused to "downgrade" mandatory duties to discretionary obligations. Resources were deemed to be irrelevant. – perhaps because they were negligible in this instance as only two other children were affected. But lower courts have since fully

			followed the precedent in much more costly cases.
Disability rights to home adaptations (<i>the Mohammed case</i> , 1998, All ER 788)	Birmingham refused to provide housing adaptations that were deemed necessary for a disabled applicant on resource grounds.	Did a housing authority have the discretion to take its own resources into account in considering grant-aid under section 23 of Housing Grants and Construction Regeneration Act 1996, given the act's wide-ranging purposes?	No. The divisional court held that a housing authority was under a mandatory duty to provide home adaptations under the wide-ranging act in accordance with the assessed needs of a disabled person, irrespective of the resources it had available for that purpose.
Homeless rights (<i>the Kujtim case</i> , 1991, 4 All ER 101)	A Kosovan asylum seeker, suffering from a depressive illness induced by stress, had been evicted twice from temporary bed and breakfast accommodation as a consequence of extremely anti-social behaviour.	Could a housing authority evict a homeless person who had been assessed as being "in urgent need of care and attention" under section 21 of the National Assistance Act and therefore placed in emergency accommodation?	The Court of Appeal found that an authority had a continuing mandatory as opposed to a discretionary duty under section 21 to provide shelter for the asylum seeker once it had recognised his urgent need for "care and attention".
Disability rights to residential accommodation (<i>the Coughlan case</i> , 2000, 51 BMLR 1)	Six severely disabled residents moved from a hospital that was being closed to a new nursing home with the assurance that it would be "their home for life". But the health authority then closed the new facility.	Could the health authority close the home, mainly on economic grounds, and thus break its promise to the six people after consulting them and taking into account that the promise had been made?	The Court of Appeal decided that the closure of the home was a breach of the residents' "legitimate expectations" and of their right to respect for their family and private life under Article 8 of the European Convention. A mandatory order was made to keep the nursing home open indefinitely.
Right to life and health treatment (<i>the case of child B</i> , 1995, 2 All ER 129)	Child B, a young girl with acute leukaemia, was denied potentially life-saving treatment by her health authority under its priorities policy.	Section 3 of the National Health Services Act 1977 creates a duty to provide for the diagnosis and treatment of "illness" as far as he deems it reasonably necessary. Could the health authority refuse costly treatment to a child on grounds of its priorities and scarce resources where the efficacy of the treatment was in doubt but the child's right to life was at stake?	In the first instance, the divisional court judge held that while the authority should determine how scarce resources should be distributed, there had to be a substantial public interest ground to justify infringing a child's right to life. The authority's priorities policy was too limited and not transparent enough to justify interfering with her right to life. But the Court of Appeal felt that the authority did not need to explain its decision so transparently and held that it alone could decide how its "limited budget" should be spent.
Right to health treatment (<i>the case of A, D and G</i> , 1999, Lloyd's Rep Med 399)	The North West Lancs health authority denied three transsexuals gender re-assignment surgery under a policy that gave such surgery low priority on grounds of its	Did the health authority's blanket policy of giving low priority to gender re-assignment surgery justify the refusal of such surgery to the three transsexual men under the National Health Services Act 1977?	The Court of Appeal held that the authority was under a duty in operating such a policy to assess the possible benefits of gender re-assignment surgery individually in all three cases. It has failed to do so adequately and its refusal of treatment was quashed. The decision was remitted to the authority.

	low health gains		
Right to respect for family and private life (<i>the Donoghue case</i> , 2001, 2 FLR 284)	A pregnant single mother with three children aged under six was being evicted from a housing association home that had been temporarily granted to her pending a decision on whether she was "intentionally homeless". It was decided that she was.	Was the decision of the housing association to evict the woman under section 21 of the Housing Act 1988 a violation of her right to respect for her family and private life under Article 8 of the European Court (now made part of UK law by the Human Rights Act 1998)?	The Court of Appeal agreed with the trial judge that there had been no violation of Article 8 since the refusal to make an eviction order would violate the rights of others to housing and allow temporarily homeless people to jump the housing queue. The Court of appeal added that it would be necessary to alter radically the purpose of the Housing Act to render it compatible with the European Convention and the court would be "acting as a legislator" if it did so.
Right to respect for family and private life (<i>the Lambeth case</i> , 2002, 4 CCLR 487)	A mother with three children, two of whom were autistic and suffered from severe learning difficulties, lived in an unsuitable Lambeth council flat with no garden or outside play area. The council recognised their need for rehousing, but there was no real prospect of a move.	The council had assessed the family's needs under section 17 of the Children Act 1989 and recognised that their present home severely impaired their health and well-being. But they were merely placed on the transfer list instead of being rehoused? Did the section 17 assessment of need "crystallise" into a mandatory duty that the council was bound to honour?	The Court of Appeal held by a majority that the Children Act did not empower social services to provide accommodation; and held unanimously that section 17 did not, as in cases like <i>Kujtim</i> (see above), "crystallise" into a mandatory duty on the council to meet the need. The decision results in families being split and the cases is going to the House of Lords.

References: All ER = All England Reports; CCR = Community Care Reports; FLR = Family Law Reports; BMLR = Butterworths Medical Law reports; LRMC = Lloyds Reports of Medical Cases; CCLR = Community Care Law Reports

The comments of Lord Hoffmann in a more recent case (*Matthews v Ministry of Defence* [2003] UKHL 5, 13 February 2003) provide a reasonable summary of the judiciary's views on the limited place that economic and social rights occupy under judicial review:

Human rights are the rights essential to the life and dignity of the individual in a democratic society. The exact limits of such rights are debatable and, although there is not much trace of economic rights in the 50-year-old [European] Convention, I think it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery. But they certainly do not include the right to a fair distribution of resources or fair treatment in economic terms - in other words, distributive justice. Of course distributive justice is a good thing. But it is not a fundamental human right.

It is not on the face of it a great leap from this position to that adopted by the South African Constitutional Court in its search for a workable approach to enforcing economic and social rights that are constitutionally entrenched. In judgments such as the case of *Grootboom v RSA* (2000) 10 BHRC 84 on housing, the Court has made clear that, while everyone has a right to a minimum level of protection, the South African courts should not become embroiled in policy decisions and questions of resource allocations. Instead, the courts will determine whether the government has acted reasonably in all the circumstances. The main formal difference between the Hoffmann statement and the South African position might well lie in the former's reluctance to become involved in determining whether somebody has received "fair treatment in economic terms" which does not necessarily involve questions of redistribution.

Here, the courts have used principles of judicial review to give effect to positive enforceable socio-economic rights in cases such as *Coughlan* and *Tandy* (see table above), perhaps because the

resource implications were not too great. In asylum cases, they have come close to recognising the need for a safety net, though whereas Mr Justice Collins argued in the case of six asylum-seekers who had failed to apply for asylum immediately on entry that Parliament could not have intended to give genuine asylum-seekers "the bleak alternatives of returning to persecution or of destitution", the Court of Appeal subsequently rejected his ruling that the regulations could lead to a breach of human rights because of the "real risk" that an asylum-seeker could end up destitute (*R(Q) v Secretary of State for the Home Department* [2003] EWHC 195 (Admin), 19 February 2003; and *Q & Ors, R (On the Application of) v Secretary of State for the Home Department* [2003] EWCA Civ 364, 18 March). 2003).

But the courts tend also, for example, to read housing legislation restrictively, as for example in the recent case *Begum v London Borough of Tower Hamlets* [2003] UKHL 4, 13 February 2003. This House of Lords case raises questions about the scope of the justiciability of social rights in the UK in accordance with Article 6 of the European Convention. The law lords considered whether it is legitimate to limit the justiciability of social rights (by comparison with private law claims) on the grounds that public housing is a scheme of welfare where there are not enough resources to give everybody a home that suits them, or any home at all; and that litigation incurs costs for authorities. They decided that the existing right to appeal against the legality of the decision or other judicial review principles to a court of law is enough to satisfy Article 6 and the absence of an appeal on the facts is not fatal.