

A LEVEL

Examiners' report

LAW

H418

For first teaching in 2020

H418/03 Summer 2023 series

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Introduction

Our examiners' reports are produced to offer constructive feedback on candidates' performance in the examinations. They provide useful guidance for future candidates.

The reports will include a general commentary on candidates' performance, identify technical aspects examined in the questions and highlight good performance and where performance could be improved. A selection of candidate answers is also provided. The reports will also explain aspects which caused difficulty and why the difficulties arose, whether through a lack of knowledge, poor examination technique, or any other identifiable and explainable reason.

Where overall performance on a question/question part was considered good, with no particular areas to highlight, these questions have not been included in the report.

A full copy of the question paper and the mark scheme can be downloaded from OCR.

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Paper 3 series overview

Candidates generally appeared to be more successfully prepared for this paper than in the previous year. Both parts of the paper attracted significant numbers of candidate responses and all questions produced a range of answers. The overall standard of response was higher than last year.

There was clear evidence that candidates put most of their energies into learning the main articles of the Convention and these responses are showing an increasing awareness and sophistication over those of previous years. The level of citation and general understanding of the scope of protection available have improved this year as has the understanding of how the articles may be legitimately restricted.

There is some evidence that some candidates rely too heavily on solely learning the articles and do not put sufficient time into the extra, but related topics, such as police powers, the laws of obscenity and defamation as these were slightly less detailed than the other questions. Nevertheless, there were some excellent answers to these questions, where it was clear that candidates had learned these topics in depth.

A significant minority of candidates appeared not to be ready to discuss the contents of the Human Rights Act 1998 in any detail and this was surprising, given the centrality of the Act to understanding human rights protection in the legal system of England and Wales.

The more successful answers understood that human rights questions are often a case of evaluating a balance of legal rights and then reaching a decision about the most likely outcome. This is a really important realisation and a skill that could be rehearsed before sitting the paper.

Candidates who did well on this paper generally:	Candidates who did less well on this paper generally:
<ul style="list-style-type: none"> engaged with the command of the instruction within the question and made a genuine attempt to address the focus of the question set out in detail the key terms and meanings of key concepts within each question underpinned their explanations with good, detailed reference to appropriate cases and statutes produced balanced arguments which evaluated both sides of the debate before reaching any conclusions made appropriate reference to a range of human rights judicial tools in the interpretation of issues, such as the margin of appreciation and proportionality. 	<ul style="list-style-type: none"> wrote prepared answers which did not address the specific instruction or command in the question did not include definitions of the key terms and the main rights within the questions tended not to bring in supporting case law when explaining the scope of individual rights often recycled material from other questions or other papers which was not directly relevant to the specific question tended to present one-sided arguments and/or make snap judgements on the outcome of a particular scenario style question, rather than presenting a balanced argument confused the HRA 1998 with the ECHR.

Section A overview

This section on the nature of law produced some excellent and well detailed answers. Centres and candidates are clearly well rehearsed in preparing these questions. The rule of law question attracted far fewer responses than the question on morality in a multicultural context. Candidates who performed less well tended to have pre-prepared answers which were not adapted to the specific context and requirement of the question. A significant number of candidates did not understand the technical meaning of the term the 'rule of law' and produced some very general responses about the importance of law, which did not attract many marks.

Question 1

1 'The rule of law is seen as an essential principle within our legal system.'

Discuss the extent to which you agree that the rule of law is central to our legal system.

[20]

This was the lesser chosen of the two questions on Section A. It required an understanding and explanation of the technical term the 'rule of law' and its significance in the legal system.

More successful responses recognised that the rule consists of several legal principles, most of which had been set out by Dicey. These scripts set out the principles, such as equality before the law and absence of arbitrary power and evaluated how important they are within the system.

The question allowed for a diversity of approaches but the more successful responses all tended to illustrate the operation of the principles by reference to established cases and many used more recent cases such as *Miller v Prime Minister* to show the continuing significance of the rule of law in today's constitutional settlement.

The more successful responses also discussed the development and evaluation of Dicey's approach by other constitutional lawyers. More successful responses also showed how there were some systemic issues which they illustrated by bringing in examples from different subject areas from the syllabus. This was one topic where such an approach worked very well, when done appropriately.

Less successful responses tended not to define the term rule of law at all but to discuss it in general terms of equality and fairness or they simply recycled material about law and justice. Whatever merit there was in this approach was very limited indeed.

Others tended to discuss the rule of law simply in terms of law and order and punishment which was a misunderstanding of what the term means.

Question 2

- 2 'It is much harder for a multicultural society, reflecting a diversity of views, to arrive at a moral consensus.'

Discuss how effectively the legal system of England and Wales can adapt to changes in morality, in the light of the above statement. **[20]**

The majority of candidates had prepared this topic in some detail and so were able to produce a good attempt at this question.

More successful responses started by explaining the meaning of a multicultural society and how this creates challenges for the law. They tended to select a range of issues where this tension was clear to see and then to present the legal solutions to such situations. Euthanasia, drug use, abortion, rape within marriage, and the development of homosexual rights were all fertile grounds for evaluation in this regard.

Many candidates used familiar situations such as the issue of limitations on consent as set out in *Brown* and *Wilson* or the moral challenges faced in cases like *Re A* or *Evans v UK* to develop their arguments.

A large majority of candidates brought in legal theorists to show how the arguments have developed over time.

The most successful responses were able to use both theorists and relevant cases to construct their essays. The most important part of this was to maintain a clear sight on the context of multiculturalism.

Pre-rehearsed essays which did not adapt to the focus of the question did not score as highly as responsive and balanced essays.

Section B overview

This section on human rights law requires candidates to set out their knowledge of a particular area of human rights law and to apply it to specific scenario style questions.

Candidates are required to set out the law relating to the available human rights protection and to show the boundaries and limitations of such protection. They are then to apply this knowledge to the scenarios in question and reach a conclusion as to whether there has been a violation. There is a requirement to explore both sides of the argument and to produce a balanced answer.

The essay question requires an evaluation of some aspect of human rights protection. In this case the Human Rights Act 1998. It requires a balanced approach to the two sides of the argument.

Question 3

Amari is an asylum seeker who has arrived in the United Kingdom from a war zone. He is sent to an asylum detention centre while his application for asylum is processed. Six months later he is still waiting for a decision and his detention has not been reviewed.

Ben is a suspected terrorist. He is placed under personal restrictions and surveillance by the security forces as he is described as a security risk. He is also placed under a 16-hour daily curfew and his passport is taken away. He is electronically tagged and is subject to severe limitations on who he can associate with.

Casey is a prisoner serving a life sentence who is eligible for their parole hearing. Three days before the hearing, it is cancelled due to 'staff shortages on the parole board'. They are told that they will have to wait another year as they are a 'very high risk' prisoner.

Nina is a 21-year-old woman with learning difficulties. She has previous convictions for shoplifting. A police officer, investigating a robbery on the high street, sees Nina in a nearby park. She approaches Nina and asks her where she has been all evening. Nina says nothing. The officer then tells Nina that she must accompany her to the station. When Nina asks why, the officer replies: 'You know what you've done'.

On arrival at the station, Nina is taken straight to an interview room. She is cautioned using the following words: 'Be careful what you say, as it may be given in evidence. You must answer every question'. Nina asks for a solicitor, but is told it is too late to get one. Nina is questioned for six hours without a break. She asks for a drink but is told she cannot have any food or drink until she has cooperated fully. Nina is so hungry and exhausted that she confesses to the crime.

3 Advise Amari, Ben and Casey as to whether they can use Article 5 to assist their cases. **[20]**

This question on deprivation of liberty was a very popular option on the paper. It attracted a broad range of different answers and approaches, but generally candidates were able to score well by following the approach below.

More successful responses tended to begin with a detailed account of the meaning of deprivation of liberty, often discussing where the boundary between deprivation and restriction lies. These answers tended to use a range of cases to define the meaning of deprivation and understood that there is some variation within the cases themselves.

More successful responses were discriminating in their use of Article 5 (1) and were able to identify which of the subsections were relevant, rather than simply reciting each subsection. For example, in relation to Amari's case, that s5 (1) (f), and associated cases, was the appropriate area to discuss. A large number of candidates correctly referenced the case of *Saadi v UK* in support of this part of the question.

In application, more successful responses considered the principles of proportionality and balance when deciding whether there had been a violation. They considered a range of factors and looked at both sides of the argument. Less successful responses tended to reach their conclusion based on a single factor. Less successful responses tended to throw all areas of 5 (1) into the discussion without explaining which were most likely to be relevant in the three scenarios.

A significant number of candidates merged the different sections of Article 5 (1) together. They regarded asylum seekers as being covered by the same rules as the criminal law and used the language of punishment and imprisonment in relation to Amari. It is a really important part of answering a question on Article 5 that candidates identify the specific limitation or the statutory provision which allows for the deprivation.

In relation to Ben a large number of candidates did identify that his situation would be covered by statute – The Terrorism Prevention and Investigation Measures Act 2011 and were able to use appropriate case law, such as *JJ v Secretary of State*, to assess whether Ben had in fact been deprived of his liberty.

In relation to Casey, many candidates seemed to equate being in prison with a presumption that human rights no longer applied. More successful responses identified *Stafford v UK* and *Vintner and Others v UK* as useful cases and also were able to explain the principle that review of detention is an essential aspect of a legal deprivation of liberty.

Question 4

- 4 Advise Nina whether her treatment by the police when she was arrested and during her subsequent interview was lawful, and what effect this may have on her case.

[20]

The main focus of this question related to the use of arrest powers and the behaviour of police during the interview. This was a very specific focus which some candidates did not pick up on. A significant number of responses included long and detailed explanations of the powers of stop and search, which was beyond the scope of the question and therefore did not gain marks. It is really important to stress that candidates read the command of the question carefully to fully focus their efforts on the area under assessment.

One common misconception was that it is acceptable to arrest a person merely on the basis of their previous convictions, rather than any particular behaviour.

Strong responses identified the relevant sections of the *Police and Criminal Evidence Act 1984* – s24, s28, s56, s58, s78 and were able to explain their content and how they applied in relation to Nina.

Many responses tended to identify the basic issues in the question, such as the lack of a reason for the arrest but had no or minimal supporting citation to back up their arguments. These answers did attract some marks but it was much more limited than if it had been linked to appropriate citation.

More successful responses identified cases such as *R v Samuel* and *Murray v UK* to add depth to their application.

Less successful responses tended to accept at face value that the arrest must have been lawful and that there must have been reasonable suspicion to arrest.

One important skill on the human rights option is the ability to test an assertion by reference to the law and to be sceptical of the version of the facts as presented by a particular public official within the context of a scenario question.

Question 5*

- 5* The Human Rights Act 1998 has been largely successful in strengthening protection for human rights. However, there are still enough areas of concern to suggest the need for reform.

Discuss the extent to which you agree with this statement.

[20]

The main essay on the human rights aspect of the paper produced a very broad range of answers but with many candidates simply recycling information about the articles of the convention without a specific focus.

A significant minority of candidates mistook the HRA 1998 for the ECHR and tended to base their argument around the idea that this represented an 'external or foreign' source of law.

Some responses went even further down this path, conflating the ECtHR with the EU and then rehearsed arguments reminiscent of the Brexit debate which gained no marks at all.

Other responses tended to focus on the Article rights alone and to develop an argument about the relative benefits of these being brought into UK law. While there might be some merit in this approach it was much too generic to attract high marks as it was not the main focus of the essay.

The least successful candidates simply recited everything they knew about the articles within the ECHR.

More successful responses tended to bring discuss the aims and contents of the Human Rights Act itself. These answers brought in information about s2, s3 and s4 of the Human Rights Act and the effect that these sections had had on the relationship between judges and parliament. They gave case examples to show how judges had used their new powers of interpretation in a sparing and careful way so as to minimise any friction.

They also discussed the proposals to bring in a new British Bill of Rights and what the arguments were both in favour and against such a proposal.

More successful responses recognised that abolishing the Human Rights Act could upset the constitutional arrangements in Northern Ireland, Scotland and Wales and may have a negative impact on the Good Friday Agreement. These answers tended to attract many marks.

Misconception



Many candidates equated the Human Rights Act with the European Convention on Human Rights and this led to several other misconceptions about an army of 'foreign' European judges deciding cases under the HRA. A similar misconception was that the ECHR was simply a part of the European Union and this led to similar problems as in the scripts above.

Exemplar 1

		However, the Human Rights Act is able to protect our rights well as in <i>Bellinger v Bellinger</i> we have a good appeal process allowing people to be able to contest past decisions that are are unlawful. Also through cases such as <i>Goodwin v UK</i> it encourages
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		the connection between the HRA and the ECtH ECHR means that ECtHR decisions are regarded highly which is in the interest there to serve the interests of the injured party. This case lead to law reform of the Gender recognition Act 2004 making a positive change for society.
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This extract shows a candidate explaining the more complex interplay between the Human Rights Act and the ECHR in a response which attracted full marks

Question 6

Henry is a famous investigative journalist who has a weekly podcast exploring controversial news stories. He has a regular audience of more than two million listeners. Recent podcasts have included the following content:

- A claim that a drug recently licensed by the NHS to help with obesity is in fact linked with very high levels of cancer.
- An interview with a climate protestor who encourages teenagers to become actively engaged in civil disobedience instead of going to school.
- A claim that a government minister has accepted a large bribe from a foreign country which is hostile to the United Kingdom.

A government lawyer obtains an injunction banning further podcasts by Henry and shuts down his website.

Ivan is a film-maker who has just separated from his wife, Orla. He makes a film about their relationship which contains both disturbing scenes and some graphic sexual content. The film is banned by the board of censors. Angered at this ban, Ivan decides to project the film onto a public building in the centre of town as a protest. He does this on a busy Saturday afternoon when families are out shopping. The police arrest him and confiscate the film.

Ivan has also published his diary in which he makes several serious claims about Orla's behaviour. He claims that she was often physically and emotionally abusive towards him, that she tried to humiliate him in public, and that her treatment of him caused him to suffer from depression. Ivan has two witnesses who support his version of events. Orla brings a case against him for defamation.

- 6** Advise Henry whether his Article 10 rights have been breached by the injunction and the closure of his website. Explain what grounds could have been used to justify such action. **[20]**

More successful responses set out a clear explanation of the scope of freedom of expression. They included the right itself, an understanding of higher and lower value forms of expression and the significance of this in a practical situation. Many responses correctly identified the importance of cases such as *Handyside v UK* and *Otto-Preminger Institut v Austria* in this regard.

The answer to this question required a clear understanding of the relevant factors under Article 10 (2) which allow for freedom of expression to be restricted. More successful answers set these out in some detail and applied them in a balanced way.

More successful responses were able to look critically at the three different situations in the scenario and provide separate appraisals of each. Less successful responses tended to lump the three situations together and deal with them as one.

Many candidates were reluctant to support Henry's rights to freedom of expression in these cases and were much more likely to find against him. It is important to stress that candidates who tried to present the arguments on both sides of the case were the ones most likely to score highly, rather than those which jumped to conclusions.

One interesting illustration of this reluctance to find in favour of Henry was seen in relation to the revelation that some of the treatments for obesity in the question had a link to cancer. A clear factor in relation to Article 10 (2) is the concept of public health. A significant number of candidates presumed that this meant that Henry had no right to question health treatments, far fewer used this factor to suggest that Henry not only had the right to question this, but that the public had the right to receive his information. These scripts tended to rely – quite rightly – on *Sunday Times v UK* to support Henry's right to publish.

Some of the least successful responses used the same material from Question 7 to answer Question 6. They used the tort of defamation and the law on obscenity where it was clearly not relevant. This was again not following the clear instruction of the question but it also tended to produce some quite contorted logic.

Centres should make it clear to candidates that recycling the same material from one question to another in this way is unlikely to be an effective strategy.

Question 7

- 7 Advise Ivan whether the laws on obscenity would apply to his film **and** whether Orla could bring a claim against him in defamation based on the content of the diary. **[20]**

Although this part of the paper, involving Question 6 and 7 was less popular than the other part, it did produce some excellent answers.

Candidates who had learned the structure and content of obscenity and defamation were able to apply their knowledge to the two halves of the question and produce detailed and effective answers.

In relation to the obscenity part of the question there was good basic knowledge of the meaning and requirements of obscenity as set out in the Obscene Publications Act 1959 and 1964.

More successful responses set out the meaning of 'publication' and 'obscene' in good detail and supported this with the use of both long standing precedent and some of the more recent high profile cases such as *Depp v Heard*. These answers then applied this clearly and logically to the scenario and reached the conclusion that the broadcast would be obscene.

Those responses without detailed knowledge tended to argue their case from common sense and arrive at a similar conclusion but with less marks.

The second part of the question was similar in the sense that candidates who had spent some time learning the basics of the Defamation Act 2013 were able to put together a very creditable argument. The key to this second part of the question was whether the script dealt with the possible defences. The strongest responses understood the importance of this material in reaching a conclusion.

Exemplar 2

7	<p> Obscenity can be defined as gross and disturbing content which is commonly equated to pornography. The Obscene Publications Act 1959 covers the restriction of gross content to the online platform or on magazine cover or news paper. In S1, Obscene or depicts as deprave and corrupt. This essentially means the material being released is disturbing and should be on a restricted platform for viewership. The test is ordinary men would find the material disturbing. Furthermore the Obscene Publications Act 1964 covers the seizure of obscene material and it cannot be financial gain. This means that the individual cannot upload/post the obscene material to make a profit. Furthermore the obscene legislation goes further as the common law offence of outraging public decency. In <i>Shaw v DPP</i> he was charged under OPO as he was selling magazines with the prostitute to get with. Furthermore in <i>Gibson</i>, he also was charged under OPO as he sold pornography or dried/frozen faeces which is disgusting and corrupt. </p> <p> On the facts, it is likely that the material which Ivan is releasing will be charged under the Obscene Publications Act 1959 as it mentions 'he made a film about the relationship... Inc. disturbing scenes and graphic sexual content'. This would suggest that the material he is releasing is deprave and corrupt as it is obscene to the fact he would make a film including graphic sexual content. Furthermore, it can be argued that Ivan made the film for financial gain as typically movies generate finance from viewership. Furthermore it is very likely that Ivan will be guilty under the common law offence of outraging public decency. Ivan Presided </p>
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his already banned film onto a public building. Especially considering this is on a Saturday afternoon where children will be playing / shopping, Iwan. Projecting sexual content on a ~~best~~ building, undoubtedly, is going to destroy public decency and ruin innocence of the children. In conclusion Iwan will be charged under outraging public decency and both Obscene Publications act 1959 and 1964.

In addition Orla could potentially bring a case of defamation of character to Iwan. There are two main types of defamation. The first being Libel, this is a permanent form of defamation where things said are online and can forever be accessed to the public. The second form of defamation is Slander. This is temporary form e.g. it has been spoken by someone. On the facts Iwan has done libel as a published diary can be forever accessed by journalists and readers of the diary. In order to prove Defamation the courts must decide whether the reasonable man would think less of or worse than of C. Also must cause damage to C. On the facts Iwan has ~~made~~ made honour claims towards Orla by saying she was "psychically and emotionally abusive" towards him. This would undoubtedly cause any ordinary man to think less of C. Furthermore under Defamation act 2013 it must also cause financial loss for the C. There is no mention that this could financially harm Orla's finance. However there are multiple defences available for ~~for~~ Iwan. For example if the statement is true and of interest then it can be posted. On the facts it mentions that Iwan has two siblings.

		Witnesses Chen can back up his claim in his diary
		and can prove that his meaning is legit. It is not in the
		Public interest to know this information but perhaps people should be
		aware of the act Chen has committed. There are also multiple
		remedies available to other ex. She is successful in a Defendant
		case - she can get an injunction of the libel or get compensation
		damages for the financial loss of the statements. In conclusion it is
		likely that Chen will be unsuccessful as Iven has support to
		his claims - suggests they are legit.

A good illustration of this approach can be seen in this response.

Question 8*

- 8* The Human Rights Act 1998 has been largely successful in strengthening protection for human rights. However, there are still enough areas of concern to suggest the need for reform.

Discuss the extent to which you agree with this statement.

[20]

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Some responses went even further down this path, conflating the ECHR with the EU and then rehearsed arguments reminiscent of the Brexit debate which were completely uncreditworthy.

Other responses tended to focus on the Article rights alone and to develop an argument about the relative benefits of these being brought into UK law. While there might be some merit in this approach it was much too generic to attract high marks as it was not the main focus of the essay.

The weakest candidates simply recited everything they knew about the articles within the ECHR.

More successful responses tended to discuss the aims and contents of the Human Rights Act itself. These answers brought in information about s2, s3 and s4 of the Human Rights Act and the effect that these sections had had on the relationship between judges and parliament. They gave case example to show how judges had used their new powers of interpretation in a sparing and careful way so as to minimise any friction.

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