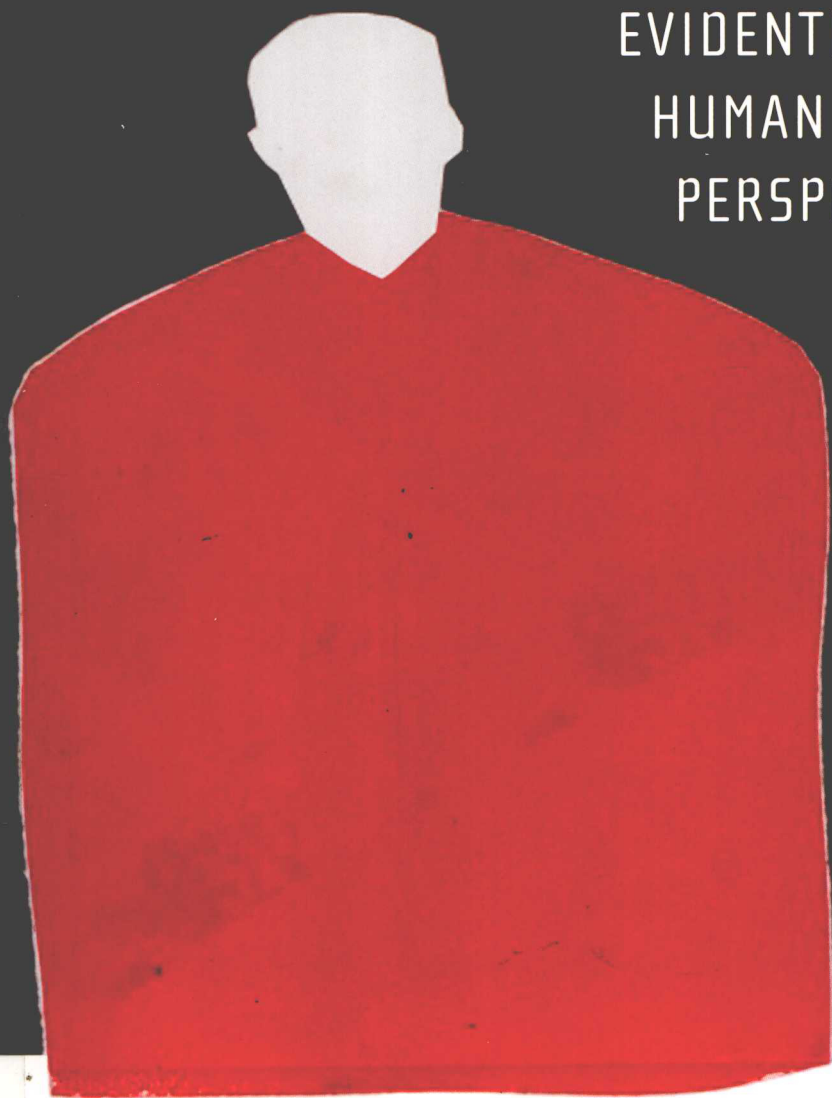




# THE PRESUMPTION OF INNOCENCE

EVIDENTIAL AND  
HUMAN RIGHTS  
PERSPECTIVES

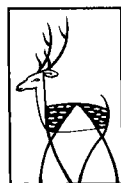


Andrew Stumer

# The Presumption of Innocence

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Human Rights Perspectives

Andrew Stumer



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## FOREWORD

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It is a particular pleasure to have been invited to contribute a foreword to this book, since its subject-matter was touched upon in Dr Stumer's very first BCL tutorial, on the burden and standard of proof, with me in Oxford. Since then I have enjoyed seeing its evolution and expansion through an MPhil dissertation, and a DPhil thesis into this full monograph.

Its subject matter lies at the intersection of legal theory and practice, public and private law, and substance and procedure. It is at the very heart of the discipline of law. Partly for this reason, it is no surprise that it should be under constant scrutiny and subject to innumerable suggestions for change in a myriad different ways. It is crucial for the whole topic of human rights, and helps to provide one of the essential components in the spine that provides both structure and control to the enterprise of law. As such it deserves serious analysis, rather than the sometimes glib justifications, and no less glib criticisms, of its elements, customarily provided elsewhere, especially in political circles, but regrettably sometimes in judicial pronouncements.

The hallmark and success of Dr Stumer's work is the careful and conscientious dissection and discussion of the sometimes high-flown rhetoric in which not only the fundamental provisions, but even their judicial applications, are so often cast. Everyone can pay lip-service to some conception of the presumption of innocence, perhaps expressed in numerical calculation of the number of guilty persons acquitted rather than that of innocent convicted. But what are the implications of the nature of the relevant crimes of the guilty or of the severity of the sentences passed upon the innocent?

This book examines from a strict legal perspective the way in which the relevant provisions of the European Convention, especially article 6(2), have been construed both by the European Court of Human Rights, and in the national courts of the member states, especially those of the United Kingdom. The aim of the analysis is to guide both the direction of further development within Europe, but every bit as importantly to examine and promote the use of that analysis in the interpretation and construction of similar provisions elsewhere, especially in other common law jurisdictions.

The main theme that emerges is strong affirmation of the use of the presumption so as to prevent the conviction of the innocent, and strict interpretation of any derogation on the basis of vague community values. The merit of this work is that it shows in clear detail just how this line can be held against inroads inspired by blurred and imprecise conventional slogans and sound-bites.

## *Foreword*

It is only by work of this character and quality that the institutions of human rights can be made to operate as effective and acceptable tools to direct legal decisions, rather than as affirmations of loose aspirations. This book sets the tone, and opens the door, for a fresh approach to this whole area.

Professor Colin Tapper  
Magdalen College, Oxford  
September 2009

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## LIST OF ABBREVIATIONS

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Abbreviation	Full Title
CLJ	<i>Cambridge Law Journal</i>
Crim LR	<i>Criminal Law Review</i>
Cross & Tapper	Colin Tapper <i>Cross and Tapper on Evidence</i> 11th edn (OUP, Oxford 2007)
Dennis	IH Dennis <i>The Law of Evidence</i> 3rd edn (Sweet & Maxwell, London 2007)
E & P	<i>International Journal of Evidence and Proof</i>
LQR	<i>Law Quarterly Review</i>
MLR	<i>Modern Law Review</i>
Munday	Roderick Munday <i>Evidence</i> 4th edn (OUP, Oxford 2007)
OJLS	<i>Oxford Journal of Legal Studies</i>
PL	<i>Public Law</i>
Roberts & Zuckerman	Paul Roberts & Adrian Zuckerman <i>Criminal Evidence</i> (OUP, Oxford 2004)

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# INTRODUCTION

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The presumption of innocence is universally recognised as a core principle in the administration of criminal justice.<sup>1</sup> Any system that regarded a person as guilty merely by virtue of accusation would fall short of commonly accepted standards of fairness. The presumption of innocence tilts the scales of justice in favour of a defendant by requiring the prosecution to establish guilt to a high standard of certainty. As a result, convictions are made more difficult and there is an increased likelihood that the guilty will escape punishment. Every system of criminal law therefore faces a constant tension between protecting the rights of defendants and the community interest in convicting the guilty. On many occasions, this tension is resolved by measures that undermine the presumption of innocence. In all parts of the world, those who define the rules of criminal justice must have some means of deciding whether, and if so when, limitations on the presumption of innocence may be justified.

In the past decade, English lawyers have confronted these issues in a direct fashion, due to the introduction of the Human Rights Act 1998 (HRA). The HRA gives quasi-constitutional status to the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR). Article 6(2) of the ECHR states: ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.’ While Article 6(2) is expressed in unqualified terms, the Strasbourg Court has declared that the right protected therein is subject to ‘reasonable limits’.<sup>2</sup> On six occasions since 1999, the House of Lords has endorsed the notion that the presumption of innocence is subject to ‘reasonable limits’ and has applied a proportionality test to determine the scope of those limits.<sup>3</sup> This book considers

<sup>1</sup> See Universal Declaration on Human Rights (adopted 10 December 1948) Article 11(1); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) Article 14(2); Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) Article 6(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) Article 8(2); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986); Declaration of the Rights of Man and of the Citizen (France, August 1789) Article 9; Canadian Charter of Rights and Freedoms 1982, s 11(d); Constitution of the Republic of South Africa 1996, s 35(3)(h); Charter of Human Rights and Responsibilities Act 2006 (Vic), s 25(1); New Zealand Bill of Rights Act 1990, s 25(c). In the United States, the presumption of innocence has been held to be implicit in the “due process” guarantee of the Fifth and Fourteenth Amendments: see *Coffin v US*, 156 US 432, 453–461 (1895) (White J); *Estelle v Williams*, 425 US 501, 503 (1976) (Burger CJ, for the Court); *Taylor v Kentucky*, 436 US 478, 484 (1978) (Powell J, for the majority).

<sup>2</sup> *Salabiaku v France* (App No 10589/83) (1991) 13 EHRR 379 [28].

<sup>3</sup> *R v DPP; ex p Kebilene* [2000] 2 AC 326 (HL) 384 (Lord Hope); *R v Lambert* [2002] 2 AC 545 (HL) [34] (Lord Steyn), [87] (Lord Hope), [150] (Lord Clyde); *R v Benjafield* [2003] 1 AC 1099 (HL) 1153 [15] (Lord Steyn); *R v Johnstone* [2003] 1 WLR 1736 (HL) [48] (Lord Nicholls); *Sheldrake v DPP*;

whether, and if so to what extent, the presumption of innocence ought to be subject to restriction. It will be argued that limits on the right to be presumed innocent cannot ordinarily be justified. They should be permitted only in a narrow set of circumstances when the values underpinning the presumption of innocence are not truly threatened.

Academics have identified two facets to the presumption of innocence.<sup>4</sup> The first is a rule applicable at trial that the burden of proof is on the prosecution to prove the guilt of the defendant beyond reasonable doubt. This facet was described in *Woolmington v DPP* as the ‘golden thread’ of English criminal law.<sup>5</sup> It is the more familiar aspect of the presumption of innocence, at least to common law lawyers, and it is sometimes treated as exhaustive of its content.<sup>6</sup> The second facet is a more general principle that the treatment of the defendant throughout the criminal process should be consistent, as far as possible, with his or her innocence. Used in this broader sense, the presumption of innocence underpins the whole range of rules intended to ensure fairness to defendants.<sup>7</sup> Specifically, the Strasbourg Court has stated that it would be a breach of the presumption of innocence for a decision concerning the defendant to reflect his or her guilt prior to conviction.<sup>8</sup> Hence, the refusal of bail pending trial,<sup>9</sup> an order for confiscation of property without proof of an illegal source,<sup>10</sup> and even the publication of the name of the defendant prior to conviction<sup>11</sup> could be said to breach the presumption of innocence. In the same vein, the Strasbourg Court has stated that the right to

*AG's Reference (No 4 of 2002)* [2005] 1 AC 264 (HL) [12] (Lord Bingham); *R v Chagot Limited* [2009] 1 WLR 1 (HL) [27] (Lord Hope). See also *McIntosh v Lord Advocate* [2003] 1 AC 1078 (PC) [30] (Lord Bingham); *AG of Hong Kong v Lee Kwong-kut* [1993] AC 951 (PC) 969 (Lord Woolf).

<sup>4</sup> P Healy ‘Proof and Policy: No Golden Threads’ [1987] Crim LR 355, 364; PJ Schwickard ‘The Presumption of Innocence: What is it?’ (1998) 11 *South African Journal of Criminal Justice* 396, 403; S Summers ‘Presumption of Innocence’ (2001) 1 *The Juridical Review* 37, 57; L Laudan ‘The Presumption of Innocence: Material or Probatory’ (2005) 11 *Legal Theory* 333, 333–334; A Ashworth ‘Four Threats to the Presumption of Innocence’ (2006) 10 E & P 241, 243; M Redmayne ‘Rethinking the Privilege Against Self-Incrimination’ (2007) 27 *Oxford Journal of Legal Studies* 209, 218–219.

<sup>5</sup> *Woolmington v DPP* [1935] AC 462 (HL) 481–482 (Viscount Sankey LC).

<sup>6</sup> See N Bridge ‘Presumptions and Burdens’ (1949) 12 MLR 273, 282; G Williams *The Proof of Guilt: A Study of the English Criminal Trial* 3rd edn (Stevens, London 1963) 184; Cross & Tapper 144.

<sup>7</sup> See WS Laufer ‘The Rhetoric of Innocence’ (1995) 70 *Washington Law Review* 329, 333–334.

<sup>8</sup> *Minelli v Switzerland* (App No 8660/79) (1983) 5 EHRR 554 [37].

<sup>9</sup> *Caballero v UK* (App No 32819/96) (2000) 30 EHRR 643 [43]. *Cf Bell v Wolfish*, 441 US 520, 533 (1979) (Rehnquist J, for the majority): ‘Without question, the presumption of innocence plays an important role in our criminal justice system . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.’

<sup>10</sup> Such orders have been held to fall outside the scope of Art 6(2) since they do not involve the determination of a ‘criminal charge’: *McIntosh v Lord Advocate* [2003] 1 AC 1078 (PC) [25] (Lord Bingham), [43] (Lord Hope); *R v Benjafield* [2003] 1 AC 1099 (HL) 1152 (Lord Steyn); *R v Briggs-Price* [2009] UKHL 19 [40] (Lord Phillips), [64] (Lord Rodger), [13] (Lord Mance), *cf* [94] (Lord Brown); *Phillips v UK* (App No 41087/98) ECHR 5 July 2001; *Van Offeren v The Netherlands* (App No 19581/04) ECHR 5 July 2005. However, the House of Lords has held that the presumption of innocence is implicit in Art 6(1), which applies to the sentencing stage of a criminal proceeding: *R v Briggs-Price* [2009] UKHL 19 [41] (Lord Phillips), [65] (Lord Rodger).

<sup>11</sup> R Munday ‘Name Suppression: An Adjunct to the Presumption of Innocence and to Mitigation of Sentence’ [1991] *Criminal Law Review* 680 and 753.

silence and privilege against self-incrimination are closely associated with the presumption of innocence.<sup>12</sup>

This book is concerned exclusively with the burden and standard of proof and does not directly address the second, broader facet of the presumption of innocence. One reason for this is that the first facet of the presumption has a more clearly definable legal content: the burden of proof must be on the prosecution, and guilt must be proved beyond reasonable doubt. It has been suggested that the presumption of innocence should be understood exclusively in this more restricted sense, since otherwise it would become a 'vaporous euphemism for fairness'.<sup>13</sup> A second reason for focusing on the burden and standard of proof is that English cases so far decided under Article 6(2) have been primarily concerned with this aspect. In the English cases, Article 6(2) has been used to challenge the practice of imposing burdens of proof on defendants. A burden of proof on the defendant is referred to as a 'reverse burden' since it is a departure from the ordinary rule requiring the prosecution to prove guilt.

In understanding the conflict between reverse burdens and the presumption of innocence, there is much to be learned from other jurisdictions that have addressed the problem. Useful comparative material is found in the United States, Canada, South Africa and, to a lesser extent, New Zealand. The courts in these jurisdictions have grappled with questions very similar to those faced under Article 6(2). Both Strasbourg<sup>14</sup> and the House of Lords<sup>15</sup> have warned against the use of comparative law in interpreting and applying Article 6(2). This is because differences in the language and structure of national constitutions may affect the interpretation of the presumption of innocence in other jurisdictions. Nevertheless, the comparative law is useful in shedding light on concepts and problem that are faced by the English courts. Accordingly, the comparative law on the presumption of innocence is worked throughout each of the chapters in this book, wherever it assists in illuminating the discussion of a key concept.

Chapter one is foundational and introduces key concepts such as the burden and standard of proof. The central theme of this book is outlined in Chapter two. Chapter two argues that there is a dual rationale for the presumption of innocence: protecting the innocent from wrongful conviction and promoting the rule of law. The first of these rationales is of such importance that it cannot, in general, be subjugated to other interests. Only when this rationale is not called into play or is called into play in an attenuated sense should the courts consider approving limits on the presumption of innocence through the use of reverse burdens. The rationale of protecting the innocent may be attenuated either because there is a

<sup>12</sup> *Saunders v UK* (App No 19187/91) (1997) 23 EHRR 313 [68]; *Heaney and McGuinness v Ireland* (App No 34720/97) (2001) 33 EHRR 12 [40], [59]; *Weh v Austria* (App No 38544/97) (2005) 40 EHRR 37 [39]. The connection has also been noted in Canada and South Africa: *R v Noble* [1997] 1 SCR 874, 921 (Sopinka J); *Dubois v The Queen* [1985] 2 SCR 350, 357 (Lamer J); *S v Zuma* 1995 (2) SA 642 (CC) [27] (Kentridge AJ).

<sup>13</sup> Healy (see n 4 above) 365. See also Schwikkard (see n 4 above) 404; Summers (see n 4 above) 56.

<sup>14</sup> *Bates v UK* (App No 26280/95) EComHR 16 January 1996.

<sup>15</sup> *Sheldrake v DPP; AG's Reference (No 4 of 2002)* [2005] 1 AC 264 (HL) [33] (Lord Bingham).

low risk of wrongful conviction, or because the consequences of conviction are minimal. In cases where the rationale of protecting the innocent is attenuated, the courts can take account of the community interest in obtaining convictions by applying a proportionality analysis. In this analysis, the courts must give weight to the continually applicable rationale of promoting the rule of law.

The remaining chapters work through the consequences of this understanding of the presumption. Chapter three argues that the presumption of innocence is an entirely procedural protection and therefore does not have consequences for the substance of the criminal law. It also argues that the presumption of innocence requires, as a *prima facie* matter, that the prosecution bear the burden of proof with respect to every matter necessary for conviction. Chapter four analyses the decisions of the Strasbourg Court concerning Article 6(2). It will be shown that the Strasbourg Court has routinely permitted reversal of the burden of proof. Since this practice is inconsistent with the best understanding of the presumption of innocence, the English courts ought to depart from it. Chapter five discusses the proper approach to the proportionality inquiry when it is relevant to the presumption of innocence. It will be argued that the proportionality inquiry should focus upon the 'necessity' of a reverse burden, and not upon its 'reasonableness' or 'balance'. Chapter six ties together each of the points made in the earlier chapters by considering the relative weight to be given to each of the factors relevant to the allocation of the burden of proof.

The presumption of innocence is one of the most fundamental human rights. Underlying it is the principle that the state must not take coercive action against any individual unless it has been proved that the person is guilty of a criminal offence and is properly subject to punishment. The guarantee that the state will not interfere with its citizens except when it has demonstrated the justification for the interference is essential for any state with aspirations of conforming to the liberal ideal. This ideal requires that each individual be treated as an end, not as a means, and that the pursuit of life's goals be left to the best endeavours of the individual, without unnecessary intervention. The coercive powers of the state in the field of criminal law, in particular the power of imprisonment, have the potential to deprive individuals of the right pursue their own objectives and to fashion the path of their own lives.

The liberal ideal frequently comes up against the harsh realities of criminal justice, in which perfect procedures which result in no wrongful convictions are impossible. The pressure to ensure public safety leads governments into curtailing the rights of criminal defendants who, as a class, are viewed unsympathetically by many in the community. Yet, if the liberal ideal is to be put into practice, criminal procedure must continue to protect the rights of defendants and limit the abuse of the coercive powers of the state. In forging a way through the conflict between the aspiration to fulfill the liberal ideal and the needs of criminal justice, a proper understanding of the role of the presumption of innocence is essential. This book seeks to provide that understanding, in a manner that will guide both the legislature, in the passage of criminal legislation, and the courts, who are charged with protecting the presumption of innocence in the context of the Human Rights Act.

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# TABLE OF CONTENTS

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<i>Foreword</i>	vii
<i>Table of Abbreviations</i>	xi
<i>Table of Cases</i>	xiii
<i>Table of Legislation</i>	xxix
<i>Table of Conventions, Treaties etc</i>	xxxv
<i>Introduction</i>	xxxvii
1. THE PRESUMPTION BEFORE THE HUMAN RIGHTS ACT	1
A. History of the Presumption of Innocence	1
B. Burden of Proof	8
1. Persuasive Burdens	9
2. Evidential Burdens	16
C. Standard of Proof	19
D. Impact of the HRA	22
E. Conclusion	26
2. RATIONALE FOR THE PRESUMPTION	27
A. Two rationales for the Presumption	27
1. Protecting the Innocent	28
2. Promoting the Rule of Law	37
B. Limitation of the Presumption	40
1. Limitation of Rights	41
2. Threat of Serious Crime	43
3. When the Rationale is Attenuated	48
C. Conclusion	51
3. SCOPE OF THE PRESUMPTION	52
A. Substantive Approach	53
1. Rejection in the English Cases	54
2. Case for a Substantive Approach	57
3. Other Constraints on Unfair Offences	65
B. Narrow Procedural Approach	68
1. Confusion in the English Cases	68
2. Case for a Narrow Procedural Approach	73
C. Broad Procedural Approach	82
1. Greater Power includes the Lesser	83

## *Table of Contents*

2. Risk of More Strict Liability Offences	84
D. Conclusion	87
4. THE PRESUMPTION IN STRASBOURG	88
A. The Content of the Presumption	89
1. Official Decisions Reflecting Guilt	90
2. Burden of Proof	92
3. Presumptions Confined within Reasonable Limits	98
4. Article 6(2) and Substantive Law	102
B. Limitation of Article 6 Rights	107
1. Community Interest Under Article 6(2)	107
2. Community Interest and Other Article 6 Rights	109
C. Conclusion	118
5. PROPORTIONALITY AND THE PRESUMPTION	119
A. Confusion in the English Cases	120
1. Necessity Approach	121
2. Balance Approach	124
3. A ‘Difference of Emphasis’	127
B. The Nature of the Proportionality Inquiry	132
1. Legitimate Objective	134
2. Suitability, Necessity and Balance	136
3. Proportionality and the Problem of Deference	146
C. Conclusion	151
6. ALLOCATING THE BURDEN OF PROOF	152
A. Seriousness of the Offence	153
B. Penalty	157
C. Regulatory Offences	162
1. Minimal Censure and Penalty	162
2. An Effective Regulatory Regime	164
D. Knowledge and Ease of Proof	167
1. Relative Ease of Proof	167
2. ‘Peculiar Knowledge’	172
E. Importance of Matters Proved by Prosecution	176
1. Proof of Wrongfulness	176
2. Connection between Basic and Presumed Fact	186
F. Conclusion	188
Conclusion	190
<i>Bibliography</i>	193
<i>Index</i>	209

---

## TABLE OF CASES

---

### Australia

<i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336 (HCA) .....	9
<i>Dawson v R</i> (1961) 106 CLR 1 (HCA) .....	21
<i>Graham v R</i> (1983) 11 Aust Crim R 21 (VCCA) .....	10
<i>Green v R</i> (1971) 126 CLR 28 (HCA) .....	21
<i>Jackson v Harrison</i> (1978) 138 CLR 438 (HCA) .....	163
<i>Kable v DPP (NSW)</i> (1996) 189 CLR 51 (HCA) .....	37
<i>Mizzi v The Queen</i> (1960) 105 CLR 659 (HCA) .....	22
<i>R v Bonnor</i> [1957] VR 227 .....	182
<i>R v Falconer</i> (1990) 171 CLR 30 (HCA) .....	12
<i>R v Youssef</i> (1990) 50 A Crim R 1 .....	184
<i>Sodeman v The King</i> (1936) 55 CLR 192 (HCA) .....	22
<i>Thomas v R</i> (1960) 102 CLR 584 (HCA) .....	21
<i>Thompson v The Queen</i> (1989) 169 CLR 1 (HCA) .....	10
<i>Vallance v R</i> (1961) 108 CLR 56 (HCA) .....	12

### Canada

<i>Andrews v Law Society of British Columbia</i> [1989] 1 SCR 143 .....	140
<i>Balcombe v The Queen</i> [1954] SC 303 .....	10
<i>BC Motor Vehicle Act, Re</i> [1985] 2 SCR 486 .....	64
<i>Black v Law Society of Alberta</i> [1989] 1 SCR 591 .....	140
<i>Chaoulli v Quebec</i> [2005] 1 SCR 791 .....	133, 141
<i>Dickason v University of Alberta</i> [1992] 2 SCR 1103 .....	140
<i>Dubois v The Queen</i> [1985] 2 SCR 350 .....	xv
<i>Edmonton Journal v Alberta (AG)</i> [1989] 2 SCR 1326 .....	140
<i>Irwin Toy Ltd v Quebec (AG)</i> [1989] 1 SCR 927 .....	42, 148, 150
<i>Libman v Quebec (AG)</i> [1997] 3 SCR 569 .....	148, 150
<i>McKinney v University of Guelph</i> [1990] 3 SCR 229 .....	140, 150
<i>New Brunswick v G</i> [1999] 3 SCR 46 .....	141
<i>Newfoundland (Treasury Board) v NAPE</i> [2004] 3 SCR 381 .....	136
<i>R v Appleby</i> [1972] SCR 303 .....	24
<i>R v Big M Drug Mart</i> [1985] 1 SCR 295 .....	135
<i>R v Brydon</i> [1995] 95 CCC (3d) 509 .....	20
<i>R v Butler</i> [1992] 1 SCR 452 .....	138
<i>R v Chaulk</i> [1990] 3 SCR 1303 .....	185

## Table of Cases

<i>R v Downey</i> [1992] 2 SCR 10 .....	11, 19, 187
<i>R v Edwards Books and Arts</i> [1986] 2 SCR 713 .....	135, 137
<i>R v Jones</i> [1986] 2 SCR 284 .....	140
<i>R v Kowlyk</i> [1988] 2 SCR 59 .....	12
<i>R v Laba</i> [1994] 3 SCR 965 .....	18, 25, 42, 150, 187
<i>R v Lee</i> [1989] 2 SCR 1384 .....	136
<i>R v Lifchus</i> [1997] 3 SCR 320 .....	8, 21
<i>R v Noble</i> [1997] 1 SCR 874 .....	xv
<i>R v Oakes</i> [1986] 1 SCR 103 .....	28, 133, 137, 187
<i>R v Osolin</i> [1993] 4 SCR 595 .....	18
<i>R v Schwartz</i> [1988] 2 SCR 443 .....	9, 16, 170, 172
<i>R v Sharpe</i> [2001] 1 SCR 45 .....	141
<i>R v The Wholesale Travel Group Inc</i> [1991] 3 SCR 154 .....	19, 162, 164–65
<i>R v Vaillancourt</i> [1987] 2 SCR 636 .....	57, 64
<i>R v Whyte</i> [1988] 2 SCR 3 .....	69
<i>RJR-Macdonald v Canada</i> [1995] 3 SCR 199 .....	138, 150
<i>Ross v New Brunswick School District No 15</i> [1996] 1 SCR 825 .....	138
<i>Singh v Minister of Employment and Immigration</i> [1985] 1 SCR 177 .....	136
<i>Stoffman v Vancouver General Hospital</i> [1990] 3 SCR 483 .....	150

## European Commission and Court of Human Rights

<i>AG v Malta</i> (App No 1664/90) EComHR 10 December 1991 .....	100
<i>Ahmed v UK</i> (App No 22954/93) (1998) 29 EHRR 1 .....	117, 138
<i>Allenet de Ribemont v France</i> (App No 15175/89) (1995) 46 EHRR 1222 .....	91
<i>Ashingdane v UK</i> (App No 8225/78) (1985) 7 EHRR 528 .....	43, 115
<i>Atlan v UK</i> (App No 36533/97) ECHR 19 June 2001 .....	113
<i>Austria v Italy (Pfunders Case)</i> (1963) 6 Yearbook ECHR 740 .....	91–92, 96
<i>Averill v UK</i> (App No 36408/97) (2001) 31 EHRR 36 .....	110–11
<i>B v UK</i> (App No 36536/02) (1996) 42 EHRR 11 .....	117
<i>Barberà, Messegué and Jabardo v Spain</i> (App No 10588/83) (1988) 11 EHRR 360 .....	93, 96
<i>Barfod v Denmark</i> (App No 11508/85) (1991) 13 EHRR 493 .....	142
<i>Barthold v Germany</i> (App No 8734/79) (1985) 7 EHRR 383 .....	138
<i>Bates v UK</i> (App No 26280/95) EComHR 16 January 1996 .....	xv, 100, 108
<i>Beckles v UK</i> (App No 44652/98) (2003) 36 EHRR 13 .....	110–11
<i>Belgian Linguistic Case (Merits)</i> (App No 1474/62) (1968) 1 EHRR 252 .....	142
<i>Blum v Austria</i> (App No 31655/02) ECHR 3 February 2005 .....	94
<i>Böhmer v Germany</i> (App No 37568/97) (2004) 38 EHRR 19 .....	91
<i>Bonisch v Austria</i> (App No 8658/79) (1987) 9 EHRR 191 .....	96
<i>Brock v UK</i> (App No 26279/95) EComHR 16 January 1996 .....	100, 108
<i>Brown v UK</i> (App No 4223/98) ECHR 2 July 2002 .....	106
<i>Brualla Gomez de la Torre v Spain</i> (App No 26737/95) (2001) 33 EHRR 1341 .....	115

## Table of Cases

<i>Bruckner v Austria</i> (App No 21442/93) EComHR 18 October 1994.....	101
<i>BT v Norway</i> (App No 16269/90) EComHR 1 April 1992.....	93
<i>Buck v Germany</i> (App No 41604/98) (2006) 42 EHRR 21 .....	138
<i>Bullock v UK</i> (App No 29102/95) EComHR 16 January 1996 .....	100, 108
<i>Caballero v UK</i> (App No 32819/96) (2000) 30 EHRR 643 .....	xiv
<i>Campbell and Cosans v UK</i> (App No 7511/76) (1982) 4 EHRR 293.....	117
<i>Condron v UK</i> (App No 35718/97) (2001) 31 EHRR 1.....	111
<i>Cossey v UK</i> (App No 10843/84) (1991) 13 EHRR 622 .....	109
<i>Daktaras v Lithuania</i> (App No 42095/98) (2002) 34 EHRR 60.....	91
<i>Delta v France</i> (App No 11444/85) (1993) 16 EHRR 574.....	96
<i>Demicoli v Malta</i> (App No 13057/87) (1992) 14 EHRR 47 .....	160
<i>Devenney v UK</i> (App No 24265/94) (2002) 35 EHRR 24 .....	115
<i>Devlin v UK</i> (App No 29545/95) (2002) 34 EHRR 43 .....	115
<i>Deweer v Belgium</i> (App No 6903) (1979) 2 EHRR 439.....	95
<i>Doorson v Netherlands</i> (App No 20524/92) (1996) 22 EHRR 330 .....	113–14
<i>Dudgeon v UK</i> (App No 7525/76) (1982) 4 EHRR 149 .....	65
<i>Engel v Netherlands</i> (App No 5100/71) (1979) 1 EHRR 647 .....	160
<i>Englert v Germany</i> (App No 10282/83) (1987) 13 EHRR 392.....	91
<i>F v Switzerland</i> (App No 11329/85) (1987) 10 EHRR 411 .....	117
<i>Falk v Netherlands</i> (App No 66273/01) ECHR 19 October 2004 .....	108
<i>Fayed v UK</i> (App No 17101/90) (1994) 18 EHRR 393 .....	115
<i>Fitt v UK</i> (App No 29777/96) (2000) 30 EHRR 480 .....	113, 143
<i>Foster v UK</i> (App No 28846/95) EComHR 16 January 1996.....	100, 108
<i>Funke v France</i> (App No 10828/84) (1993) 16 EHRR 297.....	96, 115–16
<i>Gaskin v UK</i> (App No 10454/83) (1989) 12 EHRR 36.....	142
<i>Geerings v Netherlands</i> (App No 30810/03) (2007) 46 EHRR 1222 .....	91
<i>Golder v UK</i> (App No 4451/70) (1979–80) 1 EHRR 524 .....	115
<i>Grayson and Barnham v UK</i> (App No 19955/05) ECHR 23 September 2008 .....	88, 95
<i>H v UK</i> (App No 15023/89) EComHR 4 April 1990.....	94, 183
<i>Hansen v Denmark</i> (App No 28971/95) ECHR 16 March 2000.....	105
<i>Hardy v Ireland</i> (App No 23456/94) EComHR 29 June 1994 .....	18, 95
<i>Hatton v UK</i> (App No 36022/97) (2002) 34 EHRR 1; (2003) 37 EHRR 28.....	142
<i>Heaney and McGuinness v Ireland</i> (App No 34720/97) (2001) 33 EHRR 12 .....	xv, 96, 110, 116
<i>Hokkanen v Finland</i> (App No 19823/92) (1994) 19 EHRR 139 .....	142
<i>Hussain v UK</i> (App No 8866/04) (2006) 43 EHRR 22.....	91
<i>Jacobsson v Sweden</i> (App No 10842/84) (1989) 12 EHRR 56 .....	142
<i>Jalloh v Germany</i> (App No 54810/00) (2007) 44 EHRR 32 .....	116–17, 143
<i>James v UK</i> (App No 8793/79) (1986) 8 EHRR 123 .....	96
<i>Janosevic v Sweden</i> (App No 34619/97) (2004) 38 EHRR 22.....	107–8
<i>Jasper v UK</i> (App No 27052/95) (2000) 30 EHRR 441 .....	113, 143
<i>Johnston v Ireland</i> (App No 9697/82) (1987) 9 EHRR 203.....	96
<i>Kansal v UK</i> (App No 21413/02) (2004) 39 EHRR 31.....	121

## Table of Cases

<i>Katte Klitsche de la Grange v Italy</i> (App No 12539/86) (1994) 19 EHRR 368 .....	142
<i>Klein Poelhuis v Netherlands</i> (App No 34970/97) EComHR 21 May 1997 .....	109
<i>Kostovski v Netherlands</i> (App No 11454/85) (1989) 12 EHRR 434 .....	113
<i>Kroon v The Netherlands</i> (App No 18535/91) (1994) 19 EHRR 263 .....	142
<i>Lawless v Ireland</i> (App No 332/57) (1979–80) 1 EHRR 15 .....	96
<i>Lingens v Austria</i> (App No 8803/79) (1982) 4 EHRR 373 .....	93, 95
<i>Lithgow v UK</i> (App No 9006/80) (1986) 8 EHRR 329 .....	115
<i>Lutz v Germany</i> (App No 9912/82) (1987) 10 EHRR 182 .....	91
<i>Maatschap v Netherlands</i> (App No 31463/96) EComHR 21 May 1997 .....	108
<i>Marckx v Belgium</i> (App No 6833/74) (1979–80) 2 EHRR 330 .....	96
<i>Minelli v Switzerland</i> (App No 8660/79) (1983) 5 EHRR 554 .....	xiv, 90–91, 93
<i>Müller v Austria</i> (No 1) (App No 12555/03) ECHR 5 October 2006 .....	101
<i>Müller v Austria</i> (No 2) (App No 28034/04) ECHR 18 September 2008 .....	101
<i>Murray v UK</i> (App No 18731/91) (1996) 22 EHRR 29 .....	110–12, 115
<i>Nölkenbockhoff v Germany</i> (App No 10300/83) (1987) 10 EHRR 163 .....	91
<i>Norris v Ireland</i> (App No 10581/83) (1991) 13 EHRR 186 .....	65
<i>Observer and Guardian v UK</i> (App No 13585/88) (1991) 14 EHRR 153 .....	138
<i>Osman v UK</i> (App No 23452/94) (2000) 29 EHRR 245 .....	115
<i>Pfunders Case</i> . See <i>Austria v Italy</i>	
<i>Pham Hoang v France</i> (App No 13191/87) (1993) 16 EHR 53 .....	99
<i>Phillips v UK</i> (App No 41087/98) ECHR 5 July 2001 .....	xiv, 88
<i>Porrás v Netherlands</i> (App No 49226/99) ECHR 18 January 2000 .....	99
<i>Powell and Rayner v UK</i> (App No 9310/81) (1990) 12 EHRR 355 .....	142
<i>Proksch v Austria</i> (App No 18724/91) EComHR 18 October 1994 .....	101
<i>Py v France</i> (App No 66289/01) (2006) 42 EHRR 26 .....	117
<i>Quinn v Ireland</i> (App No 36887/97) ECHR 21 December 2000 .....	96, 110
<i>Radio France v France</i> (App No 53984/00) (2005) 40 EHRR 29 .....	96, 106
<i>Rees v UK</i> (App No 9532/81) (1986) 9 EHRR 56 .....	109, 117, 142
<i>Resch v Austria</i> (App No 21585/93) EComHR 18 October 1994 .....	101
<i>Robinson v UK</i> (App No 20858/92) EComHR 5 May 1993 .....	94, 186
<i>Rowe and Davis v UK</i> (App No 28901/95) (2000) 30 EHRR 1 .....	113
<i>Sahin v Turkey</i> (App No 44774/98) ECHR 10 November 2005 .....	117
<i>Salabiaku v France</i> (App No 10519/83) EComHR 16 April 1986 .....	104–5
<i>Salabiaku v France</i> (App No 10589/83) (1991) 13 EHRR	
379 .....	xiii, 54–55, 98–99, 101, 103–4, 107–8, 120
<i>Saunders v UK</i> (App No 19187/91) (1997) 23 EHRR 313 .....	xv, 96, 116
<i>Sekanina v Austria</i> (App No 13126/87) (1994) 17 EHRR 221 .....	91
<i>Selvanayagam v UK</i> (App No 57981/00) ECHR 12 December 2002 .....	105
<i>Sheffield and Horsham v UK</i> (App No 22885/93) (1999) 27 EHRR 163 .....	142
<i>Société Levages Prestations v France</i> (App No 21920/93) (1997) 24	
EHRR 351 .....	115
<i>Soering v UK</i> (App No 14038/88) (1989) 11 EHRR 439 .....	109, 142
<i>Sporrong and Lönnroth v Sweden</i> (App No 7151/75) (1983) 5	
EHRR 35 .....	109, 142