



A Level

Law

7162/3B

Report on the examination

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Introduction

Most students understood the demands of the questions and generally managed their time well, though in some answers to question 11 it did appear that the candidate might have been running out of time. Many did not address the part of Q11 on sources of law which then limited their marks on that question.

There were some well-sustained answers to question 10, with the Article 2 aspects of the question particularly well-handled. In contrast, the treatment of domestic law for Q11 was weaker – often incomplete, and, when identified, the explanation was often vague or inaccurate.

Most students when answering questions 10 and 11 recognised that the police, as agents of the State, are bound to act compatibly with the ECHR. However, when answering question 10, there was still some confusion over how the ECHR might apply to the incident concerning Fynn and Ivey. Building on last year, it was pleasing to see more students recognising the relevance to such a dispute of the tort of misuse of private information, but some still thought Ivey could be sued directly for breach of Article 8.

In relation to questions 10 and 11, some students wasted time elaborating on irrelevant aspects of the particular right, e.g. when life begins and ends under Article 2, or lengthy explorations of the scope of Article 8, rather than focusing on explaining that the photographs and story would fall under 'private life'.

The way some students allocated time to the two different parts of question 9 limited the marks they could achieve. In many responses more time was devoted to the second part of the question, worth a maximum of 5 marks, than the first part, worth 10 marks. In some answers there was very little, if any, material for the 10 mark part.

A significant number of students did not attempt Question 6.

Question 01

The correct answer was option C:

'The right to life under Article 2 also gives everyone a right to die.'

This option was chosen by 77% of students, showing most were aware of case law from the ECtHR holding that Article 2 does not grant a right to die.

The most commonly chosen incorrect answer was option D: 'The right to respect for private and family life under Article 8 could be breached by environmental pollution.' This is true because in several cases, failure by the State to provide information about environmental risks has been held to breach Article 8, e.g. *Guerra v Italy*.

Question 02

The correct answer was option C:

‘Both individuals and States may bring actions in the European Court of Human Rights.’

This option was chosen by 39% of students.

The most commonly chosen incorrect answer was option B: ‘A judge must not apply an English law statute if it is incompatible with the ECHR.’ This was an understandable mistake, as students will have learned that courts are public authorities under s6 of the Human Rights Act 1998, which states that a public authority must not act incompatibly with the ECHR. But under the doctrine of parliamentary sovereignty, parliament is the supreme law-making power, and courts must apply acts of parliament. If a superior court considers an act to be incompatible with the ECHR it can make a declaration of incompatibility under s4 of the Human Rights Act 1998, but it cannot strike down or invalidate the statute.

Question 03

The correct answer was option D:

‘To set out rules for a local area.’

This option was chosen by 70% of students. Given that the majority of students answered this question correctly, it was perhaps a little surprising to see some confusion in question 6 between statutory instruments and by-laws.

Incorrect answers were mostly distributed between option A (‘To add detail to existing legislation’) and option C (‘To make law in time of emergency’). Option A relates to statutory instruments and option C to orders in council (which are generally statutory instruments, too).

Question 04

The correct answer was option C:

‘Judges’ pay is determined by government.’

This option was chosen by 41% of students. It is false because protection of judges’ pay from political interference is a way of protecting judicial independence. In the UK, judges’ pay is set by an independent body (the Senior Salaries Review Body) which advises the government. It is paid from the Consolidated Fund and so not subject to annual parliamentary budgets.

The most common incorrect answer was option B: ‘Judges can review the legality of a government decision.’ This was incorrect as judges can review the legality of a government decision through judicial review.

Question 05

The correct answer was option C:

‘The burden of proof in a criminal trial is usually on the prosecution.’

This option was chosen by 62% of students.

Incorrect answers were mostly distributed between options B (‘Criminal prosecutions are usually brought by the victim’) and D (‘The standard of proof in a civil trial is beyond reasonable doubt’). Option B was incorrect because criminal prosecutions are usually brought by the State. Option D was incorrect because the standard of proof in a civil trial is on the balance of probabilities.

Question 06

This question required students to explain how statutory instruments are made and to give two examples of matters that might be dealt with using a statutory instrument. If no examples were given, the maximum **marks** available was 3, so essentially there were 3 marks for the initial explanation and 2 for the examples.

Recognising that statutory instruments are a form of delegated legislation was an obvious place to start and many students did this. The explanation could then be developed by outlining how the delegation of power occurs (Parliament delegates law-making power by means of a parent or enabling act) and then identifying who the power is delegated to (in the case of statutory instruments the delegation is to a government minister). These three points were enough to merit 3 marks. Other creditworthy points relevant to how statutory instruments are made were explanations of affirmative and /or negative resolution procedures.

Examples could have been general or specific. General examples relate to the nature/purpose of a statutory instrument – e.g. to add detail to primary legislation; to modify primary legislation; to set commencement dates for provisions in primary legislation; to deal with emergencies (e.g. Orders in Council are a type of statutory instrument). Specific examples relate to a particular statutory instrument or (some part of) its content. A combination of general and specific could be regarded as two examples – e.g. statutory instruments can deal with supplying detail to supplement primary legislation (general), and an example of a statutory instrument that does this (specific), e.g. Construction and Use Regulations for Road Vehicles to supply detail for primary legislation on Road Traffic.

Some students were clearly well-prepared for this question, and wrote confident, concise answers gaining good marks. Other students struggled to identify what a statutory instrument was. There was a lot of confusion with statutory interpretation (an understandable guess) and

some confusion with by-laws (also understandable as both are types of delegated legislation). Some answers showed knowledge of what a statutory instrument was, but not of how it was made, while others discussed the value of statutory instruments (e.g. to save parliamentary time) straying away from the focus of the question.

Question 07

Students were asked to suggest why the stopping and searching of Amanda would have been unlawful under s1 of the Police and Criminal Evidence Act 1984 (PACE). It was helpful to start by explaining the law. PACE s1(1) makes it clear that the stop and search power applies to a person in a public place (not a dwelling). The power is to stop and search for stolen or prohibited items (e.g. an offensive weapon) PACE s1(2), provided the officer has reasonable grounds to suspect such items will be found, PACE s1(3). (Subsections are included here for clarity; it was not necessary for students to refer to specific subsections when answering.) There were two marks available for the law (AO1).

Application of s1 to Amanda might have started by explaining that she was in a public place – a street – fulfilling this aspect of PACE s1(1). Further application would involve asking (a) whether Brooke was searching for stolen or prohibited items and (b) whether Brooke had reasonable grounds to suspect that Amanda might be carrying such items. Since Brooke searched Amanda due to her annoyance at Amanda pulling a face and making a sneering remark, the search seemed to have been promoted by personal irritation rather than any reasonable grounds for suspecting Amanda was carrying stolen or prohibited items. Furthermore, there was no suggestion that Amanda was carrying stolen or prohibited items, nor that Brooke was looking for such items. We were told that Brooke knew of Amanda's past activities, but these did not include use of weapons or stealing, and previous convictions, even if there had been any, would not on their own constitute reasonable grounds for suspicion. Since the search did not meet the requirements of PACE s1(2) – (3) it would have been unlawful. There were 3 marks available for application (AO2).

For students who knew the law on stop and search this was a fairly straightforward question. What held some back from gaining full marks was incomplete application. Some merely asserted there were no reasonable grounds to search Amanda without referring to the details in the scenario supporting such an assertion. The best answers referred both to the fact that weapons had never been used by Amanda's group, and to Brooke's annoyance at Amanda pulling a face at her. Each of these details was significant. The first allowed students to argue that there were no grounds to suspect Amanda was carrying weapons. The second showed what had actually prompted the search: personal feelings of annoyance, not objective evidence.

Many students showed a very good understanding of the meaning of 'reasonable' as requiring an objective basis for the search such as facts, information or intelligence. In the best answers this was then related to Brooke's apparent personal motivation for the search and the lack of any objective evidence. Some answers also explained that personal factors such as previous convictions could never be sufficient on their own. (Reference to PACE Code A was not required but was, of course, creditworthy.) A minority of answers, however, simply referred to

the police requiring 'suspicion' or 'grounds' for the search, omitting any reference to the need for an objective basis.

A number of responses confused lawful grounds for arrest with lawful grounds for stop and search, asserting that grounds for a lawful stop and search involved reasonable suspicion that the suspect was committing, or was about to commit, an offence.

Question 08

This question required students to advise Emery as to the lawfulness of his arrest, taking into account the Police and Criminal Evidence Act 1984 (PACE) and Article 5 of the European Convention on Human Rights (ECHR).

Under s24 PACE a police officer can arrest a person who they have reasonable grounds to suspect is about to commit an offence. Since Emery's behaviour was creating a risk of injury to others and provoking angry reactions, there would appear to have been reasonable grounds to suspect he was about to commit an offence of bodily harm. The arrest must be necessary for one of the reasons listed in s24(5) which include to prevent the person arrested from causing physical injury to himself or another person. Again, Emery's behaviour indicated the arrest was necessary for this reason.

The police are a public authority so under s6 of the Human Rights Act 1998 they must act compatibly with the ECHR. Article 5 of the ECHR protects the right to liberty and is intended to guarantee freedom from arbitrary arrest. It thus limits the circumstances in which a person may be deprived of their liberty. To be lawful, any deprivation of liberty must be 'prescribed by law' - i.e. have a basis in domestic / national law - and must be for one of the reasons listed. Under 5.1(c) a person may be deprived of their liberty by a lawful arrest, for the purpose of bringing them before the competent legal authority, on reasonable suspicion of having committed an offence, or where it is reasonably considered necessary to prevent them committing an offence.

Applying the provisions of Article 5 to the scenario, Emery's arrest was 'prescribed by law' since it met the requirements of s24 PACE as explained above. Furthermore, it was based on a reasonable suspicion that Emery was about to commit an offence, again as explained above.

But the scenario stated that the police officer's main purpose was to protect Emery from being harmed by members of the angry crowd, and they later released him without bringing him before a court. This raises the issue of whether Emery's arrest was in breach of Article 5 because 5.1 (c) refers to an arrest 'effected for the purpose of bringing him before the competent legal authority' and 5.3 states that everyone arrested 'shall be brought promptly before a judge'. The European Court of Human Rights (ECtHR) has held that there must be a degree of flexibility in applying this requirement in order not to unnecessarily prolong a short preventative detention (*S v Denmark*). In *R(Hicks) v Commissioner of Police for the Metropolis* the Supreme Court held that preventative detention can be lawful provided the arrest itself was lawful and the detention was for a short period of time only – the ECtHR has indicated this is likely to be hours rather than days (*S v Denmark*). Here, Emery's arrest was lawful under PACE s24 as explained above, and Emery was only detained for six hours. If he were to have

been brought before a judge it might have necessitated a longer detention, which would run counter to the aim of Article 5.

So there was a strong argument that Emery's arrest and detention were lawful, though credit was given for the alternative conclusion.

Some answers dealt only with PACE or only with Article 5.

With regard to PACE, good answers outlined and applied the two requirements for a lawful arrest (reasonable grounds for suspecting an offence was about to be committed, and reasonable grounds to believe the arrest was necessary) while weaker answers often addressed only one of these.

With regard to Article 5, many students were able to explain the concept of a deprivation of liberty, often with reference to a relevant case, and to distinguish it from a mere restriction of movement. Some were then able to confidently identify that an arrest was a deprivation of liberty and then to point out that to comply with Article 5 it had to be prescribed by law and justified under one of the reasons in 5.1(a) – (c).

Some weaker answers showed confusion between a deprivation of liberty and the kettling in *Austin v UK*, which was held to be a mere restriction of movement. Such students often argued that Emery had not been deprived of his liberty since the six hours he was detained for were less than the period of kettling in *Austin*.

Many students who identified that there had been a deprivation of liberty went on to argue that it would have been justified under Article 5.1(c) as being reasonably considered necessary to prevent Emery from committing an offence. Other students relied on the 5.1 (b): lawful arrest to secure the fulfilment of an obligation prescribed by law, often relating this to an obligation on the police to take reasonable steps to prevent an imminent breach of the peace. This was also creditworthy. Weaker responses showed uncertainty or confusion over the lawful grounds for a deprivation of liberty.

Some answers referred to the need for an arrest to be a proportionate measure to achieve the aim of preventing the commission of an offence (*Ladent v Poland*). A strong argument could be made that Emery's arrest was proportionate to prevent him committing an offence of bodily harm - since his behaviour was creating a danger of falls and injuries to other visitors - and that no less severe measure was available to the police. Weaker responses sometimes referred to wording from the second paragraph of Articles 8, 10 or 11 (i.e. necessary in a democratic society to achieve a legitimate aim).

The requirement that Emery be told the reason for his arrest, under Article 5.2 and PACE s28, was raised by many students, and was given credit.

Some weaker responses simply repeated the facts of the scenario without explaining or applying relevant law from Article 5 or PACE.

Question 09

This question had two parts. The first asked students to examine the view that law has an important role to play in balancing conflicting interests. There were 10 marks available for this. The second asked students to discuss the extent to which this balancing role can be seen in the rules protecting a person's reputation in the context of human rights. There were 5 marks available for this part.

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

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

Better answers adopted a broad approach to this part of the question, often starting by identifying different kinds of interests and then examining some of the ideas of philosophers including Bentham, von Jhering, Pound, and Marx. Examples were drawn from a number of areas of substantive law, such as the tort of nuisance, the defence of voluntary intoxication, sentencing or bail.

The best answers examined how the relevant rules of law went about achieving a balance. A commonly used example was the effect of aggravating and mitigating factors on sentencing. The partial nature of the defence of voluntary intoxication was explored in a number of responses. *Miller v Jackson* was a popular case example, with stronger responses using it to examine the discretionary nature of the remedy of an injunction and why it might be granted or refused to balance the interests of the claimant and defendant. The defence of insanity was also used to examine how the individual interest of a defendant could be balanced against the societal interest in public safety and the victim's interest in seeing justice done.

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

For the second, substantive part of the question, students needed to first identify the rules of law that protect reputation and then assess the extent to which they balance conflicting interests.

Reputation is an aspect of private life and so falls within Article 8. Since Article 8 is a qualified right, under 8(2) it can be lawfully interfered with to protect the rights and freedoms of others, including the right to freedom of expression, Article 10. In the same way, under 10(2) the right to freedom of expression can be interfered with to protect someone's reputation. The conflict between these two rights often arises in the context of an action for the tort of misuse of private information where a claimant may wish to prevent the publication of private material which in many cases could affect their reputation. Provided a reasonable expectation of privacy exists, the court will balance the two rights using factors identified in cases such as *Axel Springer v Germany*, including whether there is a public interest in knowing the information, the previous conduct of the claimant, the consequences of publication for the claimant etc. The tort of defamation specifically protects reputation. The rules set out in the

Defamation Act 2013 attempt to balance protection for reputation with freedom of expression in a number of ways. First, 'serious harm' is required (s1) so there is a threshold to reach before someone can sue. Secondly, there are a number of defences which operate to allow freedom of expression if the material is true (s2), or an honest opinion based on fact (s3), or a statement on a matter of public interest (s4).

Some students limited their marks by focusing entirely, or almost entirely, on this second part of the question for which there was a maximum of 5 marks.

Question 10

This question required students to apply English law and the ECHR to two distinct, though related, incidents. The first concerned Ivey secretly taking and sharing a photo of her boyfriend, Fynn, and contacting a newspaper with the aim of selling a story about Fynn, his former partner Gina, and her father Hector. The second concerned Fynn being seriously injured after Police failed to take seriously threats to his life from Hector, and the subsequent Police shooting of Kane, who they mistook for Hector.

Photographs have been recognised in a number of cases (such as *Von Hannover v Germany* (No 2)) as coming within the concept of private life. So Fynn's private life was interfered with by Ivey secretly taking his photograph and sharing it with Hector. It would be further interfered with if the newspaper published a story about him, Gina and Hector, since information about personal relationships falls clearly within the concept of a private life (recognised in many cases including *Pretty v UK*). But Ivey was a private individual, not a public authority, so she was not directly bound by s6 of the Human Rights Act 1998 (HRA) to act compatibly with the ECHR. Therefore Fynn could not sue Ivey directly for breach of Article 8.

Fynn could however bring a claim against Ivey for misuse of private information. This tort requires first that the claimant had a reasonable expectation of privacy in the information at issue – here the photo and the story about Fynn's bad treatment of Gina, and her father, Hector, threatening Fynn. If a reasonable expectation of privacy is found, the court (which is a public authority under s6 HRA) will then balance the claimant's right to privacy under Article 8, against the defendant's right to freedom of expression under Article 10.

Whether or not Fynn had a reasonable expectation of privacy is an objective question. 'The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity...': *ZXC v Bloomberg LP*. (A very similar wording of the test was set out by the House of Lords in *Campbell v MGN Ltd*.)

Relevant factors to consider were set out in *Murray v Express Newspapers plc*: the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent; the effect on the claimant; the circumstances in which and the purposes for which the information came into the hands of the publisher. Photographs are recognised as particularly intrusive (*Stoute v News Group Newspapers Ltd*).

Applying these Murray factors to the **scenario**, it would appear that Fynn did have a reasonable expectation of privacy regarding the photograph and the story. Fynn was not famous. The information about his past was shared by Fynn with Ivey in the context of a close personal relationship. Ivey's purpose was profit. Fynn did not consent to the photograph being taken or shared with Hector, nor to the sharing of the information about his past life with the newspaper. The effect on Fynn of Ivey sending the photograph to Hector was to put his life in danger, and any publication of the story by the newspaper would be very damaging to Fynn and to Gina. Furthermore, Fynn's bad treatment of Gina had happened twenty years ago and past criminal behaviour is usually regarded as giving rise to a reasonable expectation of privacy (*Stoute v News Group Newspapers Ltd*, par 52, citing *Gatley on Libel and Slander*, (12 ed)).

Having found that Fynn had a reasonable expectation of privacy, the court would move on to balance Fynn's Article 8 right with Ivey's and the newspaper's Article 10 right. Under s12(4) HRA, where a court is considering whether to grant a remedy (such as an injunction) that would affect the exercise of freedom of expression, the court must have particular regard to the importance of this right. And if the material is journalistic (as the newspaper story would be) the court must have regard to the extent to which the material has, or is about to, become available to the public, and whether publication would be in the public interest. But it is clear from the case law that neither Article 8 nor 10 has precedence and that the balancing has to be carried out with 'an intense focus' on the facts of the case (*Re S (A Child)*). Guidelines for balancing Article 8 and 10 were set out in *Axel Springer v Germany* and include: whether the information contributes to a debate of general interest; the notoriety of the person concerned and the subject matter of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of the publication.

The fact that Fynn's bad behaviour happened twenty years ago makes it harder to argue there would be a public interest in publishing the story. As noted above, Fynn is not a famous person, nor has he sought the limelight. The photograph was obtained 'secretly' without consent and the consequences of publication on Fynn and Gina could be very serious. It is likely therefore that his Article 8 right would outweigh Ivey's Article 10 right. Fynn could be awarded damages against Ivey for her misuse of his private information and possibly an injunction against the newspaper prohibiting publication of the story.

It was pleasing to see more students aware of the tort of misuse of private information than in previous years, with some able to explain why this would have to be the basis of any claim by Fynn against Ivey. The two-part structure of the tort was not always clear. Some responses went straight to the *Axel Springer* balancing factors without first considering if there had been a reasonable expectation of privacy. Some students merely asserted that there was an expectation of privacy, but a number of answers outlined and applied the test of a reasonable person of ordinary sensibilities (often citing *Campbell*). The Murray factors were perhaps less frequently used, but in some answers they were applied very effectively.

Some responses became confused when an attempt was made to apply the terms of 8(2) and 10(2) to Ivey and the newspaper, and Fynn, respectively. This was not necessary. It was certainly creditworthy to point out that each article allows for interference to protect the other. So Article 8(2) allows for a proportionate interference with private life to protect the

rights and freedoms of others (including the right to freedom of expression). Similarly, Article 10(2) allows for proportionate interference with expression to protect the reputation of others, and to prevent the disclosure of information received in confidence. But as part of the tort of misuse of private information, the judge will consider the justifications for interfering with each right, and the proportionality of any interference, at the balancing stage. So there is no need for a separate application of 8(2) or 10(2).

Remedies were not always addressed, and when they were many answers revealed confusion over the basis of the claim, often referring to Fynn being awarded damages under s8 HRA, and to Ivey having breached Article 8, rather than Fynn being awarded damages against Ivey for misuse of his private information.

The second part of Q10 concerned possible breaches of Article 2 the right to life and was often more confidently handled than the first part of the question. Most students correctly explained that the police, as agents of the State, were bound under s6 HRA 1998 to act compatibly with the ECHR. And most were able to outline Article 2.1 and to distinguish between the positive duty to protect life (relevant to Fynn) and the negative duty to refrain from taking life (relevant to Kane).

If there is a real and immediate risk to the life of an identified individual, which the police know or ought to know of, they have a duty to take reasonable steps to minimise the risk: *Osman v UK*. The police were aware of the risk to Fynn's life from Hector, but did not take the threat seriously. Some students applied the *Osman* test very effectively, arguing that the risk was both 'real' as Hector was a known career criminal, and 'immediate' as threats had been made shortly before the hit and run incident. Some students pointed out that reasonable steps might have included investigating the threats or offering Fynn some sort of protection. Since the police had not taken any steps to protect Fynn, most students concluded the police were in breach of their positive duty to protect Fynn's life. Some students were also able to explain that although Fynn did not die, Article 2 is still engaged if State agents put the victim's life at serious risk: *Makaratzis v Greece*. By failing to take any protective action towards Fynn the police had arguably put his life at serious risk. The majority of answers explained that Fynn could sue the police for breach of his Article 2 right under s7 HRA and be awarded an appropriate remedy (damages) under s8.

Some weaker responses lacked the *Osman* test, simply asserting that the police owed a duty to protect Fynn. Some thought Fynn's Article 5 right to liberty had been interfered with as he had been forced to leave the UK. Some students elaborated on irrelevant aspects of Article 2, such as when life begins and ends.

The shooting of Kane involved the negative duty on the State not to deprive a person of their life. Article 2.2 sets out situations in which deprivation of life will not be unlawful. To come within one of these exceptions, the force used must be 'no more than absolutely necessary' and must be for one of the reasons listed in 2.2(a), (b) or (c). Since the police were trying to arrest Kane, who was pointing a gun at them, the relevant exceptions were 2.2(a) to protect from unlawful violence and 2.2(b) to effect a lawful arrest. Some students elaborated on this by explaining that lethal force has to be strictly proportionate, often citing *McCann v UK*. Most students argued that given the very serious threat posed by Kane to the police officers (and possibly to other people) shooting him was no more force than absolutely necessary and was strictly proportionate given that Kane had a gun and could open fire on the officers at any

moment. Some students questioned this, pointing out that the officers could perhaps have used a non-lethal shot.

Stronger answers also considered the mistake made by the police in confusing Kane with Hector. Cases such as *McCann and Armani da Silva v UK* have held that the police using lethal force can rely on an honest mistake which is perceived for good reasons to be valid at the time, but which subsequently turns out to be mistaken. Most students who applied this test concluded that even though Kane was not Hector, the police had good reason to shoot given that he was pointing a gun at them. Some students were able to explain that police operations involving potentially lethal force must be effectively planned and controlled, often citing *Finogenov v Russia*. Some argued that the mistaking of Kane for Hector pointed to possible errors in planning which, if found, could constitute a breach of Article 2.

Many responses referred to the need for an effective investigation into a death at the hands of State agents, and a number were able to elaborate on what this might entail, e.g. investigation by an independent body, involvement of the next of kin, some element of public scrutiny etc. *Jordan v UK* was often cited and some students outlined the role of the Independent Office for Police Conduct (IOPC).

Most students concluded that the police were not in breach of Article 2 in relation to the shooting of Kane, and so any action taken against them by Kane's family for breach of Article 2 would be unsuccessful. A small number of answers also referred to a possible negligence action against the police by Fynn and Kane's family, with some citing *Robinson v Chief Constable of West Yorkshire* as authority for the proposition that the police can be sued for negligence if their actions create a reasonably foreseeable risk of harm to a person. It could be argued that if the arrest of a violent career criminal was poorly planned, this would create such a risk.

There were many strong responses to this part of the question, showing a good knowledge of the relevant aspects of Article 2. Some students lost marks by only dealing with one of the victims - Kane or Fynn - but not both.

Question 11

The substantive law part of this question concerned two separate examples of protest: the first held outside a zoo, and the second occurring on a later date inside a zoo. Students were asked to apply both English law and the law of the ECHR to the incidents described. Both protests were static and so assemblies, rather than processions. The first involved protestors 'standing' on the road outside the zoo holding banners; the second involved Lina and two other protestors shouting at the public from inside the zoo.

The police imposed a limit of 10 on the number that could be present at the first protest outside the zoo. Their power to do this is contained in s14 of the Public Order Act 1986 (POA) and is given to the most senior officer present at the scene. The trigger for imposing conditions is a reasonable belief that conditions are necessary to prevent serious public disorder, or serious damage to property or serious disruption to the life of the community, or that the purpose of the organiser is to intimidate others.

It could be questioned whether the police were justified under s14 POA in imposing a condition on the assembly since there appeared to be no evidence of a risk of serious public disorder or serious disruption to the life of the community. The scenario stated that the protestors did not obstruct the road. Complaints to the police would not seem sufficient grounds to conclude there was a risk of either serious public disorder or serious disruption to the life of the community. An argument could perhaps be made that the protestors' purpose was to intimidate those going to the zoo. The imposition of the condition limiting numbers would only be lawful if one of the triggers in s14 POA was present.

Many students were aware of the police power to impose conditions under the POA, though the degree of accuracy with which the law was explained varied considerably. In a number of answers there was no explanation and/or application of the triggers for this power and there were few references to the power being given to the senior police officer present at the scene.

A significant number of students referred to the notice requirement in s11 POA 1986. This, however, relates to processions. While organisers of static assemblies might consider it advisable to give the police notice, it is not a legal requirement.

The second protest occurred when Lina and two others climbed over the zoo fence at night and the next morning shouted at the public as they entered. Many students recognised this behaviour as aggravated trespass under s68 of the Criminal Justice and Public Order Act 1994 (CJPOA). The strongest responses defined aggravated trespass as requiring trespass and some form of disruption or obstruction or intimidation. Applying this to the scenario it was clear that Lina and the other two members of the group had trespassed on to private property when they climbed over the zoo fence. By shouting at the public they were arguably disrupting and/or obstructing the lawful activity of visiting the zoo and/or intimidating the public from visiting the zoo. This was reinforced by the mention in the scenario of children becoming upset.

Under s69 CJPOA a police officer can ask a person reasonably believed to be committing aggravated trespass to leave. Failure to comply is an offence for which the police officer can then arrest the person concerned. So the arrest of Lina after she refused to leave the zoo was lawful under s69 CJPOA.

While some students recognised the aggravated trespass, not all who did were able to define it or point to the source of law for this offence. Some students applied the law on trespassory assembly from s14A POA. While some credit was given for this, a trespassory assembly is a gathering of 20 or more people whereas there were only three protestors inside the zoo. Some students referred to s61 CJPOA giving police the power to remove **trespassers** who have an intention to reside on land, but Lina and the other two protestors did not have such a purpose.

The behaviour inside the zoo could also be considered a breach of the peace, defined in *R v Howell* as where harm is done or threatened to be done to a person or in their presence to their property, or when a person is put in fear of such harm. Some students pointed out that breach of the peace could apply both to the protestors and the members of the public who

were throwing stones. Stronger answers went on to explain that a police officer has a duty to take reasonable steps, including arrest, to deal with a breach of the peace or to prevent a breach of the peace reasonably believed to be imminent. The police first asked Lina to leave and then, when she refused, arrested her. Since Lina and the other two group members were trespassing and provoking angry reactions from the public, these steps were arguably reasonable ways to deal with the breach of the peace, whether considered actual or imminent.

Many students explained that the police, as agents of the State, are bound to act compatibly with the ECHR under s 6 HRA 1998. Most students recognised the relevance of Article 11 to the incidents in the scenario, though not all saw the relevance of Article 10.

The right under Article 11 is a right to 'peaceful' assembly. Since the scenario stated that there was no obstruction of traffic by the protestors on the roadside, most students concluded that this assembly was peaceful. Some went on to point out that a peaceful assembly can nevertheless be lawfully interfered with in certain circumstances, often citing *Cisse v France*.

The protestors were also exercising their right to freedom of expression by carrying banners saying 'Zoos are prisons'. In some answers the Article 10 right was only considered when discussing the second protest in which protestors shouted from inside the zoo, but the banners held by the protestors in the first protest outside the zoo were clearly a form of expression.

These two articles are closely linked since the aim of a protest is to express a view or opinion. Many students pointed out that both protest and expression can shock or disturb and yet still fall within Articles 11 and 10, often citing *Ollinger v Austria* and/or *Handyside v UK*.

The condition limiting the number at the roadside assembly to 10, the later instruction to Lina and the other two group members to leave the zoo, and Lina's subsequent arrest were all interferences by the police with the protestors' rights to freedom of assembly and association under Article 11 and to freedom of expression under Article 10. But since Articles 10 and 11 are qualified rights, they can lawfully be interfered with under 10(2) or 11(2) if the interference is prescribed by law and necessary in a democratic society in pursuit of one of the listed aims. In stronger responses each of the above interferences with Article 10 and 11 was identified and checked against these criteria.

Prescribed by law means having a basis in domestic law. Some students elaborated on this, explaining the law must be clear and accessible. In the scenario, the imposition of the condition limiting numbers was prescribed by the POA. The instruction to Lina and the other two group members to leave, and the subsequent arrest of Lina were prescribed by law under the CJPOA s68-69, and the common law on breach of the peace.

'Necessary in a democratic society' means that the interference must correspond to a pressing social need and be a proportionate measure to achieve a legitimate aim (*Handyside v UK*). Aims relevant to the scenario were public safety and the prevention of disorder and crime. Some students examined the proportionality of the limit on numbers by asking if it was the least intrusive means to achieve these aims. In some responses it was argued that the limit on

numbers to 10 was not a proportionate measure given that the protest was not obstructing traffic. Weaker responses failed to apply the proportionality principle at all.

If the limit on numbers was found to be disproportionate then this interference would have been in breach of Articles 10 and 11, entitling protestors to take action under s7 HRA and allowing the awarding of an appropriate remedy under s8 HRA.

With regard to the police asking the protestors inside the zoo to leave and the arrest of Lina, there was a much stronger argument that these steps were proportionate to the legitimate aims of public safety, and preventing disorder and crime. The presence of the protestors was clearly upsetting both adults and children and seemed likely to lead to violence as adult members of the public were shouting back at them and throwing stones. Furthermore, the protestors were trespassing and many students recognised that while Article 11 protects protest on public land, the same is not generally true for private property, often citing *Appelby v UK*. So it could be argued there was no protection from Article 11 here.

Some students pointed out that the behaviour of the public (shouting back and throwing stones) was similar to a counter protest. Many students were aware that the State has a positive duty to police protests so as to protect peaceful protestors from violent counter protests. Cases such as *Ezelin v France* and *Platform Artze fur das Leben v Austria* were often cited in support of this. On this basis it was argued that there was a possible breach of Article 11 due to the police's failure to protect Lina and the other two group members from the public. However, as some students recognised, this argument was unlikely to succeed because Lina and her two companions were trespassing and so no longer exercising their right to peaceful protest.

The last part of Q11 asked students to assess the contribution of different sources of law to the rules they had explained and applied to the scenario. This non-substantive aspect was worth 7 marks.

The relevant sources of law were common law, statute and the ECHR. To gain full marks on this part, students needed to briefly explain each source and then give an example from their answer.

Common law is law made by judges when deciding cases. An example could be the law on breach of the peace which was defined in *R v Howell*. This was relevant to the behaviour inside the zoo (shouting and stone throwing).

Statutory law, or legislation, is law made by Parliament. Examples of such law applied to the scenario would be the POA and the CJPOA. The POA sets out the law allowing conditions to be imposed on assemblies. This was relevant to the police imposing a limit of 10 on the number allowed at the roadside protest. The CJPOA defines the offence of aggravated trespass which was applicable to Lina and the two members of the group who climbed over the fence to get into the zoo and then shouted at the public.

The ECHR is an international treaty setting out rights such as freedom of expression and freedom of assembly and association in Articles 10 and 11 respectively. These rights were being exercised by the protestors. The police, as agents of the State, are bound to act compatibly with these rights under s6 HRA. So to be lawful the actions of the police in dealing with incidents had to fall within the terms of 10(2) and 11(2).

There were some thoughtful responses to this part of the question, though not many addressed all three sources. Not all students understood what ‘sources of law’ referred to. Some students limited their marks by failing to link the sources they had identified to any law applied to the scenario. In a number of responses there was confusion between the ECHR and European Union law. In some of these answers, directives and regulations were discussed, for which there was no credit.

Mark Ranges and Award of Grades

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