

## Chapter 2: Exercise 2


### QUESTIONS AND ANSWERS

The aim of these questions is to test both your knowledge of web-based legal research resources, and your online research skills, focusing on the use of **free** rather than subscription sources, using the information in Chapter 2, section 2.7.2 as a starting point. Some of these tasks would be simpler if you had access to/made use of online subscription services like LexisLibrary or Westlaw, though that is not always the case. To highlight the similarities and differences we have given alternative answers to questions (a) and (g) using both free and subscription services. The answers given here are correct as of 30th March 2016.

(a) The latest reported decision on circumstances in which a court may make a declaration of incompatibility under section 4, Human Rights Act 1998.

**Answer:** This is a relatively difficult task, whether using free or subscription services, not because it is difficult to frame an effective research, but in terms of interpreting the results - because it helps to have some understanding of how declarations of compatibility work to convert that search into an answer to the question – it thus highlights how hard researching a novel area of law can be. It is often useful to have done some background reading first, before going to the primary sources.

The most basic strategy is to search for the phrase “declaration of incompatibility”. This is straightforward in BAILII, LexisLibrary and Westlaw – In BAILII, if you use the case search function there is an ‘exact phrase’ field (see the example below) or, in all of these systems you can achieve the same effect on a quick search by placing double quote marks around the search terms. This



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 URL: [http://www.bailii.org/form/search\\_cases.html](http://www.bailii.org/form/search_cases.html)

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<b>Citation:</b>	<input type="text"/>	e.g. [2000] 1 AC 360	<input type="button" value="Search"/>
<b>Case name:</b>	<input type="text"/>	e.g. barber v somerset	
<b>All of these words:</b>	<input type="text"/>	e.g. breach fiduciary duty	
<b>Exact phrase:</b>	<input type="text" value="declaration of incompatibility"/>	e.g. parliamentary sovereignty	
<b>Any of these words:</b>	<input type="text"/>	e.g. waste pollution radiation	
<b>Advanced query:</b> <a href="#">[Help]</a>	<input type="text"/>	e.g. pollut* and (nuclear or radioactiv*)	
<b>Optional dates:</b>	From <input type="text"/> To <input type="text"/>	Enter as yyyy, yyyyymm, or yyyyymmdd	
<b>Sort results by:</b>	<input type="radio"/> Date <input type="radio"/> Jurisdiction <input type="radio"/> Title <input checked="" type="radio"/> Relevance		
<b>Highlight search terms in result:</b>	<input checked="" type="radio"/> Yes <input type="radio"/> No		

Source: <http://www.bailii.org/>

instructs the system to search for the exact phrase. However this strategy will potentially generate a large number of lower level cases (High Court and equivalent) where an application for a declaration has been dismissed with limited discussion. To control for that effect, if you are using BAILII, you can initially sort (or later re-order) your search results according to relevance - see image above. This makes a significant difference, and should enable you to find your answer within a relatively small number of cases.

Note however that using BAILII (unlike Lexis or Westlaw) you cannot see your research terms extracted from each case within the results list – you have to go into each judgment and either scroll, looking for the highlighted keywords, or search for them using the ‘Context’ function. By contrast, in both LexisLibrary and Westlaw you can use the ‘keywords’ or ‘terms in context’ functions to view your search terms in context, in your results list. This helps you assess which cases involve only brief or passing discussion of declarations, and those which are more substantial. This still leaves you with a number of cases to review, but it does help shorten the process. Another useful feature in Lexis and Westlaw is that the case is linked to notes and articles that involve discussion of that decision – this can also help you assess the importance of each case.

While “declarations of incompatibility” does a pretty good job as a search term in this instance, remember that the online subscription services offer greater search functionality than most free services. You can use this to create more thorough or more refined searches. Thus, for example, in Lexis or Westlaw you can use a variety of proximity connectors to define the relationship between search terms. For example in Westlaw you could use the search *s.4 /s “Human Rights Act 1998” & “declaration of incompatibility”* to search for all cases that include sentences that make express reference to s.4 of the HRA 1998 *and* include (separately) the phrase ‘declaration of incompatibility’. (The /s connector indicates that search terms either side of the connector must appear in the same sentence.) Used in conjunction with the keywords/terms in context functions, this could help you to get a clearer picture of the extent of relevant discussion in each case.

At the time of writing, the most important recent cases that you might have identified are:

- The Supreme Court’s decision in the assisted suicide case of *R (Nicklinson) and another v Ministry of Justice and others* [2014] UKSC 38. This remains probably the most high-profile case to discuss declarations of incompatibility in recent years. Heard by nine Supreme Court Justices, the Court, by a significant majority (7-2), chose not to grant a declaration on a range of public policy grounds. In particular the case highlighted the discretionary nature of the power to make a declaration under s.4. Consequently, it was held that this was one of a limited number of cases where, even if it was shown that domestic legislation was inconsistent with a Convention right, the courts might still decline to make a declaration of incompatibility.
- The Court of Appeal decision in *Benkharbouche v Embassy of Sudan* [2015] EWCA Civ 33 is a technically important but difficult case on the interplay between the HRA and the EU Charter of Fundamental Rights (both of which protect due process rights), in relation to the question whether foreign embassies could use diplomatic immunity to resist unfair dismissal and other employment claims brought by domestic staff. The CA decided in the course of this

that the (UK) State Immunity Act 1978 was in part inconsistent with Art. 6 ECHR, and granted a declaration of incompatibility.

The ECtHR decision in *Nicklinson and Lamb v United Kingdom* [2015] ECHR 709 on the other hand is a ‘false positive’ – it comes up because it references a lot of the discussion of declarations of incompatibility from the UK domestic court decisions under consideration, but ultimately it does not in itself add significantly to the jurisprudence.

(b) The text of the Criminal Procedure Rules 2005.

**Answer:** The full text of the 2005 Rules can be found on the legislation.gov.uk website at <http://www.legislation.gov.uk/uksi/2005/384/contents/made>. You can either go there directly from your browser, by entering the instrument title (provided you know to look for the legislation.gov.uk address), or go first to the legislation.gov.uk homepage and search from there by instrument title.

Note that the landing page tells you “**Status:** This is the original version (as it was originally made). This item of legislation is currently only available in its original format.” In other words the text does not include any subsequent amendments to the Rules. This highlights both a strength and a (relative) weakness of the legislation.gov.uk site. The weakness is that revisions are not always incorporated into the legislative text, though sometimes they are. The ‘status’ statement is thus a critical piece of information. It puts you on notice that the version you are seeing is not revised. In this case, to work out what has changed, you need to click on the ‘More resources’ tab, which takes you to all the amendments subsequently made to the 2005 Rules. The last item (on p.5) refers you to the Criminal Procedure Rules 2010; if you click on the link to the 2010 Rules, you can see that these consolidated the 2005 Rules and amendments thereto into a new set of Rules. (This however does not tell you that the current set of Rules are in fact the Criminal Procedure Rules 2015, you would have to track the 2010 Rules through their various iterations to work this out, a relatively laborious process!) The strength of the legislation.gov.uk site is precisely that it also provides an archive of superseded and repealed legislation, which can be useful if you are researching the legislative history of a specific provision or piece of legislation.

(c) Statistics on the number of ethnic minority judges in England & Wales.

**Answer:** Go to the Courts and Tribunals Judiciary website at [www.judiciary.gov.uk](http://www.judiciary.gov.uk); using the search box, search for “statistics” or “diversity statistics” (“ethnicity” as a search terms is less helpful as it takes you to a range of older and, in some cases, less relevant pages). These will take you to the latest judicial diversity statistics, currently for 2015, see: <https://www.judiciary.gov.uk/about-the-judiciary/who-are-the-judiciary/diversity/judicial-diversity-statistics-2015/>

(d) Information on the progress of Bills in the current session of Parliament.

**Answer:** This one is quite straightforward. Go to the [www.Parliament.uk](http://www.Parliament.uk) homepage. From there the quickest route is to click on the 'Bills and legislation' link at the foot of the page. This takes you direct to a 'Bills and legislation' landing page. From here, click the 'Bills before Parliament' link, which takes you to a further page (<http://services.parliament.uk/bills/>) containing a complete list of Bills before Parliament in the current session. The list identifies whether a Bill is currently before the Commons or the Lords, and distinguishes those that have already received the Royal Assent. Clicking on the title of a Bill will take you to a further page showing the detailed progress of that Bill through Parliament, with access to the full text of both the Bill and the Parliamentary debates during its progress.

(e) The names of the Advocates-General of the European Court of Justice.

**Answer:** An authoritative listing of Advocates-General can be found on the CJEU ('Curia') website by clicking on the 'members' link under the 'Court of Justice' tab. The quickest way from there to identify the Advocates-General is to click on the 'Order of precedence' at [http://curia.europa.eu/jcms/jcms/Jo2\\_7027/](http://curia.europa.eu/jcms/jcms/Jo2_7027/). This takes you to a listing of all members of the Court by precedence (ie date of appointment), and role (Judge, Advocate General, Registrar). Because Judges and Advocates-General are all designated as 'members' of the court there is no separate list of Advocates-General as such.

(f) The decision of the House of Lords in *Pepper v Hart* [1993].

**Answer:** In BAILII you can enter the parties' names using either the 'Search by title' or Case Law Search' function. The former is marginally more straightforward, but both will take you directly to the case.

House of Lords decisions between 1996 and 2008 can also be retrieved from the House of Lords judgments archive on the UK Parliament website (see <http://www.publications.parliament.uk/pa/ld/ldjudgmt.htm>), though cases are simpler to retrieve from BAILII. Note too that *Pepper v Hart* is too early to be part of that archive, so BAILII is the only non-subscription source for this report.

(g) Citations of *Pepper v Hart* in UK cases decided after 1 January 2003.

**Answer:** In BAILII, go to the Case Law Search page. Enter *Pepper v Hart* in the 'exact phrase' field (not case name – otherwise it will retrieve only the original case of *Pepper v Hart*). Then set the date

parameters to a start date of 2003/01/02, and your current end date. At the time of writing this gave us a total of 562 cases, the most recent being *R (Fleet Maritime Services (Bermuda) Ltd) v The Pensions Regulator (Rev 1)* [2015] EWHC 3744 (Admin).

Westlaw and LexisLibrary searches are not dissimilar in form from BAILII. In Westlaw the simplest method is to use the advanced case search function. Enter “Pepper v Hart” in Free Text, and set the Date field to search for cases reported after 01/01/2003. In Lexislibrary, you can similarly use the ‘search terms’ field from the quick search page to search for cases citing Pepper v Hart, and then refine the search by setting date parameters from your results page, or you can use the advanced case search function from the outset. Note that Lexis and Westlaw are more up-to-date, but BAILII defaults to a broader jurisdictional base, which includes decisions from the Republic of Ireland. You can filter these out if you wish. These differences largely account for the variation in numbers of cases found by your search – for example, when we did this exercise, Westlaw came up with 469 cases to BAILII’s 562.

- (h) References to the case 202/89 *European Commission v United Kingdom* in later decisions of the ECJ.

**Answer:** This is a nasty little trick question, as you will keep drawing a blank on references to this case, whether in BAILII (which has a specific CJEU database) or on InfoCuria - the CJEU’s own database of case law. The reason is that the case was discontinued and removed from the register in December 1990. You can find this out simply by entering the case number in the InfoCuria search page. The resulting landing page, shown below, indicates that the case was closed (indicated by upper arrow) and consequently never reported. The date on which it was closed, and some further information on the case can be found by clicking on the case information icon, also indicated.

The screenshot shows the InfoCuria search results page. The search criteria selected is 'Case number = 202/89'. The search result is '1 case(s)'. The case details are as follows:

1/1	C-202/89 - Commission v United Kingdom	[Case closed]
Main proceedings		
Commission v United Kingdom Case C-202/89		
Reports of Cases <i>Information not available</i>		

At the bottom of the page, there is a navigation bar showing '1 / 1 Pages'.

Source: <http://curia.europa.eu/juris/recherche.jsf?cid=326115>

- (i) An authoritative version of Article 62 of the Treaty of Rome.

**Answer:** This looks tricky because Art. 62 has been renumbered as part of the reforms to the Treaty framework discussed in Chapter 11. However, as the authoritative version of the Treaty (as amended) for the time being includes the former numbering of articles under the old EC Treaty alongside the new numbering, it is not that difficult to find the former Article 62, so long as you are aware that the operative provisions of the Treaty of Rome or EC Treaty (as it was also called) have been rolled into the new Treaty on the Functioning of the EU (TFEU).

The conventional starting point for searching EU legislation is the Eur-Lex website. You need to go first to the page 'Treaties currently in force' (<http://eur-lex.europa.eu/collection/eu-law/treaties-force.html>). You will see here that the 'Treaties currently in force page carries a warning that "there have been amendments to the text of the TFEU that are not reflected in this consolidated version. You can read the latest version on the [EU] [Council website](#). This version is available for information only." Clicking on the 'Council website' link will take you directly to the latest, authorised version of the TFEU.

If you want to check the new number of Art. 62 first, rather than just scroll through the TFEU, you can still use the consolidated version of the Treaties (2012) on the Eur-Lex site. Go to the Treaties in force page and click on the Tables of equivalences (shown below), which show how the old Treaty provisions have been renumbered.

Title and year of document	Official Journal	EUR-Lex (CELEX number)
Treaty on the Functioning of the European Union (Consolidated version 2012)	OJ C 326, 26.10.2012	12012E/TXT
Table of contents	OJ C 326, 26.10.2012, p. 1-12	12012E
Preamble	OJ C 326, 26.10.2012, p. 47	12012E000
Articles (1-358)	OJ C 326, 26.10.2012, p. 47-199	12012E001
Protocols (1-37)	OJ C 326, 26.10.2012, p. 201-329	12012E/PRO/01
Annex I	OJ C 326, 26.10.2012, p. 333-335	12012EN01
Annex II	OJ C 326, 26.10.2012, p. 336	12012EN02
Declarations (1-65)	OJ C 326, 26.10.2012, p. 337-361	12012L/AFI/DCL/01
Tables of equivalences	OJ C 326, 26.10.2012, p. 368-390	12012E/TBL

This will tell you that Article 62 of the Treaty establishing the European Community (the Treaty of Rome) has been renumbered Art. 77 in the TFEU.

(j) An authoritative version of Article 3 of the European Convention on Human Rights.

Answer: The authoritative version of the Convention can be found on the website of the European Court of Human Rights under the 'Official Texts' tab (see <http://www.echr.coe.int/pages/home.aspx?p=basictexts>). Note that there is no authoritative version on the Council of Europe website, which hosts only historic (original) and simplified versions of the Convention.