Human Rights Act 1998

1998 CHAPTER 42

An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights; to make provision with respect to holders of certain judicial offices who become judges of the European Court of Human Rights; and for connected purposes. [9th November 1998]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Annotations:

Extent Information

E1 For the extent of this Act outside the U.K., see s. 22(6)(7)

Modifications etc. (not altering text)

C1 Act: certain functions of the Secretary of State transferred to the Lord Chancellor (26.11.2001) by S.I. 2001/3500, arts. 3, 4, **Sch. 1 para. 5**

C2 Act (except ss. 5, 10, 18, 19 and Sch. 4): Functions of the Lord Chancellor transferred to the Secretary of State, and all property, rights and liabilities to which the Lord Chancellor is entitled or subject to in connection with any such function transferred to the Secretary of State for Constitutional Affairs (19.8.2003) by S.I. 2003/1887, art. 4, **Sch. 1**

Introduction

1 The Convention Rights.

(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—

(a) Articles 2 to 12 and 14 of the Convention,

(b) Articles 1 to 3 of the First Protocol, and

(c) **[**F1Article 1 of the Thirteenth Protocol**]**,

as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The **[**F2Secretary of State**]** may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention—

(a) which the United Kingdom has ratified; or

(b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

Annotations:

Amendments (Textual)

F1 Words in s. 1(1)(c) substituted (22.6.2004) by The Human Rights Act 1998 (Amendment) Order 2004 (S. I. 2004/1574), **art. 2(1)**

F2 Words in s. 1 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

2 Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section—

(a) by **F3**. . . **[**F4the Lord Chancellor or**]** the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and
(ii) for which no rules made under paragraph (a) are in force.

Annotations:

Amendments (Textual)

F3 Words in s. 2(3)(a) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**

F4 Words in s. 2(3)(a) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**

Modifications etc. (not altering text)

C3 S. 2(3)(a): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), **art. 3(2)** (with arts. 4, 5)

Legislation

3 Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4 Declaration of incompatibility.

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—
(a) that the provision is incompatible with a Convention right, and
(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means—
[F5(a) the Supreme Court;**]**

(b) the Judicial Committee of the Privy Council;

(c) the **[**F6Court Martial Appeal Court**]** ;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

[F7(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.**]**

(6) A declaration under this section ("a declaration of incompatibility")—

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

Annotations:

Amendments (Textual)

F5 S. 4(5)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(2)**; S.I. 2009/1604, **art. 2(d)**

F6 Words in s. 4(5)(c) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16 para. 156**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F7 S. 4(5)(f) inserted (1.10.2007) by Mental Capacity Act 2005 (c. 9), ss. 67(1), 68(1)-(3), **Sch. 6 para. 43** (with ss. 27, 28, 29, 62); S.I. 2007/1897, **art. 2(1)(c)(d)**

5 Right of Crown to intervene.

(1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies—

(a) a Minister of the Crown (or a person nominated by him),

(b) a member of the Scottish Executive,

(c) a Northern Ireland Minister,

(d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the **[**F8Supreme Court**]** against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)—

"criminal proceedings" includes all proceedings before the **[**F9Court Martial Appeal Court**]**; and

"leave" means leave granted by the court making the declaration of incompatibility or by the **[**F10Supreme Court**]**

Annotations:

Amendments (Textual)

F8 Words in s. 5(4) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

F9 Words in s. 5(5) substituted (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 16 para. 157**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

F10 Words in s. 5(5) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 148, **Sch. 9 para. 66(3)**; S.I. 2009/1604, **art. 2(d)**

Public authorities

6 Acts of public authorities.

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) [F11] . . . . . .

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

Annotations:

Amendments (Textual)

F11 S. 6(4) repealed (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 40, 146, 148, Sch. 9 para. 66(4), **Sch. 18 Pt. 5**; S.I. 2009/1604, **art. 2(d)(f)**

Modifications etc. (not altering text)

C4 S. 6(1) applied (2.10.2000) by 1999 c. 33, **ss. 65(2)**, 170(4); S.I. 2000/2444, art. 2, **Sch. 1** (subject to transitional provisions in arts. 3, 4, Sch. 2)

C5 S. 6(3)(b) modified (1.12.2008 with exception in art. 2(2) of commencing S.I.) by Health and Social Care Act 2008 (c. 14), **ss. 145(1)-(4)**, 170 (with s. 145(5)); S.I. 2008/2994, **art. 2(1)**

7 Proceedings.

(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of—

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes—

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means—

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by [F12]. . . **[**[F13]the Lord Chancellor or**]** the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland—

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the [M1]Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to—

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

Annotations:

Amendments (Textual)

F12 Words in s. 7(9)(a) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**

F13 Words in s. 7(9)(a) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**,

Modifications etc. (not altering text)

C6 S. 7 amended (2.10.2000) by Regulation of Investigatory Powers Act 2000 (c. 23), **ss. 65(2)(a)**, 83 (with s. 82(3); S.I. 2000/2543, **art. 3**

C7 S. 7: referred to (11.3.2005) by Prevention of Terrorism Act 2005 (c. 2), {s. 11(2)}

C8 S. 7(9)(a): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), **art. 3(2)** (with arts. 4, 5)

C9 S. 7(11): functions of the Secretary of State to be exercisable concurrently with the Lord Chancellor (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), **art. 3(2)** (with arts. 4, 5)

Marginal Citations

M1 1990 c. 41.

8 Judicial remedies.

(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated—

(a) in Scotland, for the purposes of section 3 of the [M2]Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the [M3]Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section—

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

Annotations:

Marginal Citations

M2 1940 c. 42.

M3 1978 c. 47.

9 Judicial acts.

(1) Proceedings under section 7(1)(a) in respect of a judicial act may be brought only—

(a) by exercising a right of appeal;

(b) on an application (in Scotland a petition) for judicial review; or

(c) in such other forum as may be prescribed by rules.

(2) That does not affect any rule of law which prevents a court from being the subject of judicial review.

(3) In proceedings under this Act in respect of a judicial act done in good faith, damages may not be awarded otherwise than to compensate a person to the extent required by Article 5(5) of the Convention.

(4) An award of damages permitted by subsection (3) is to be made against the Crown; but no award may be made unless the appropriate person, if not a party to the proceedings, is joined.

(5) In this section—

"appropriate person" means the Minister responsible for the court concerned, or a person or government department nominated by him;

"court" includes a tribunal;

"judge" includes a member of a tribunal, a justice of the peace **[**[F14](or, in Northern Ireland, a lay magistrate)**]** and a clerk or other officer entitled to exercise the jurisdiction of a court;

"judicial act" means a judicial act of a court and includes an act done on the instructions, or on behalf, of a judge; and

"rules" has the same meaning as in section 7(9).

Annotations:

Amendments (Textual)

F14 Words in definition s. 9(5) inserted (N.I.)(1.4.2005) by 2002 c. 26, s. 10(6), Sch. 4 para. 39; S.R. 2005/109, **art. 2** Sch.

Remedial action

10 Power to take remedial action.

(1) This section applies if—

(a) a provision of legislation has been declared under section 4 to be incompatible with a Convention right and, if an appeal lies—

(i) all persons who may appeal have stated in writing that they do not intend to do so;

(ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or

(iii) an appeal brought within that time has been determined or abandoned; or

(b) it appears to a Minister of the Crown or Her Majesty in Council that, having regard to a finding of the European Court of Human Rights made after the coming into force of this section in proceedings against the United Kingdom, a provision of legislation is incompatible with an obligation of the United Kingdom arising from the Convention.

(2) If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.

(3) If, in the case of subordinate legislation, a Minister of the Crown considers—

(a) that it is necessary to amend the primary legislation under which the subordinate legislation in question was made, in order to enable the incompatibility to be removed, and

(b) that there are compelling reasons for proceeding under this section,

he may by order make such amendments to the primary legislation as he considers necessary.

(4) This section also applies where the provision in question is in subordinate legislation and has been quashed, or declared invalid, by reason of incompatibility with a Convention right and the Minister proposes to proceed under paragraph 2(b) of Schedule 2.

(5) If the legislation is an Order in Council, the power conferred by subsection (2) or (3) is exercisable by Her Majesty in Council.

(6) In this section "legislation" does not include a Measure of the Church Assembly or of the General Synod of the Church of England.

(7) Schedule 2 makes further provision about remedial orders.

Other rights and proceedings

11 Safeguard for existing human rights.

A person's reliance on a Convention right does not restrict—

(a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom; or

(b) his right to make any claim or bring any proceedings which he could make or bring apart from sections 7 to 9.

12 Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

13 Freedom of thought, conscience and religion.

(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the

Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

(2) In this section "court" includes a tribunal.

Derogations and reservations

14 Derogations.

(1) In this Act "designated derogation" means—

F15 . . . . . .

any derogation by the United Kingdom from an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the **[**F16Secretary of State**]**

F17(2) . . . . . .

(3) If a designated derogation is amended or replaced it ceases to be a designated derogation.

(4) But subsection (3) does not prevent the **[**F18Secretary of State**]** from exercising his power under subsection (1) F19. . . to make a fresh designation order in respect of the Article concerned.

(5) The **[**F20Secretary of State**]** must by order make such amendments to Schedule 3 as he considers appropriate to reflect—

(a) any designation order; or

(b) the effect of subsection (3).

(6) A designation order may be made in anticipation of the making by the United Kingdom of a proposed derogation.

Annotations:

Amendments (Textual)

F15 S. 14(1): from "(a)" to "(b)" repealed (1.4.2001) by S.I. 2001/1216, **art. 2(a)**

F16 Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

F17 S. 14(2) repealed (1.4.2001) by S.I. 2001/1216, **art. 2(b)**

F18 Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

F19 S. 14(4): "(b)" repealed (1.4.2001) by S.I. 2001/1216, **art. 2(c)**

F20 Words in s. 14 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

15 Reservations.

(1) In this Act "designated reservation" means—

(a) the United Kingdom's reservation to Article 2 of the First Protocol to the Convention; and

(b) any other reservation by the United Kingdom to an Article of the Convention, or of any protocol to the Convention, which is designated for the purposes of this Act in an order made by the **[**F21Secretary of State**]** .

(2) The text of the reservation referred to in subsection (1)(a) is set out in Part II of Schedule 3.

(3) If a designated reservation is withdrawn wholly or in part it ceases to be a designated reservation.

(4) But subsection (3) does not prevent the **[**F22Secretary of State**]** from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.

(5) **[**F23Secretary of State**]** must by order make such amendments to this Act as he considers appropriate to reflect—

(a) any designation order; or

(b) the effect of subsection (3).

Annotations:

Amendments (Textual)

F21 Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

F22 Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

F23 Words in s. 15 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

16 Period for which designated derogations have effect.

(1) If it has not already been withdrawn by the United Kingdom, a designated derogation ceases to have effect for the purposes of this Act—

F24 . . . . . .

. . ., at the end of the period of five years beginning with the date on which the order designating it was made.

(2) At any time before the period—

(a) fixed by subsection (1) F25. . ., or

(b) extended by an order under this subsection,

comes to an end, the **[**F26Secretary of State**]** may by order extend it by a further period of five years.

(3) An order under section 14(1) F27. . . ceases to have effect at the end of the period for consideration, unless a resolution has been passed by each House approving the order.

(4) Subsection (3) does not affect—

(a) anything done in reliance on the order; or

(b) the power to make a fresh order under section 14(1) . . ..

(5) In subsection (3) "period for consideration" means the period of forty days beginning with the day on which the order was made.

(6) In calculating the period for consideration, no account is to be taken of any time during which—

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

(7) If a designated derogation is withdrawn by the United Kingdom, the **[**[F28]Secretary of State**]** must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

Annotations:

Amendments (Textual)

F24 S. 16(1): words from "(a)" to "any other derogation" repealed (1.4.2001) by S.I. 2001/1216, **art. 3(a)**

F25 Words in s. 16(2)(a) repealed (1.4.2001) by S.I. 2001/1216, **art. 3(b)**

F26 Words in s. 16 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

F27 S. 16(3)(4)(b): "(b)" repealed (1.4.2001) by S.I. 2001/1216, **art. 3(c)(d)**

F28 Words in s. 16 substituted (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(1)**

17 Periodic review of designated reservations.

(1) The appropriate Minister must review the designated reservation referred to in section 15(1)(a)—

(a) before the end of the period of five years beginning with the date on which section 1(2) came into force; and

(b) if that designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(2) The appropriate Minister must review each of the other designated reservations (if any)—

(a) before the end of the period of five years beginning with the date on which the order designating the reservation first came into force; and

(b) if the designation is still in force, before the end of the period of five years beginning with the date on which the last report relating to it was laid under subsection (3).

(3) The Minister conducting a review under this section must prepare a report on the result of the review and lay a copy of it before each House of Parliament.

Judges of the European Court of Human Rights

18 Appointment to European Court of Human Rights.

(1) In this section "judicial office" means the office of—

(a) Lord Justice of Appeal, Justice of the High Court or Circuit judge, in England and Wales;

(b) judge of the Court of Session or sheriff, in Scotland;

(c) Lord Justice of Appeal, judge of the High Court or county court judge, in Northern Ireland.

(2) The holder of a judicial office may become a judge of the European Court of Human Rights ("the Court") without being required to relinquish his office.

(3) But he is not required to perform the duties of his judicial office while he is a judge of the Court.

(4) In respect of any period during which he is a judge of the Court—

(a) a Lord Justice of Appeal or Justice of the High Court is not to count as a judge of the relevant court for the purposes of section 2(1) or 4(1) of the **[**F29Senior Courts Act 1981**]**(maximum number of judges) nor as a judge of the **[**F30Senior Courts**]** for the purposes of section 12(1) to (6) of that Act (salaries etc.);

(b) a judge of the Court of Session is not to count as a judge of that court for the purposes of section 1(1) of the M4Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the M5Administration of Justice Act 1973 ("the 1973 Act") (salaries etc.);

(c) a Lord Justice of Appeal or judge of the High Court in Northern Ireland is not to count as a judge of the relevant court for the purposes of section 2(1) or 3(1) of the M6Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the **[**F31Court of Judicature**]** of Northern Ireland for the purposes of section 9(1)(d) of the 1973 Act (salaries etc.);

(d) a Circuit judge is not to count as such for the purposes of section 18 of the M7Courts Act 1971 (salaries etc.);

(e) a sheriff is not to count as such for the purposes of section 14 of the M8Sheriff Courts (Scotland) Act 1907 (salaries etc.);

(f) a county court judge of Northern Ireland is not to count as such for the purposes of section 106 of the M9County Courts Act Northern Ireland) 1959 (salaries etc.).

(5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the M10Sheriff Courts (Scotland) Act 1971 (temporary appointment of sheriff principal) applies, while he holds that appointment, as if his office is vacant.

(6) Schedule 4 makes provision about judicial pensions in relation to the holder of a judicial office who serves as a judge of the Court.

(7) The Lord Chancellor or the Secretary of State may by order make such transitional provision (including, in particular, provision for a temporary increase in the maximum number of judges) as he considers appropriate in relation to any holder of a judicial office who has completed his service as a judge of the Court.

[F32(7A) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(a)—

(a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of England and Wales;

(b) before making the order, that person must consult the Lord Chief Justice of England and Wales.

(7B) The following paragraphs apply to the making of an order under subsection (7) in relation to any holder of a judicial office listed in subsection (1)(c)—

(a) before deciding what transitional provision it is appropriate to make, the person making the order must consult the Lord Chief Justice of Northern Ireland;

(b) before making the order, that person must consult the Lord Chief Justice of Northern Ireland.

(7C) The Lord Chief Justice of England and Wales may nominate a judicial office holder (within the meaning of section 109(4) of the Constitutional Reform Act 2005) to exercise his functions under this section.

(7D) The Lord Chief Justice of Northern Ireland may nominate any of the following to exercise his functions under this section—

(a) the holder of one of the offices listed in Schedule 1 to the Justice (Northern Ireland) Act 2002;

(b) a Lord Justice of Appeal (as defined in section 88 of that Act).**]**

Annotations:

Amendments (Textual)

F29 Words in s. 18(4)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, **Sch. 11 para. 4**; S.I. 2009/1604, **art. 2(d)**

F30 Words in s. 18(4)(a) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, **Sch. 11 para. 4**; S.I. 2009/1604, **art. 2(d)**

F31 Words in s. 18(4)(c) substituted (1.10.2009) by Constitutional Reform Act 2005 (c. 4), ss. 59, 148, **Sch. 11 para. 6**; S.I. 2009/1604, **art. 2(d)**

F32 S. 18(7A)-(7D) inserted (3.4.2006) by Constitutional Reform Act 2005 (c. 4), ss. 15, 148, **Sch. 4 para. 278**; S.I. 2006/1014, **art. 2**, Sch. 1 para. 11(v)

Marginal Citations

M4 1988 c. 36.

M5 1973 c. 15.

M6 1978 c. 23.

M7 1971 c. 23.

M8 1907 c. 51.

M9 1959 c. 25 (N.I.).

M10 1971 c. 58.

Parliamentary procedure

19 Statements of compatibility.

(1) A Minister of the Crown in charge of a Bill in either House of Parliament must, before Second Reading of the Bill—

(a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights ("a statement of compatibility"); or

(b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate.

Supplemental

20 Orders etc. under this Act.

(1) Any power of a Minister of the Crown to make an order under this Act is exercisable by statutory instrument.

(2) The power of [F33]. . . **[**[F34]the Lord Chancellor or**]** the Secretary of State to make rules (other than rules of court) under section 2(3) or 7(9) is exercisable by statutory instrument.

(3) Any statutory instrument made under section 14, 15 or 16(7) must be laid before Parliament.

(4) No order may be made by [F35]. . . **[**[F36]the Lord Chancellor or**]** the Secretary of State under section 1(4), 7(11) or 16(2) unless a draft of the order has been laid before, and approved by, each House of Parliament.

(5) Any statutory instrument made under section 18(7) or Schedule 4, or to which subsection (2) applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(6) The power of a Northern Ireland department to make—

(a) rules under section 2(3)(c) or 7(9)(c), or

(b) an order under section 7(11),

is exercisable by statutory rule for the purposes of the [M11]Statutory Rules (Northern Ireland) Order 1979.

(7) Any rules made under section 2(3)(c) or 7(9)(c) shall be subject to negative resolution; and section 41(6) of the [M12]Interpretation Act Northern Ireland) 1954 (meaning of "subject to negative resolution") shall apply as if the power to make the rules were conferred by an Act of the Northern Ireland Assembly.

(8) No order may be made by a Northern Ireland department under section 7(11) unless a draft of the order has been laid before, and approved by, the Northern Ireland Assembly.

Annotations:

Amendments (Textual)

F33 Words in s. 20(2) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**

F34 Words in s. 20(2) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**

F35 Words in s. 20(4) repealed (19.8.2003) by The Secretary of State for Constitutional Affairs Order 2003 (S. I. 2003/1887), art. 9, **Sch. 2 para. 10(2)**

F36 Words in s. 20(4) inserted (12.1.2006) by The Transfer of Functions (Lord Chancellor and Secretary of State) Order 2005 (S.I. 2005/3429), art. 8, **Sch. para. 3**

Marginal Citations

M11 S.I. 1979/1573 (N.I. 12).

M12 1954 c. 33 (N.I.).

21 Interpretation, etc.

(1) In this Act—

"amend" includes repeal and apply (with or without modifications);

"the appropriate Minister" means the Minister of the Crown having charge of the appropriate authorised government department (within the meaning of the [M13]Crown Proceedings Act 1947);

"the Commission" means the European Commission of Human Rights;

"the Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 as it has effect for the time being in relation to the United Kingdom;

"declaration of incompatibility" means a declaration under section 4;

"Minister of the Crown" has the same meaning as in the Ministers of the [M14]Crown Act 1975;

"Northern Ireland Minister" includes the First Minister and the deputy First Minister in Northern Ireland;

"primary legislation" means any—

(a) public general Act;

(b) local and personal Act;

(c) private Act;

(d) Measure of the Church Assembly;

(e) Measure of the General Synod of the Church of England;

(f) Order in Council—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the [M15]Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the **[**[F37]Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,**]** a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;

"the First Protocol" means the protocol to the Convention agreed at Paris on 20th March 1952;

[F38]. . .

"the Eleventh Protocol" means the protocol to the Convention (restructuring the control machinery established by the Convention) agreed at Strasbourg on 11th May 1994;

[[F39]"the Thirteenth Protocol" means the protocol to the Convention (concerning the abolition of the death penalty in all circumstances) agreed at Vilnius on 3rd May 2002;**]**

"remedial order" means an order under section 10;

"subordinate legislation" means any—

(a) Order in Council other than one—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

(ba) **[**F40Measure of the National Assembly for Wales;

(bb) Act of the National Assembly for Wales;**]**

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the M16Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly;

(f) order, rules, regulations, scheme, warrant, byelaw or other instrument made under primary legislation (except to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation);

(g) order, rules, regulations, scheme, warrant, byelaw or other instrument made under legislation mentioned in paragraph (b), (c), (d) or (e) or made under an Order in Council applying only to Northern Ireland;

(h) order, rules, regulations, scheme, warrant, byelaw or other instrument made by a member of the Scottish Executive **[**F41, Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government,**]** a Northern Ireland Minister or a Northern Ireland department in exercise of prerogative or other executive functions of Her Majesty which are exercisable by such a person on behalf of Her Majesty;

"transferred matters" has the same meaning as in the Northern Ireland Act 1998; and

"tribunal" means any tribunal in which legal proceedings may be brought.

(2) The references in paragraphs (b) and (c) of section 2(1) to Articles are to Articles of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(3) The reference in paragraph (d) of section 2(1) to Article 46 includes a reference to Articles 32 and 54 of the Convention as they had effect immediately before the coming into force of the Eleventh Protocol.

(4) The references in section 2(1) to a report or decision of the Commission or a decision of the Committee of Ministers include references to a report or decision made as provided by paragraphs 3, 4 and 6 of Article 5 of the Eleventh Protocol (transitional provisions).

(5) F42. . . . . .

Annotations:

Extent Information

E2 For the extent of s. 21 outside the U.K. see s. 22(7)

Amendments (Textual)

F37 Words in the definition of "primary legislation" in s. 21(1) substituted by Government of Wales Act 2006 (c. 32), s. 160(1), **Sch. 10 para.56(2)** (with Sch. 11 para. 22) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending

Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.

F38 S. 21(1): definition of "the Sixth Protocol" omitted (22.6.2004) by virtue of The Human Rights Act 1998 (Amendment) Order 2004 (S.I. 2004/1574), **art. 2(2)**

F39 S. 21(1): definition of "the Thirteenth Protocol" inserted (22.6.2004) by virtue of The Human Rights Act 1998 (Amendment) Order 2004 (S.I. 2004/1574), **art. 2(2)**

F40 Words in the definition of "subordinate legislation" in s. 21(1) substituted by Government of Wales Act 2006 (c. 32), s. 160(1), **Sch. 10 para.56(3)** (with Sch. 11 para. 22) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.

F41 Words in the definition of "subordinate legislation" in s. 21(1) substituted by Government of Wales Act 2006 (c. 32), s. 160(1), **Sch. 10 para.56(4)** (with Sch. 11 para. 22) the amending provision coming into force immediately after "the 2007 election" (held on 3.5.2007) subject to s. 161(4)(5) of the amending Act, which provides for certain provisions to come into force for specified purposes immediately after the end of "the initial period" (which ended with the day of the first appointment of a First Minister on 25.5.2007) - see ss. 46, 161(1)(4)(5) of the amending Act.

F42 S. 21(5) repealed (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 17**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

Commencement Information

I1 S. 21 wholly in force at 2.10.2000; s. 21(5) in force at Royal Assent, see s. 22(2)(3); s. 21 in force so far as not already in force (2.10.2000) by S.I. 2000/1851, **art. 2**

Marginal Citations

M13 1947 c. 44.

M14 1975 c. 26.

M15 1973 c. 36.

M16 1973 c. 17.

22 Short title, commencement, application and extent.

(1) This Act may be cited as the Human Rights Act 1998.

(2) Sections 18, 20 and 21(5) and this section come into force on the passing of this Act.

(3) The other provisions of this Act come into force on such day as the Secretary of State may by order appoint; and different days may be appointed for different purposes.

(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

(5) This Act binds the Crown.

(6) This Act extends to Northern Ireland.

(7) **F43** . . . . . .

Annotations:

Subordinate Legislation Made

P1 S. 22(3) power partly exercised: 24.11.1998 appointed for specified provisions by S.I. 1998/2882, **art. 2**
S. 22(3) power fully exercised: 2.10.2000 appointed for remaining provisions by S.I. 2000/1851, **art. 2**

Amendments (Textual)

F43 S. 22(7) repealed (28.3.2009 for certain purposes and 31.10.2009 otherwise) by Armed Forces Act 2006 (c. 52), ss. 378, 383, **Sch. 17**; S.I. 2009/812, **art. 3** (with transitional provisions in S.I. 2009/1059); S.I. 2009/1167, **art. 4**

SCHEDULES

SCHEDULE 1

Section 1(3).

THE ARTICLES

PART I

THE CONVENTION

RIGHTS AND FREEDOMS

ARTICLE 2

RIGHT TO LIFE

1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2 Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3

PROHIBITION OF TORTURE

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4

PROHIBITION OF SLAVERY AND FORCED LABOUR

1 No one shall be held in slavery or servitude.

2 No one shall be required to perform forced or compulsory labour.

3 For the purpose of this Article the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

(b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;

(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;

(d) any work or service which forms part of normal civic obligations.

ARTICLE 5

RIGHT TO LIBERTY AND SECURITY

1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

ARTICLE 6

RIGHT TO A FAIR TRIAL

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3 Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 7

NO PUNISHMENT WITHOUT LAW

1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2 This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

ARTICLE 8

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of

the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

FREEDOM OF EXPRESSION

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

FREEDOM OF ASSEMBLY AND ASSOCIATION

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12

RIGHT TO MARRY

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 14

PROHIBITION OF DISCRIMINATION

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

ARTICLE 16

RESTRICTIONS ON POLITICAL ACTIVITY OF ALIENS

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17

PROHIBITION OF ABUSE OF RIGHTS

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

LIMITATION ON USE OF RESTRICTIONS ON RIGHTS

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

PART II

THE FIRST PROTOCOL

ARTICLE 1

PROTECTION OF PROPERTY

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

ARTICLE 2

RIGHT TO EDUCATION

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ARTICLE 3

RIGHT TO FREE ELECTIONS

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

[F44 PART 3

ARTICLE 1 OF THE THIRTEENTH PROTOCOL

ABOLITION OF THE DEATH PENALTY

Annotations:

Amendments (Textual)

F44 Sch. 1 Pt. 3 substituted (22.6.2004) by The Human Rights Act 1998 (Amendment) Order 2004 (S.I. 2004/1574), **art. 2(3)**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.**]**

PART III

THE SIXTH PROTOCOL

. . . . . .

SCHEDULE 2

Section 10.

REMEDIAL ORDERS

Orders

1 (1) A remedial order may—

(a) contain such incidental, supplemental, consequential or transitional provision as the person making it considers appropriate;

(b) be made so as to have effect from a date earlier than that on which it is made;

(c) make provision for the delegation of specific functions;

(d) make different provision for different cases.

(2) The power conferred by sub-paragraph (1)(a) includes—

(a) power to amend primary legislation (including primary legislation other than that which contains the incompatible provision); and

(b) power to amend or revoke subordinate legislation (including subordinate legislation other than that which contains the incompatible provision).

(3) A remedial order may be made so as to have the same extent as the legislation which it affects.

(4) No person is to be guilty of an offence solely as a result of the retrospective effect of a remedial order.

Procedure

2 No remedial order may be made unless—

(a) a draft of the order has been approved by a resolution of each House of Parliament made after the end of the period of 60 days beginning with the day on which the draft was laid; or

(b) it is declared in the order that it appears to the person making it that, because of the urgency of the matter, it is necessary to make the order without a draft being so approved.

Orders laid in draft

3 (1) No draft may be laid under paragraph 2(a) unless—

(a) the person proposing to make the order has laid before Parliament a document which contains a draft of the proposed order and the required information; and

(b) the period of 60 days, beginning with the day on which the document required by this sub-paragraph was laid, has ended.

(2) If representations have been made during that period, the draft laid under paragraph 2(a) must be accompanied by a statement containing—

(a) a summary of the representations; and

(b) if, as a result of the representations, the proposed order has been changed, details of the changes.

Urgent cases

4 (1) If a remedial order ("the original order") is made without being approved in draft, the person making it must lay it before Parliament, accompanied by the required information, after it is made.

(2) If representations have been made during the period of 60 days beginning with the day on which the original order was made, the person making it must (after the end of that period) lay before Parliament a statement containing—

(a) a summary of the representations; and

(b) if, as a result of the representations, he considers it appropriate to make changes to the original order, details of the changes.

(3) If sub-paragraph (2)(b) applies, the person making the statement must—

(a) make a further remedial order replacing the original order; and

(b) lay the replacement order before Parliament.

(4) If, at the end of the period of 120 days beginning with the day on which the original order was made, a resolution has not been passed by each House approving the original or replacement order, the order ceases to have effect (but without that affecting anything previously done under either order or the power to make a fresh remedial order).

Definitions

5 In this Schedule—

"representations" means representations about a remedial order (or proposed remedial order) made to the person making (or proposing to make) it and includes any relevant Parliamentary report or resolution; and

"required information" means—

(a) an explanation of the incompatibility which the order (or proposed order) seeks to remove, including particulars of the relevant declaration, finding or order; and

(b) a statement of the reasons for proceeding under section 10 and for making an order in those terms.

Calculating periods

6 In calculating any period for the purposes of this Schedule, no account is to be taken of any time during which—

(a) Parliament is dissolved or prorogued; or

(b) both Houses are adjourned for more than four days.

[[F48]7 (1) This paragraph applies in relation to–

(a) any remedial order made, and any draft of such an order proposed to be made,–

(i) by the Scottish Ministers; or

(ii) within devolved competence (within the meaning of the Scotland Act 1998) by Her Majesty in Council; and

(b) any document or statement to be laid in connection with such an order (or proposed order).

(2) This Schedule has effect in relation to any such order (or proposed order), document or statement subject to the following modifications.

(3) Any reference to Parliament, each House of Parliament or both Houses of Parliament shall be construed as a reference to the Scottish Parliament.

(4) Paragraph 6 does not apply and instead, in calculating any period for the purposes of this Schedule, no account is to be taken of any time during which the Scottish Parliament is dissolved or is in recess for more than four days.**]**

Annotations:

Amendments (Textual)

F48 Sch. 2 para. 7 inserted (27.7.2000) by S.I. 2000/2040, art. 2, **Sch. Pt. I para. 21** (with art. 3)

SCHEDULE 3

Sections 14 and 15.

DEROGATION AND RESERVATION

F49

PART I

. . . . . .

Annotations:

Amendments (Textual)

F49 Sch. 3 Pt. I repealed (1.4.2001) by S.I. 2001/1216, **art. 4**

F50

PART I

DEROGATION

. . . . . .

Annotations:

Amendments (Textual)

F50 Sch. 3 Pt. I repealed (8.4.2005) by The Human Rights Act 1998 (Amendment) Order 2005 (S.I. 2005/1071), **art. 2**

PART II

RESERVATION

At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

Dated 20 March 1952

Made by the United Kingdom Permanent Representative to the Council of Europe.

SCHEDULE 4

Section 18(6).

JUDICIAL PENSIONS

Duty to make orders about pensions

1 (1) The appropriate Minister must by order make provision with respect to pensions payable to or in respect of any holder of a judicial office who serves as an ECHR judge.

(2) A pensions order must include such provision as the Minister making it considers is necessary to secure that—

(a) an ECHR judge who was, immediately before his appointment as an ECHR judge, a member of a judicial pension scheme is entitled to remain as a member of that scheme;

(b) the terms on which he remains a member of the scheme are those which would have been applicable had he not been appointed as an ECHR judge; and

(c) entitlement to benefits payable in accordance with the scheme continues to be determined as if, while serving as an ECHR judge, his salary was that which would (but for section 18(4)) have been payable to him in respect of his continuing service as the holder of his judicial office.

Contributions

2 A pensions order may, in particular, make provision—

(a) for any contributions which are payable by a person who remains a member of a scheme as a result of the order, and which would otherwise be payable by deduction from his salary, to be made otherwise than by deduction from his salary as an ECHR judge; and

(b) for such contributions to be collected in such manner as may be determined by the administrators of the scheme.

Amendments of other enactments

3 A pensions order may amend any provision of, or made under, a pensions Act in such manner and to such extent as the Minister making the order considers necessary or expedient to ensure the proper administration of any scheme to which it relates.

Definitions

4 In this Schedule—

"appropriate Minister" means—

(a) in relation to any judicial office whose jurisdiction is exercisable exclusively in relation to Scotland, the Secretary of State; and

(b) otherwise, the Lord Chancellor;

"ECHR judge" means the holder of a judicial office who is serving as a judge of the Court;

"judicial pension scheme" means a scheme established by and in accordance with a pensions Act;

"pensions Act" means—

(a) the [M17]County Courts Act Northern Ireland) 1959;

(b) the [M18]Sheriffs' Pensions (Scotland) Act 1961;

(c) the [M19]Judicial Pensions Act 1981; or

(d) the [M20]Judicial Pensions and Retirement Act 1993; and

"pensions order" means an order made under paragraph 1.

Annotations:

Marginal Citations

M17 1959 c. 25 (N.I.).
M18 1961 c. 42.
M19 1981 c. 20.
M20 1993 c. 8.

Changes to legislation:
There are outstanding changes not yet made by the legislation.gov.uk editorial team to Human Rights Act 1998. Any changes that have already been made by the team appear in the content and are referenced with annotations.

Changes and effects yet to be applied to :

- s. 4(5)(f) words substituted by 2013 c. 22 Sch. 14 para. 5(5)
- Sch. 4 para. 4 words inserted by 2013 c. 25 Sch. 8 para. 26

Commencement Orders yet to be applied to the Human Rights Act 1998
Commencement Orders bringing legislation that affects this Act into force:

- S.I. 2006/1014 art. 2(a) Sch. 1 para. 11(v) commences (2005 c. 4)
- S.I. 2007/1897 art. 2 commences (2005 c. 9)
- S.I. 2009/812 art. 3(a)(b) commences (2006 c. 52)
- S.I. 2009/1059 Order transitional provisions for effects of commencing SI 2009/812
- S.I. 2009/1604 art. 2 commences (2005 c. 4)

Ministry of JUSTICE

Human rights: human lives

A handbook for public authorities

Contents

Part 3: Guidance and information 50

MoJ acknowledges the work done by Jenny Watson and Mitchell Woolf on their book 'Human Rights Act Toolkit' (LAG: London) which forms the basis for some sections in Part 3 of this handbook. We are extremely grateful to them for allowing this material to be used.

Foreword

This guide is designed to assist officials in public authorities to implement the Human Rights Act 1998.

It aims:

- to raise your awareness of the different rights and freedoms protected by the Human Rights Act, and
- to show you, through actual examples, how to consider the potential human rights impact of your work, whether you are delivering services directly to the public or devising new policies and procedures.

This guide is deliberately expressed in general terms in order to be as useful and relevant as possible to all types of public authority. Some will find that it meets their requirements as it stands. Others may wish to use it as a point of departure and reference tool for the development of guidance tailored to their own particular needs.

We welcome feedback on the usefulness of the handbook, and any suggestions to improve it. You can contact us:

- **by writing to:** Ministry of Justice, Human Rights Division, 7th Floor, 102 Petty France, London, SW1H 9AJ
- **by telephone:** 020 3334 3734
- **by e-mail:** humanrights@justice.gsi.gov.uk

Why we wrote this handbook

All those who work in public authorities, whether devising policy or procedures or delivering services directly to the public, must act in a way that's compatible with the Human Rights Act 1998.

The Act is all about treating individuals fairly, with dignity and respect – while still safeguarding the rights of the wider community. But the Human Rights Act has had a lot of bad press recently – most of it undeserved.

A review of the Act, commissioned by the Prime Minister, was published in July 2006 and concluded that, while the Act has been beneficial, there are misconceptions about it; there is a general lack of understanding of it; and there isn't enough guidance to help in applying the Act. This handbook is designed to fill that gap.

What you will find in this handbook

- information relevant to people working at all levels within any public authority
- the background on where the Human Rights Act originated and what rights it enshrines (Part 1)
- explanations of each of the rights and how they may be relevant to different public authorities (Part 2)
- real-life examples and case studies that show how human rights work in practice (Part 2)
- a jargon buster and answers to frequently asked questions (Part 3)
- details on where to find further information and useful contacts (Part 3).

What you will not find in this handbook

- a substitute for proper legal advice or an exhaustive explanation of human rights law: always take proper legal advice if you have a specific issue to deal with
- detailed sector-specific information. This guide is deliberately generic to make it as relevant as possible to a broad range of public authorities
- lots of legal jargon.

Part 1

Background

Basics

Who should use this handbook and why?

If you work in a public authority this handbook can help you to understand how the Human Rights Act relates to what you do and how you do it. The handbook is designed to give you information on how human rights are relevant to your role and what obligations public authorities have under the Human Rights Act. After reading this we hope you will feel confident in dealing with human rights issues in your day-to-day work, whether you are in central or local government, the police or armed forces, schools or public hospitals, or any other public authority.

What is the European Convention on Human Rights?

The European Convention on Human Rights was drafted after World War II by the Council of Europe. The Council of Europe was set up as a group of like-minded nations, pledged to defend human rights, parliamentary democracy and the rule of law, and to make sure that the atrocities and cruelties committed during the war would never be repeated. The UK had a major role in the design and drafting of the European Convention on Human Rights, and ratified the Convention in March 1951. The Convention came into force in September 1953.

The Convention is made up of a series of Articles. Each Article is a short statement defining a right or freedom, together with any permitted exceptions. For example: “Article 3 – Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The rights in the Convention apply to everyone in the states that have signed the Convention. Anyone who believes that a state has breached their human rights should first take every possible step to have their case resolved in the domestic courts of that state. If they are unhappy with the result they can then take their case to the European Court of Human Rights, set up by the European Convention on Human Rights and based in Strasbourg, France.

What is the Human Rights Act?

The Human Rights Act came into effect in the UK in October 2000. The Act enabled people in the UK to take cases about their human rights to a UK court. Previously they had to take complaints about their human rights to the European Court of Human Rights in Strasbourg.

What are human rights?

There are 16 basic rights in the Human Rights Act, all taken from the European Convention on Human Rights. They don't only affect matters of life and death like freedom from torture and killing; they also affect people's rights in everyday life: what they can say and do, their beliefs, their right to a fair trial and many other similar basic entitlements (a more detailed explanation of the types of rights is at page 53).

Article 1

This article is introductory and is not included in the Human Rights Act.

Article 2: Right to life

Everyone's right to life must be protected by law. There are only very limited circumstances where it is acceptable for the state to use force against a person that results in their death, for example a police officer can use reasonable force in self-defence.

Article 3: Prohibition of torture

Everyone has the absolute right not to be tortured or subjected to treatment or punishment that is inhuman or degrading.

Article 4: Prohibition of slavery and forced labour

Everyone has the absolute right not to be treated as a slave or to be required to perform forced or compulsory labour.

Article 5: Right to liberty and security

Everyone has the right not to be deprived of their liberty except in limited cases specified in the Article (for example where they are suspected or convicted of committing a crime) and provided there is a proper legal basis in UK law for the arrest or detention.

Article 6: Right to a fair trial

Everyone has the right to a fair and public hearing within a reasonable period of time. This applies both to criminal charges brought against them, and in cases concerning their civil rights and obligations. Hearings must be before an independent and impartial court or tribunal established by law. It is possible to exclude the public from the hearing (though not the judgment) if that is necessary to protect things like national security or public order. A person who is charged with a criminal offence is presumed innocent until proven guilty according to law and must also be guaranteed certain minimum rights in relation to the conduct of the criminal investigation and trial.

Article 7: No punishment without law

Everyone has the right not to be found guilty of an offence arising out of actions which, at the time they were committed, were not criminal. People are also protected against later increases in the maximum possible sentence for an offence.

Apart from the right to hold particular beliefs, the rights in Articles 8 to 11 may be limited where that is necessary to achieve an important objective. The precise objectives for which limitations are permitted are set out in each Article – they include things like protecting public health or safety, preventing crime and protecting the rights of others.

Article 8: Right to respect for private and family life

Everyone has the right to respect for their private and family life, their home and their correspondence. This right can be restricted only in specified circumstances.

Article 9: Freedom of thought, conscience and religion

Everyone is free to hold a broad range of views, beliefs and thoughts, and to follow a religious faith. The right to manifest those beliefs may be limited only in specified circumstances.

Article 10: Freedom of expression

Everyone has the right to hold opinions and express their views on their own or in a group. This applies even if these views are unpopular or disturbing. This right can be restricted only in specified circumstances.

Article 11: Freedom of assembly and association

Everyone has the right to assemble with other people in a peaceful way. They also have the right to associate with other people, which includes the right to form a trade union. These rights may be restricted only in specified circumstances.

Article 12: Right to marry

Men and women have the right to marry and start a family. The national law will still govern how and at what age this can take place.

Article 13

This article is not included in the Human Rights Act.

Article 14: Prohibition of discrimination

In the application of the other Convention rights, people have the right not to be treated differently because of their race, religion, sex, political views or any other personal status, unless there is an 'objective justification' for the difference in treatment. Everyone must have equal access to the Convention rights, whatever their status.

Article 1 of Protocol 1: Protection of property

(A 'protocol' is a later addition to the Convention.)

Everyone has the right to the peaceful enjoyment of their possessions. Public authorities cannot usually interfere with a person's property or possessions or the way that they use them except in specified limited circumstances.

Article 2 of Protocol 1: Right to education

Everyone has the right not to be denied access to the educational system.

Article 3 of Protocol 1: Right to free elections

Elections for members of the legislative body (for example Parliament) must be free and fair and take place by secret ballot. Some qualifications may be imposed on who is eligible to vote (for example a minimum age).

Article 1 of Protocol 13: Abolition of the death penalty

This provision prohibits the use of the death penalty.

Part 2 covers each of these rights (except Article 1 of Protocol 13) and how they are relevant to public authorities in more detail.

What impact does the Human Rights Act have on public authorities?

- Public authorities have an obligation to treat people in accordance with their Convention rights (see pages 7–49 for a more detailed explanation). Anyone who feels their rights have been infringed by a public authority can take their complaint to a UK court or tribunal.
- Wherever possible, existing legislation must be applied in a way that is compatible with the rights set out in the Act. This means that legislation under which public officials operate may have to be interpreted and applied in a different way than before the Act came into force.

How does the Human Rights Act affect me?

- Public authorities have an obligation to act in accordance with the Convention rights, and therefore public officials must understand human rights and take them into account in their day-to-day work. This is the case whether officials are delivering a service directly to the public or devising new policies or procedures. Understanding human rights can help in making the right decisions.
- When it comes to decision making, the rights of one person often have to be balanced against the rights of others or against the needs of the broader community (there is more detail on this in Part 3). But if you have to restrict somebody's rights, you must make sure that you are not using a sledgehammer to crack a nut. Any restriction must be no greater than is needed to achieve the objective. This is called 'proportionality'.
- Always bear in mind that some Convention rights are absolute and can never be interfered with (for example the right not to be subjected to torture or inhumane or degrading treatment or punishment).

"Where after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works… unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."

Eleanor Roosevelt, Chairman of the United Nations Human Rights Commission, 1948

Article 2

Part 2

The Convention rights in more detail

Right to life

What does this right mean?

- 'The right to life' means that the state has an obligation to protect life. This means, generally, that the state must not take the lives of its citizens.
- However, there are three very limited circumstances when taking life may not contravene Article 2:
  - when ***defending*** oneself or someone else from unlawful violence
  - when lawfully ***arresting*** someone or preventing the escape of someone lawfully detained
  - when acting lawfully to stop a ***riot or insurrection.***

Nevertheless, even if the action taken by the public authority falls into one of these three categories, any force used must be no more than absolutely necessary, which means that it must be strictly proportionate to the situation.

- Article 2 also requires the state to take certain positive steps to protect the lives of people within its jurisdiction. For example, the taking of life must be illegal under a state's law.
- Article 2 can also create a more active obligation to protect life, for example where a public authority is aware of a real and imminent threat to someone's life, or where a person is under the care of a public authority.
- Protection of the right to life may in certain circumstances also require an official investigation into deaths.

Public safety

The fact that a policy/decision restricts a Convention right does not necessarily mean that it will be incompatible with the Convention. It is a fundamental responsibility of the state – arising from Article 2 of the Convention itself – to take appropriate steps to protect the safety of its citizens. So while some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), in general the rights of one person cannot be used to 'trump' the right of the general public to be kept safe from a real risk of serious injury or loss of life. In particular the rights in Articles 8 to 11 can be restricted where it is necessary and proportionate to do so in order to protect public safety.

Is Article 2 relevant to my work?

Article 2 will be relevant particularly if you are involved in any of the following:

- policy decisions that may affect someone's right to life
- care for other people or protecting them from danger
- investigation of deaths
- you have the power of arrest
- you are a police officer, prison officer or parole officer
- you suspect that someone's life is at risk.

What must a public authority do?

Article 2 impacts on the work of public authorities in many different ways. For example:

- If a public authority knows of the existence of a real and immediate risk to someone's life from the criminal acts of another individual, then it should take appropriate preventive operational measures to protect that person.
- If a public authority undertakes care of a person, for example by putting them in prison or placing them in a home, then it must take appropriate steps to ensure that the person is safe.
- The protection of the right to life also means that there should be an effective official investigation into deaths resulting from the use of force by a public authority. This duty to investigate may also be triggered in other situations where there has been a suspicious or unlawful killing.
- If a public authority is planning an operation which may result in a risk to life, the control and organisation of the operation must be such as to ensure that only the minimum necessary force is used.
- Where the work of a public authority concerns persons known to be dangerous, there is an obligation to take appropriate steps to safeguard the public from such persons. For example this will be relevant to the parole and probation services, the police and social services.

Article 2 in practice

Case study

Osman v United Kingdom (1998)

A teacher had developed an unhealthy interest in one of his pupils that included following him home, locking him in a classroom, vandalising his home and victimising his school friend. The teacher's behaviour was reported to the headmaster and to the police. The teacher subsequently shot the pupil and his father, injuring the pupil and killing his father. The European Court of Human Rights found that the police had not failed in their duty under Article 2 to safeguard the father's right to life. There was insufficient proof that the teacher posed a real and immediate threat to life which the police knew about or ought to know about. The positive obligation to safeguard life must not impose an impossible or disproportionate burden on public authorities.

Case study

Pretty v United Kingdom (2002)

A woman suffering from an incurable degenerative disease wanted to control when and how she died. In order to avoid an undignified death through respiratory failure, she wanted her husband to help her commit suicide and sought an assurance that he would not be prosecuted for any involvement in her death. The European Court of Human Rights found that Article 2 does not create an entitlement to choose death rather than life. Accordingly, there was no right to die at the hands of a third person or with the assistance of a public authority.

Best practice example

A social worker from the domestic violence team at a local authority used human rights arguments to secure new accommodation for a woman and her family at risk of serious harm from a violent ex-partner. She had received training on the 'positive obligations' placed on the local authority to protect the right to life (under Article 2) and the right to be free from inhuman and degrading treatment (under Article 3). (Example provided by the British Institute of Human Rights).

Article 3

Prohibition of torture

What does this right mean?

- It is absolutely forbidden to subject any person to torture or to any treatment or punishment that is inhuman or degrading.

Key words and meanings

Conduct that amounts to any one of these forms of ill treatment will be in breach of Article 3.

Torture – deliberate infliction of severe pain or suffering, whether to punish or intimidate, or to obtain information.

Inhuman treatment – treatment which is less severe than torture but still causes serious physical and/or mental pain or suffering.

Degrading treatment – treatment arousing feelings of fear, anguish and inferiority capable of humiliating and debasing the victim.

Is Article 3 relevant to my work?

Article 3 will be relevant particularly if your job involves any of the following:

- caring for other people
- detaining people or looking after those in detention
- removing, extraditing or deporting people from the UK
- working in a place where someone may be inadvertently placed in a humiliating position, for example in nursing homes or hospitals.

What must a public authority do?

- There is a negative obligation to refrain from subjecting people to torture or to inhuman or degrading treatment or punishment. But in some cases this may necessitate the application of extra resources in order to prevent inhuman or degrading treatment.
- There is a positive obligation on public authorities to intervene to stop torture, inhuman or degrading treatment or punishment as soon as they become aware of it, even if a private individual is carrying it out.
- There is an obligation not to expose a person to torture or inhuman or degrading treatment or punishment, which means that a person must not be removed, extradited or deported to a country in which there is a real risk that they will be treated in such a way.
- There is a positive obligation on states to investigate any allegations of torture or of inhuman or degrading treatment or punishment.

Article 3 in practice

Case study

Z v United Kingdom (2001)

A local authority failed to separate four children from their mother even though it was clear that the children were being subjected to an unacceptable level of abuse and neglect over a four-year period. The Court found that the authority had a positive obligation to remove the children as soon as they became aware of abuse that might amount to inhuman or degrading treatment.

Case study

McGlinchey and others v United Kingdom (2003)

A woman who had a heroin addiction and suffered from asthma was sentenced to four months in prison. While there, she suffered severe heroin withdrawal symptoms including vomiting and weight loss. A doctor who visited her when she arrived advised the nursing staff to monitor her symptoms. Her condition deteriorated over a weekend, but the nursing staff did not call out a doctor, nor did they transfer her to a hospital. On the Monday morning she collapsed and was immediately admitted to hospital, where she died. The European Court of Human Rights held that the Prison Service had breached Article 3 because it had failed to take appropriate steps to treat the prisoner's condition and relieve her suffering, and had failed to act sufficiently quickly to prevent the worsening of her condition.

Best practice examples

A health trust has used the Human Rights Act to strengthen its policies against harrassment and bullying. (Example taken from the Audit Commission, *Human Rights – Improving Public Service Delivery* (2003)

A disabled man stopped attending his scheduled medical appointments at the local hospital because he felt humiliated by the hospital's practice of examining him in front of a large group of people including students. Following training, he learnt that Article 3 (prohibition of inhuman or degrading treatment) protected his dignity and felt empowered to use these human rights standards to question the practice and ask to be seen only by his doctor. (Example provided by the British Institute of Human Rights)

Article 4

Prohibition of slavery and forced labour

What does this right mean?

- Everyone has an absolute right not to be held in slavery or servitude or be required to perform forced or compulsory labour.
- The Article states that there are four types of work that are not to be considered as forced or compulsory labour:
  - work done during legitimate detention or on conditional release from detention (i.e. prison work or community service)
  - compulsory military service or civilian service as a conscientious objector
  - community service in a public emergency
  - any work that forms part of a normal civic obligation (for example compulsory fire service, or maintaining a building if you are a landlord).

Key words and meanings

- **Slavery and servitude** are closely connected, but slavery involves being owned by another person – like a possession – whilst servitude usually involves a requirement to live on another's property and with no possibility of changing the situation.
- **Forced or compulsory labour** arises when a person is made to work or perform a service against their will, and where the requirement to do the work is unjust or oppressive, or the work itself involves avoidable hardship. It can cover all kinds of work and services.

Is Article 4 relevant to my work?

Article 4 will be relevant particularly if you:

- suspect that someone is being forced to work without suitable recompense
- have powers to make people work in an emergency.

What must a public authority do?

- Ensure all staff are properly recompensed for the work they do.
- There is a positive obligation on public authorities to intervene to stop slavery, servitude or forced or compulsory labour as soon as they become aware of it.

Article 4 in practice

Case study

Siliadin v France (2005)

A 15-year-old girl was brought into France from Togo by 'Mrs D', who paid for her journey but then confiscated her passport. It was agreed that the girl would work for Mrs D until she had paid back her air fare, but after a few months she was 'lent' to 'Mr and Mrs B' who forced her to work for 15 hours a day, 7 days a week with no pay, no holidays, no identity documents and without her immigration status being regularised. The girl wore second-hand clothes and did not have her own room. The authorities intervened once they were alerted to the situation. However, at the time, slavery and servitude were not specifically criminalised in France. The European Court of Human Rights held that the girl had been held in servitude and that France had breached its positive obligations under Article 4, because French law had not afforded the girl specific and effective protection.

Article 5

Right to liberty and security

What does this right mean?

- Everyone has the right to liberty and security of person. This amounts to a right not to be 'arrested' or 'detained' even for a short period. This right is subject to exceptions where the detention has a proper legal basis in UK law and falls within one of the following categories of detention permitted by Article 5:
  - following conviction by a criminal court
  - for a failure to obey a court order or legal obligation (for example not paying a criminal fine)
  - to ensure that a person attends a court if there is a reasonable suspicion that they have committed a crime, or if it is reasonably necessary to prevent them committing a crime or escaping after they have done so
  - to ensure that a minor receives educational supervision or attends court
  - in relation to a person who is shown to be of unsound mind, an alcoholic, a drug addict or a vagrant, or who may spread an infectious disease if not detained
  - to prevent unauthorised entry into the country or in relation to a person against whom steps are being taken with a view to deportation or extradition.

Other rights under Article 5

Article 5 also concerns the procedures that must be followed by those who have power to arrest or detain others. It gives the detained person the right:

- to be told promptly of the reasons for their arrest and of any charge against them, in a language which they can understand. The information must be given in simple, non-technical terms. This applies to any detention (e.g. detention of mental patients), and is not limited to arrests of criminal suspects
- to be brought 'promptly' before a judge or judicial officer. This applies only to criminal offences
- to be tried for a criminal offence within a 'reasonable time'
- to challenge the lawfulness of their detention before an independent judicial body which will give a speedy decision and order their release if the detention is found to be unlawful
- to obtain compensation if he or she is arrested or detained in breach of Article 5.

In cases considering Article 5, the European Court of Human Rights has set out principles to be applied in a range of areas such as mental health detention, or bail in criminal cases. In the case of the latter, national law must generally allow bail pending a criminal trial, unless:

- there is a danger that the accused will not attend the trial, and the court cannot identify any bail conditions that would ensure his attendance

- there is a danger that the accused will destroy evidence, warn other possible suspects, co-ordinate his story with them, or influence witnesses
- there are good reasons to believe that the accused will commit further offences while on bail, or
- the seriousness of the crime and the public reaction to it are such that release would cause a public disturbance.

Is Article 5 relevant to my work?

Article 5 will be relevant particularly if you are involved in any of the following:

- arresting or detaining people
- limiting or curtailing people's liberty
- reviewing the detention of mental health patients
- military discipline procedures.

What must a public authority do?

- Ensure that any arrest or detention is lawful and is covered by one of the specified exceptions to the right to liberty (which are listed above).
- Ensure that any arrest or detention is not excessive in the particular circumstances you are dealing with.
- Take all reasonable steps to bring a detained criminal suspect promptly before a judge.
- Take all reasonable steps to facilitate the detained person's right to challenge the lawfulness of his detention before a court.
- Obtain reliable evidence from an objective medical expert for detention on mental health grounds.
- Tell the person detained in a simple, clear, non-technical way – and without delay – why they are being deprived of their liberty. If they do not speak English, then get an interpreter to translate into a language that they can understand.

Article 5 in practice

Case study

Austin v Metropolitan Police Commissioner (2005)

On May Day in 2001, thousands of people took part in a political demonstration in Oxford Circus, London, halting traffic and ordinary business. The police had been given no prior warning of the protest and the demonstrators were generally uncooperative. The police cordoned off an area that held some of the demonstrators and non-participants. The cordon was maintained for over seven hours, and physical conditions within the cordon became unacceptable. One demonstrator and one bystander caught up in the action brought their cases to the courts. The High Court held that the cordoning off action implemented by the police had resulted in the deprivation of liberty of all those held, but was justified as falling within one of the specified exceptions to the right to liberty because the police had taken the action to prevent crimes of violence.

Best practice example

A hospital psychiatric department held a number of mental health detainees who spoke little or no English. Members of a user-led mental-health befriending scheme were concerned about the fact that the services of an interpreter were not available when detaining these patients. They used human rights arguments based on the right to liberty (under Article 5) and the right not to be discriminated against on the basis of language (under Article 14) to argue successfully for a change in the hospital's practice of failing to provide an interpreter. (Example provided by the British Institute of Human Rights)

Article 6

Right to a fair trial

What does this right mean?

Everyone has the right to a fair trial in cases where:

- there is a dispute about someone's 'civil rights or obligations', or
- a criminal charge is brought against someone.

The right includes:

- the right to a *fair* hearing
- the right to a *public* hearing (although there are circumstances where it is permissible to exclude the public and press, for example to protect a child or national security interests)
- the right to a hearing before an *independent and impartial tribunal*
- the right to a hearing *within a reasonable time*.

What kinds of cases are covered by Article 6?

The terms 'criminal charge' and 'civil rights or obligations' have very specific meanings under Article 6. It is important to know which type you are dealing with because the protection afforded by Article 6 is more extensive if there is a 'criminal charge' at stake. It is not always easy to determine whether a penalty is a 'criminal charge' or whether a dispute involves a 'civil right or obligation' under Article 6. Some disputes will fall outside the scope of Article 6 altogether. This is an area which has generated a lot of cases through the courts. So if you are dealing with a penalty of some kind and you are not sure whether Article 6 applies, or whether the penalty is criminal or civil under the Article, then you should obtain further advice.

What is a 'criminal charge'?

Anything that amounts to a criminal charge in UK law will always be criminal under Article 6. But that is not the end of the matter. There are also certain other penalties that are not called 'criminal charges' in UK law (and do not result in a criminal conviction or criminal record), but which are considered to be 'criminal' under Article 6. This is because the classification of a penalty under UK law is not conclusive of a 'criminal charge' under Article 6. What matters is whether the nature of the 'offence' for which the penalty is imposed, and the seriousness of the possible punishment, make it very similar to a criminal charge. For example, a penalty that involves detaining a person in custody, perhaps in a military discipline case or following a contempt of court, is likely to be regarded as 'criminal' for the purposes of Article 6. In the same way, a fine that is imposed to punish and deter people from doing certain things (such as evading tax or transporting illegal immigrants into the UK) may also be regarded as criminal for Article 6 purposes, even though it is not part of the criminal law in the UK.

What is a 'civil right or obligation'?

Civil rights and obligations include rights and obligations that are recognised in UK law, for example contractual rights or property rights etc. Again, UK law is not conclusive of the matter because 'civil rights or obligations' has its own special meaning under Article 6. Essentially this term describes cases involving disputes about private rights or the use of administrative powers which affect private rights, for example contracts, planning decisions, property disputes, family law or employment law.

What sort of cases fall outside Article 6?

Article 6 does not always cover disputes under immigration legislation, or concerning extradition, tax, or voting rights. These will often fall outside the scope of Article 6 altogether.

What about appeals?

Article 6 does not guarantee a right of appeal but the general guarantees of Article 6 apply to the first level of proceedings, as well as to any appeal which is available. However, some of the more specific rights, such as the right to an oral hearing or to a public hearing, may not apply in full to an appeal.

If a case is decided by a non-judicial body, such as an administrative authority rather than a court, the proceedings may not always meet the full standard in Article 6. However, this need not matter (particularly if you are dealing with a 'civil right or obligation') if there is an appeal from the decision of that authority to a court or tribunal that does meet the Article 6 standard for fair trials and can deal with all aspects of the case. There need not be a full re-hearing of the facts of the case, for example where the earlier hearing took place in public.

The right of access to a court

As well as ensuring that the proceedings are conducted fairly, Article 6 gives you the right to bring a civil case to court. The legal system must be set up in such a way that people are not excluded from the court process. The right of access to court is not, however, unlimited and the European Court of Human Rights has accepted that the following people can be restricted from bringing cases:

- litigants who keep bringing cases without merit
- bankrupts
- minors
- people who are not within a time-limit or limitation period for bringing a case
- other people where there is a legitimate interest in restricting their rights of access to a court, provided that the limitation is not more restrictive than necessary.

The right to reasons

Article 6 generally includes a right to a reasoned decision, so that people know the basis for the decision sufficiently clearly to decide whether they can challenge it further.

What about legal aid?

Article 6 does not give a general right to legal aid in every civil case involving a person who cannot afford to bring proceedings (for legal aid in criminal cases, see page 23). However, legal aid may be required by Article 6 in some civil cases, for example in cases or proceedings that are very complex, or in circumstances where a person is required to have a lawyer representing them.

What does the right to a fair hearing mean?

This means, in essence, a person's right to present their case and evidence to the court (or the administrative authority who makes the decision) under conditions which do not place them at a substantial disadvantage when compared with the other party in the case. This includes a right to have access to material held by the other

side, and – if there is a hearing – the ability to cross-examine witnesses on terms that are equal to the other side's. Witnesses and victims also have Convention rights. Where they are young or vulnerable the court must do what it can to protect them and acknowledge their rights.

What does the right to a public hearing mean?

In principle, this right means that both the public at large and the press have access to any hearing under Article 6. But a failure to provide a public hearing at the first level of proceedings is not necessarily a breach of Article 6. For example where the initial decision-maker in a civil case is an administrative authority, then it may be sufficient to provide a public hearing at the appeal stage (see below). In any case, the right to a public hearing can be subject to certain restrictions in the interests of morals, public order or national security or where the interests of those under 18 or the privacy of the parties require an exclusion of the public and the press. However, any exclusion of the public must only go as far as is necessary to protect those interests. Even where the public have been excluded from the hearing, the outcome of the case must be publicly available, whether it is read out by the court or available in written form.

What does the right to an independent and impartial tribunal mean?

The court or other body that decides a case must be independent of the parties in that case. The way in which members of the court or body are appointed or the way they conduct a particular case can affect their independence.

Similarly, members of the court or decision-making body must be impartial, and not show prejudice or bias or give any other grounds for legitimately doubting whether they are being impartial. Sometimes a judge or an administrative decision-maker will have had some earlier involvement with the case before deciding the case. Or they may have links with either party, or very strong views. Generally speaking, however, prior involvement will not necessarily mean that the judge or the administrative decision-maker is not impartial. If there is no evidence of actual bias, then the test is whether there is an appearance of bias. For example, a judge or an administrative decision-maker who decides a case should not later be involved in the appeal against their own decision in the very same case because that would give the appearance of bias.

Do administrative decision-makers have to comply with these standards?

Decisions that are taken by administrative authorities, in cases affecting a 'civil right or obligation', do not necessarily have to comply with the full requirements of Article 6 (such as the right to a public hearing), provided that there is a right of appeal to a court or tribunal that does comply with those requirements.

However, in some cases the decision-maker may have a duty to act quasi-judicially, for example by holding a public hearing in a case where the facts are in dispute between the parties. There are also some types of decision which should not be made by an administrative authority (even at the very first level), but which should be allocated to a court. For example, a criminal charge should normally be tried by a court. Whether or

not the decision-maker in a particular case is a fair and impartial tribunal for the purposes of Article 6 is therefore a developing and complex area, about which you might need specialist advice.

What does the right to a trial within a reasonable time mean?

People are entitled to have their case heard without excessive procedural delays. Whether or not a delay is excessive will very much depend on the circumstances of the case, including:

- the type and complexity of the case (for example, criminal cases and family cases involving children usually have a strict timescale)
- the conduct and diligence in the case of both sides
- the conduct and diligence of the court.

Inadequacy of resources (for example social workers or judges) is not an excuse for excessive delay.

Additional rights in a criminal trial

These include:

- the right of the defendant, as a general principle, to be in court during their trial. If the defendant is in custody it is the responsibility of the prison authorities to ensure they are at court. The defendant can waive their right to attend court, but they must do so freely and clearly. However, if the defendant deliberately chooses to be absent from court when the trial is heard, the court may continue with the case and will not necessarily have breached Article 6 in doing so
- the right of the accused not to say anything that may incriminate themselves, often called the 'right to silence'. However, if the accused exercises the right to silence, the court may be allowed to draw conclusions about why they chose to remain silent. So there is no absolute right to silence
- the right to be presumed innocent until proven guilty, which means that it is usually for the prosecution to prove that the defendant is guilty of the offence
- the right of the accused to be informed promptly of the details of the accusation made against them and in a language they can understand
- the right to adequate time and facilities to prepare a defence case, including the provision of legal aid where justice requires this, and the right to communicate with a lawyer in good time for the trial
- the right of the defendant to question prosecution witnesses and to call and examine defence witnesses under the same conditions
- the right of the defendant to defend themselves or the right to effective legal assistance (which must be funded by legal aid if the defendant cannot afford it and it is in the interests of justice for them to have assistance)
- the right to a free interpreter where the accused cannot understand the language used.

Is Article 6 relevant to my work?

Article 6 will be relevant particularly if you are involved in:

- processing benefits, awards, permits, or licences or if you deal with appeals and decisions
- decision-making procedures in the public sector, for example planning, child care, confiscation of property
- the work of courts and tribunals.

What must a public authority do?

- Build in the necessary procedures to any process of awards, appeals or decisions to ensure that it meets the Article 6 standard.
- Ensure that any person who is subject to a decision-making process has access to an interpreter if needed.
- If the original decision-making process does not comply with the necessary standard of fairness (perhaps because there was no public hearing) then ensure that there is an appeals process in place which complies with the Article 6 standard.
- Ensure that any appeal process is readily available, fair and easily understood.
- Ensure that adequate time and facilities are given to prepare a defence or an appeal.

Article 6 in practice

Case study

H v United Kingdom (1987)

A mother who suffered with mental health problems had her child taken into care after a safety order was made to protect the child. Shortly after this she married, her mental health improved and she made applications to the courts for staying access and then for care and control, both of which were refused. The court then terminated the mother's access to the child with a view to putting the child up for adoption. Over a period of two years and seven months, the child's mother and her husband persistently but unsuccessfully approached the council seeking to re-establish contact. The council delayed considerably and failed to notify them that the child had already been placed with an adoptive family. An adoption order was subsequently made, which ended all connections between the child and the natural parents. Procedural delays had meant that by the time of the adoption hearing, the child had been with her adoptive parents for 19 months and the mother had not had access to the child for over three years. The court found that the delay by the council was in breach of Article 6, particularly given the importance of what was at stake and the 'irreversibility' of adoption.

Best practice examples

A local education authority has produced a 'good practice guide to decision-making' drawing on principles of good decision-making drawn from a range of sources including the Human Rights Act. The guide, which is designed for decision-makers at all levels within the authority, contains a user-friendly checklist of issues to consider and procedures to follow while decisions are being made. (Example provided by the British Institute of Human Rights).

A number of planning departments have allowed public participation at planning committees and changes to licensing procedures. (Example taken from the Audit Commission, *Human Rights – Improving Public Service Delivery* (2003)

A borough council has improved its procedures for appeals by appointing an independent chair. (Example taken from the Audit Commission, *Human Rights – Improving Public Service Delivery* (2003)

Article 7

No punishment without law

What does this right mean?

- A person has the right not to be found guilty of a criminal offence for an act or omission they committed at a time when such an action was not criminal. Also, a person cannot be given a punishment which is greater than the maximum penalty available at the time they committed the offence.
- If, at the time the act or omission was committed, that act was contrary to the general law of civilised nations, then prosecution and punishment for that act may be allowed. This exception allowed for the punishment of war crimes, treason and collaboration with the enemy following World War II.

Is Article 7 relevant to my work?

Article 7 will be relevant particularly if you are involved in:

- creating or amending criminal law
- prosecution of criminal offences
- disciplinary action that leads to punishment, where the offence falls within the Convention concept of a criminal offence (see Article 6 above).

What must a public authority do?

- Take account of Article 7 when creating/amending criminal legislation.
- Ensure that offences are clearly defined in law.
- Ensure that criminal laws and punishments are not applied retrospectively.

Article 7 in practice

Case study

R v Secretary of State for the Home Department, ex parte Uttley (2004)

In 1995 a man was convicted of various sexual offences, including rape. He was sentenced to 12 years' imprisonment. He was released after serving two-thirds of his sentence, subject to licence conditions until three-quarters of the way through the sentence. However, had he been convicted and sentenced at the time the offences took place, the legal provisions then in force would have entitled him to be released on remission without conditions. He argued that the imposition of licence conditions rendered him subject to a heavier penalty than that which was applicable at the time the criminal offence was committed, and that this was a breach of Article 7. The House of Lords disagreed. They held that Article 7 would only be infringed if a sentence imposed on a defendant exceeded the maximum penalty which could have been imposed under the law in force at the time the offence was committed. That was not the case here because, even at the date of the offences, the maximum sentence for rape was life imprisonment. Article 7 was not intended to ensure that the offender was punished in the exact same way as would have been the case at the time of the offence, but merely to ensure that he was not punished more heavily than the maximum penalty applicable at the time of the offence. In any event, the imposition of licence conditions did not render the sentence heavier than it would have been under the earlier regime.

Article 8

The Convention rights in more detail
Qualified rights: Articles 8 to 11

Right to respect for private and family life

What does this right mean?

- Everyone has the right to respect for their private and family life, their home and their correspondence.
- This right may be restricted, provided such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised legitimate aims:
  - national security
  - public safety
  - the economic well-being of the country
  - the prevention of disorder or crime
  - the protection of health or morals
  - the protection of the rights and freedoms of others.

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

Key words and meanings

Private life – The concept of 'private life' is broad. In general, the right to a private life means that a person has the right to live their own life with such personal privacy as is reasonable in a democratic society, taking into account the rights and freedoms of others. Any interference with a person's body or the way the person lives their life is likely to affect their right to respect for their private life under Article 8. Article 8 rights encompass matters of self-determination that may include, for example:

- freedom to choose one's own sexual identity
- freedom to choose how one looks and dresses
- freedom from intrusion by the media.

The right to private life can also include the right to have personal information, such as a person's official records, photographs, letters, diaries and medical information, kept private and confidential. Any disclosure of personal information about someone to another person or body is likely to affect a person's right to their private life under Article 8. Unless there is a very good reason, public authorities should not collect or use information like this; if they do, they need to make sure the information is accurate. Of course, they must also comply with data protection legislation.

Article 8 places limits on the extent to which a public authority can do things which invade a person's privacy in relation to their body without their permission. This can include activities such as taking blood samples and performing body searches.

In some circumstances, the state must take positive steps to prevent intrusions into a person's private life by other people. For example, the state may be required to take action to protect people from serious pollution where it is seriously affecting their lives.

Family life – The right to respect for family life includes the right to have family relationships recognised by the law. It also includes the right for a family to live together and enjoy each other's company. The concept of 'family life' under Article 8 is broader than that defined as 'the nuclear family'. As such, it can include the relationship between an unmarried couple, an adopted child and the adoptive parent, or a foster parent and fostered child.

Home – Everyone has the right to enjoy living in their home without public authorities intruding or preventing them from entering it or living in it. People also have the right to enjoy their homes peacefully. This may mean, for example, that the state has to take positive action so that a person can peacefully enjoy their home, for example, to reduce aircraft noise or to prevent serious environmental pollution. A person's 'home' may include their place of business. A person does not have to own their home to enjoy these rights.

Correspondence – Again, the definition of 'correspondence' is broad, and can include communication by letter, telephone, fax or e-mail.

Is Article 8 relevant to my work?

Article 8 will be relevant particularly if you are involved in any of the following:

- accessing, handling or disclosing personal information
- entry to properties (including businesses)
- providing or managing housing
- surveillance or investigation
- dealing with families or children
- immigration and asylum
- handling environmental issues, such as waste management or pollution
- provision of medical treatment or social care.

What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to respect for their private and family life, their home and their correspondence.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's right to respect for private and family life, their home and their correspondence.
- If a public authority does decide that it is necessary to interfere with someone's Article 8 rights, it will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

Article 8 in practice

Balancing – Article 8 is one of the Convention rights that may require you to strike a balance between a person's private rights and the needs of other people or society as a whole (see 'Balancing one person's rights against those of the community' on page 56).

The right to respect for a person's private and family life, their home and their correspondence under Article 8 also raises issues in areas such as:

- searches of homes and the use of covert surveillance, such as listening devices
- family law disputes or asylum cases where there is a risk that a family will be separated
- the rights of homosexuals (there have also been recent developments in domestic law in this area, such as the Employment Equality (Sexual Orientation) Regulations 2003)
- the rights of transgender people (which are given effect in domestic law by the Gender Recognition Act 2004)
- certain aspects of the rights of prisoners
- employees' rights to privacy, including the monitoring of e-mails and telephone calls
- the imposition of unreasonable mandatory dress codes or drug testing at work
- the use of CCTV and exchange of data obtained from it
- the right to refuse medical treatment
- the rights of egg and sperm donors, and children born as a result of artificial insemination
- the ability of the media to report details of the private lives of famous people.

Case study

Peck v United Kingdom (2003)

A man suffering from depression attempted suicide by cutting his wrists on the street. CCTV cameras filmed him walking down the street with the knife. The footage was then published as film and as photographs without his consent and without any attempt to conceal his identity. The European Court of Human Rights held that, although the filming and recording of the incident did not necessarily interfere with the man's Article 8 rights, the disclosure of the CCTV footage by the local authority constituted a serious interference with Article 8. In this case there were insufficient reasons to justify disclosure of the footage without the man's consent and without masking his identity. Accordingly, disclosure of the material was a disproportionate interference with his private life.

Case study

Connors v United Kingdom (2004)

A family had been settled for about 13 years on a site provided by the council for people with a nomadic lifestyle. The council then evicted them for causing a nuisance, using the summary eviction procedure. The family challenged the council's decision on the basis that their eviction from the site was an unjustifiable breach of their Article 8 rights. The European Court of Human Rights held that there had been a breach of the right to respect for the home under Article 8. The Court found that the legal framework applying to the occupation of pitches on local authority gypsy sites did not provide the family with sufficient procedural protection of their rights. Special consideration should be given to their needs and their nomadic lifestyle because of the vulnerable position of gypsies in society. Any interference that would render them homeless could not be justifiable unless the public interest grounds were sufficiently weighty. The Court found that there were no such grounds and as such the decision infringed Article 8.

Best practice example

A physical disabilities team at a local authority decided to provide support workers to facilitate social activities. Residents were taken to a number of social events including visits to pubs and clubs. One service user who was gay asked for a support worker to accompany him to a gay pub but the manager of the scheme refused on the basis that none of his staff was prepared to attend a gay venue. Following training by BIHR, an advocate working on behalf of the service user realised that human rights arguments based on the right to respect for private life (Article 8) could be used to challenge practices of this sort. (Example provided by the British Institute of Human Rights)

Article 9

Freedom of thought, conscience and religion

What does this right mean?

Article 9 protects people's rights in relation to a broad range of views, beliefs, thoughts and positions of conscience as well as to their faith in a particular religion.

- The state is never permitted to interfere with a person's right to hold a particular belief. It can only restrict their right to manifest a belief (for example, worshipping, teaching, practising and observing their belief either in public or in private).
- However, the state would have to show that such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised legitimate aims:
  - public safety
  - the protection of public order, health or morals
  - the protection of the rights and freedoms of others.

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

Is Article 9 relevant to my work?

Article 9 will be relevant particularly if you are involved in any of the following:

- taking decisions that may conflict with someone's religious beliefs, for example timetabling an examination on a religious holiday
- detaining or accommodating a person. You must take care to ensure that any interference with their freedom to manifest religious beliefs is proportionate
- situations where religious organisations provide a service to others.

What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to manifest their religion or belief.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's right to manifest their religion or belief.
- If a public authority does decide that it is necessary to interfere with someone's right to manifest their religion or belief, it will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

Article 9 in practice

Article 9 is one of the Convention rights that may require you (in relation to the manifestation of beliefs) to strike a balance between a person's private rights and the needs of other individuals or society as a whole.

Under the Human Rights Act the right to freedom of belief under Article 9 may be relevant to areas such as:

- the actions of employers and schools to accommodate the Article 9 rights of their employees and pupils, which may include issues relating to time off for religious holidays, uniforms and so on
- the arrangements made to ensure prisoners can practise their religion
- how far people can go in trying to encourage others to convert to their religion.

Case study

R (Williamson and others) v Secretary of State for Education and Employment and others (2005)

Article 9 was invoked in an attempt to overturn the ban on corporal punishment of children by teachers. It was claimed that part of the duty of education in the Christian context was that teachers should be able to stand in the place of parents and administer physical punishment to children who were guilty of indiscipline. The House of Lords found that the statutory ban pursued a legitimate aim and was proportionate. Children were vulnerable and the aim of the legislation was to protect them and promote their well-being. Corporal punishment involved deliberately inflicting physical violence. The legislation was intended to protect children against the distress, pain and other harmful effects this infliction of physical violence might cause.

Case study

Pendragon v United Kingdom (1998)

A national heritage site traditionally used by druids during the summer solstice was lawfully closed by the authorities. A druid claimed that the authorities had unlawfully interfered with her Article 9 rights. The court disagreed. It found, first, that the authorities had acted in accordance with the law, because they had power to close the site under an Act of Parliament. And second, the reason for closing the site was that they were unable to guarantee the safety of those celebrating the summer solstice. They were therefore acting in the interests of public safety, and the interference was justified.

Best practice example

The Strasbourg Court has found that there is also a right not to be compelled to manifest views associated with a particular religion. So, for instance, care should be taken when devising procedures for the swearing of oaths. A requirement to swear an oath on the Bible would be contrary to Article 9, as would a requirement to swear on any other religious text or in a religious form. Best practice requires the provision of an alternative form of solemn affirmation binding on the conscience of the individual without reliance on religious forms.

Article 10

Freedom of expression

What does this right mean?

- Everyone has the right to hold opinions, and to receive opinions and information without interference by a public authority and regardless of frontiers. The right also includes the freedom to express views. However, the Article does not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
- The right may be subject to formalities, conditions, restrictions or penalties, but these must have a proper legal basis. Furthermore, the interference must be necessary in a democratic society and pursue one of the following recognised legitimate aims:
  - in the interests of public safety, national security or territorial integrity
  - to prevent disorder or crime
  - to protect health or morals
  - to protect the reputations or rights of others
  - to prevent the disclosure of information received in confidence
  - to maintain the authority and impartiality of the judiciary.

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

Key words and meanings

Expression – 'Expression' can cover holding views or opinions, speaking out loud, publishing articles or books or leaflets, television or radio broadcasting, producing works of art, communication through the internet, some forms of commercial information and many other activities. It can also cover the right to receive information from others, so you possess rights both as a speaker and as a member of an audience. You can express yourself in ways that other people will not like, or may even find offensive or shocking. However, offensive language insulting to particular racial or ethnic groups would be an example of where a lawful restriction on expression might be imposed.

Is Article 10 relevant to my work?

Article 10 will be relevant particularly if you are involved in any of the following:

- broadcasting, media and press work
- regulation of communications or the internet
- writing speeches or speaking in public
- decisions in relation to provision of information, for example to people in detention
- regulation or policing of political demonstrations.

What must a public authority do?

Always be alert to policies or actions that might interfere with a person's right to freedom of expression.

Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's right to freedom of expression.

If a public authority does decide that it is necessary to interfere with someone's Article 10 rights, it will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

Article 10 in practice

The right to freedom of expression under Article 10 may be relevant to areas such as political demonstrations, industrial action and 'whistle-blowing' employees. It has also been very important for the media. The press's rights under Article 10 have come into conflict with celebrities' rights to privacy under Article 8 in several high profile cases. In addition, the interaction between Article 10 and the criminal law has been tested in several cases.

Case study

Observer and the Guardian v United Kingdom (1991)

The *Guardian* and the *Observer* published some excerpts from Peter Wright's book, *Spycatcher*, which contained material alleging that MI5 had conducted unlawful activities. The Government succeeded in obtaining an injunction preventing further publication until proceedings relating to a breach of confidence had been concluded. Subsequently the book was published in other countries and then in the UK. The *Guardian* complained that the continuation of the injunction infringed Article 10.

The European Court of Human Rights held that although the injunction was lawful, as it was in the interests of national security, once the book had been published, there was insufficient reason for continuing the publication ban. The injunction should have been discharged once the information was no longer confidential.

The Convention rights in more detail
Qualified rights: Articles 8 to 11

Freedom of assembly and association

What does this right mean?

Everyone has the right to assemble with other people in a peaceful way, and the right to associate with other people, including the right to form a trade union. Everyone also has the right not to take part in an assembly or join an association if that is their choice.

This right may be restricted provided such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised legitimate aims:

- national security
- public safety
- the prevention of disorder or crime
- the protection of health or morals
- the protection of the rights and freedoms of others.

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

Key words and meanings

Freedom of assembly – This applies to static meetings, marches, public processions and demonstrations. The right must be exercised peacefully, without violence or the threat of violence, and in accordance with the law.

Freedom of association – A person's right to freedom of association includes: the right to form a political party (or other non-political association such as a trade union or other voluntary group); the right not to join and not be a member of such an association or other voluntary group. This means that no one can be compelled to join an association or trade union, for example. Any such compulsion may infringe Article 11.

Is Article 11 relevant to my work?

Article 11 will be relevant particularly if you are involved in any of the following:

making decisions regarding public protests, demonstrations or marches

industrial relations

policy making.

What must a public authority do?

Always be alert to policies or actions that might interfere with a person's right to freedom of assembly and association.

Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's freedom of peaceful assembly and association.

If a public authority does decide that it is necessary to interfere with someone's Article 11 rights, it will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

Article 11 in practice

Restrictions – The state is allowed to limit the Article 11 rights of members of the armed forces, police and civil service, provided these limitations can be justified. This is based on the idea that it is a legitimate aim of democratic society for these people to be politically neutral, and thus restricted from being closely associated with a particular political cause.

A group of young men used a shopping centre in Wellingborough as a meeting and 'hanging out' point. The numerous complaints from shoppers and shop-owners about the nuisance caused by them sometimes led to police involvement. The local council wrote to the young men telling them they were banned from the shopping centre. A lawyer for the young men took the case to court, arguing that they had the right to gather where they chose. The court disagreed, saying that if the young men had been organising a demonstration, or other kind of peaceful assembly, they could rely on Article 11. As they were simply hanging out in the shopping centre, Article 11 did not apply.

(Case illustration from Watson, J. and Woolf, M., *Human Rights Act Toolkit*. London: LAG, 2003)

Article 12

Right to marry

What does this right mean?

- Men and women have the right to marry and found a family provided they are both of marriageable age, and marriage between two individuals is permitted in national law. This final requirement gives authorities flexibility when placing limitations on marriage. However, the state must not impose limitations which impair the very essence of the right.

Is Article 12 relevant to my work?

Article 12 will be relevant particularly if you are involved in any of the following:

- registering marriages
- making decisions on fertility treatment.

What must a public authority do?

- If a public authority takes a decision that has the effect of interfering with someone's right to marry or found a family, then it must be particularly careful to ensure that the decision is in accordance with the relevant national law.

Article 12 in practice

Transgender people – In the case of *Goodwin v UK*, the European Court of Human Rights interpreted Article 12 as providing post-operative transsexual people with the right to marry in their acquired gender. The Gender Recognition Act now allows transgender people to obtain legal recognition in their new gender, and once they have obtained such recognition they can marry a person of the opposite gender.

Case study

B & L v the United Kingdom (2005)

English law prohibited a parent-in-law from marrying their child-in-law unless both have reached age 21 and both their respective spouses have died. B was L's father-in-law, and they wished to marry. L's son treated his grandfather, B, as 'Dad'.

The court accepted the Government's argument that the legislation had the legitimate aim of protecting the family and any children of the couple. However, it none-the-less considered that there had been a violation of the right to marry under Article 12. The prohibition was based primarily on tradition. There was no legal prohibition on a couple in this situation engaging in an extra-marital relationship. Moreover, on several occasions couples had obtained exemptions from the prohibition by personal Acts of Parliament. This showed that the objections to such marriages were not absolute.

Article 14

Prohibition of discrimination

What does this right mean?

Discrimination means treating people differently, without an objective and reasonable justification, on certain prohibited grounds (this is known as direct discrimination). It can also cover situations where the same rule applies to everyone but in practice has greater impact on one particular group (this is known as indirect discrimination). Article 14 of the European Convention on Human Rights gives people the right to protection from discrimination in relation to all the other rights guaranteed under the Convention. It means that everyone is entitled to equal access to those rights. People cannot be denied equal access to them on grounds of their personal 'status'.

How does Article 14 work?

Article 14 only works to protect people from different treatment in exercising their other Convention rights. It does not give people a general right to protection from different treatment in all areas of their life. The structure of Article 14 means that a person needs to be able to identify another Convention right in order to make use of the non-discrimination protection. However, that person does not need to identify an actual breach of the right to claim that he or she has been discriminated against with respect to their enjoyment of it. They simply need to show that the subject matter of the Convention right is activated.

On what grounds is discrimination prohibited?

Article 14 gives the following as examples of the grounds of discrimination that the Article does not allow:

- sex
- race
- colour
- language
- religion
- political or other opinion
- national or social origin
- association with a national minority
- property
- birth.

Importantly, though, Article 14 protects people from discrimination on the grounds of 'other status' too. This means that the categories are not closed. The other status ground could therefore be used to protect people from discrimination on the grounds of, for example:

- sexual orientation
- whether you were born inside or outside a marriage
- disability
- marital status
- age.

Is differential treatment ever acceptable?

Differential treatment may be acceptable in some circumstances. It is legitimate to treat people differently based on differences that have nothing to do with their personal status – for example it is lawful to impose a punishment only on people who have been found guilty of a criminal or disciplinary offence, because committing an offence is not one of the protected grounds; it is not a personal status but a historical fact. A public authority is also entitled to treat people differently if there is a relevant difference in their situation, other than a prohibited ground. For example it may be legitimate to pay a man more than a woman if he has been employed longer or works in a more skilled or senior position. The difference of treatment here is not on the grounds of sex (which would be a prohibited ground), but on the grounds of skill or seniority (which are not).

Where the only difference between people is one of the prohibited grounds, a public authority can still treat them differently in a way which is connected with their Convention rights if it can show that it is pursuing a legitimate aim and that the discriminatory treatment is proportionate to the aim. Only good reasons will suffice, especially where the difference in treatment is on grounds of sex or race. This is known as justification.

There will be many ways in which Article 14, taken together with another Convention right, can apply to potentially discriminatory situations.

For example:

- It might not be a breach of a person's right to education if the state does not provide a particular kind of teaching. But if the state provides it for boys but not for girls, or for people who speak only a particular language but not another, this could be discrimination in relation to the right to education. If this were the case, the people affected would rely on their rights under Article 14 (non-discrimination) taken with Protocol 1, Article 2 (education).
- It is unlikely to be a breach of the right to respect for your property for the state to impose a particular kind of tax – Protocol 1, Article 1 specifically preserves the state's right to assess and collect tax. But if the state taxes some people but not others in the same situation, then it might be a breach of Article 14 in relation to the right to respect for property. If this were the case, the people affected would rely on their rights under Article 14 (non-discrimination) taken with Protocol 1, Article 1 (property).

Article 14 has been successfully invoked under the Human Rights Act on behalf of a gay couple who wished to be treated in the same way as a heterosexual couple for the purposes of one partner succeeding to another under a tenancy.

Is Article 14 relevant to my work?

Article 14 will be relevant wherever any of the other Convention rights is in play – even if there is no breach of the other Convention right – particularly in any circumstances where different groups are treated in different ways.

What must a public authority do?

- Where possible, a public authority should try to ensure that policies or decisions do not involve any form of discrimination on any ground.
- If it is necessary to treat some people more favourably than others, there must be an objective and reasonable justification for the discrimination.
- A public authority may be asked to produce reasons for its decisions.

Article 14 in practice

Positive discrimination occurs when a disadvantaged group is treated more favourably in order to assist them in redressing an existing situation of inequality. Such treatment will still amount to a breach of Article 14, unless a legitimate aim can be demonstrated.

Indirect discrimination occurs when a rule that applies equally to everyone results in a disproportionate disadvantage to a particular group, for example a requirement that a job holder must be over six feet tall would exclude more women than men, even though it might be possible for someone below six feet to do the job perfectly well.

Case study

Lindsay v United Kingdom (1986)

A married couple, in which the wife was the sole earner, complained that the UK income tax regime had the effect of taxing comparable couples in a discriminatory way on grounds of sex, marital status and religion. First, married couples in which the husband was the sole earner were taxed more heavily than married couples in which the wife was the sole earner. Second, married couples were taxed more heavily than co-habiting couples who were not married. The Commission found that the tax measures which gave extra advantages to a wife who was the earner in the family had an objective and reasonable justification in positively encouraging married women to work. The court did not accept that married couples were in a similar position to co-habiting couples for the purposes of taxation and Article 14 only protects people from discrimination who are less favourably treated compared to others in a similar position. Accordingly, there was no violation of Article 14.

Best practice examples

A local authority has combined human rights training with discrimination training, as both promote respect and dignity equally for all persons. Taking a human rights approach in potential discrimination cases will encourage thinking about the desired outcome from the individual's point of view rather than just simply ensuring equality of treatment. This should help staff to avoid indirect discrimination. It is sometimes the case that everybody has been treated equally but a small group of individuals suffers a distinct disadvantage.

A housing department has taken advice on issues such as discrimination against non-spouses and same-sex partners in succession, housing allocation policies, nuisance neighbours and racial harassment.

A local council has revised its policy for adult social care services working with asylum seekers to ensure that asylum seekers with special needs are treated fairly and without discrimination. (Examples taken from the Audit Commission, *Human Rights – Improving Public Service Delivery* (2003)

Protocol 1, Article 1 Protection of property

What does this right mean?

The protection of property under Protocol 1, Article 1 has three elements to it:

- A person has the right to the peaceful enjoyment of their property.
- A public authority cannot take away what someone owns.
- A public authority cannot impose restrictions on a person's use of their property.

However, a public authority will not breach this right if a law says that it can interfere with, deprive, or restrict the use of a person's possessions, and it is necessary for it to do so in the public interest. There is a public interest in the Government raising finance, and in punishing crimes, so a person's rights under Protocol 1, Article 1 are not violated by having to pay taxes or fines. The Article requires public authorities to strike a fair balance between the general interest and the rights of individual property owners.

The protection extends to businesses as well as to individuals.

When can the state interfere with the use of, or take away, a person's property?

A person has the right to use, develop, sell, destroy or deal with their property in any way they please. The right to protection of property means that public authorities cannot interfere with the way that a person uses their property unless there is a proper legal basis for this interference and such interference is justified.

For example, if a public authority plans to build a road over someone's land, it must have laws in place to let it do this. It must also have a procedure to check that a fair balance has been struck between the public interest in building the road, and the individual's right to their land. It will not normally be fair to deprive a person of their land unless the person can get proper compensation for it. An interference with a person's peaceful enjoyment of property may be necessary in the public interest – for example, a compulsory purchase of a person's property may be necessary, or a certain amount of noise from road traffic may intrude upon a person's home.

Key words and meanings

Possessions and property has a wide meaning, including land, houses, leases, money and personal property. It also covers intangible things such as shares, goodwill in a business, patents and some forms of licences, including those which allow people to exercise a trade or profession. Entitlements to social security benefits are also generally classified as property.

Is Protocol 1, Article 1 relevant to my work?

Protocol 1, Article 1 will be relevant particularly if you are involved in:

- work in any area that can deprive people of their possessions or property
- taking decisions about planning, licensing or allowing people to exercise a trade or profession
- compulsory purchase.

What must a public authority do?

- Where possible, a public authority should try to ensure that policies or decisions do not interfere with peaceful enjoyment of possessions, restrict the use of possessions or take away possessions.
- Where this is unavoidable, then the interference must be lawful and necessary in the public interest.
- If a public authority does decide that it is necessary to interfere with someone's possessions, there must be an objective and reasonable justification for that.
- A public authority may be asked to produce reasons for its decisions.
- Public authorities should take action to secure the right to property, as well as refraining from interfering with it.

Protocol 1, Article 2
Right to education

What does this right mean?

- A person has a right not to be denied access to the existing educational system.
- Parents have a right to make sure that their religious or philosophical beliefs are respected when public authorities provide education or teaching to their children.

Limits on the right to education

The general right to education is not an absolute right for a person to learn whatever they want, wherever they want. The Government has made a special reservation to the Convention in this area so that education provided by the state is limited to the extent that this is compatible with the need to provide an efficient education and the need to avoid unreasonable public expenditure. This means that a person may not have a right to the most expensive form of education if there are cheaper alternatives available, therefore the Government or local education authority must balance the right not to be deprived of an education against the spending limits it imposes. The Government has stressed that the cost of providing education is a relevant factor in making these decisions.

Parents cannot stop schools teaching subjects such as sex education if they are reasonable things for the school to teach, and so long as it is not trying to indoctrinate the children. However, parents can remove their children from sex education classes.

In a recent case it was also held that the duty under Protocol 1, Article 2 is imposed on the state and not on any particular domestic institution. It does not create a right to be educated in a particular school or a particular manner. Thus, if an expelled pupil is able to have access to efficient education somewhere else, there would be no breach of his or her Convention right.

Punishments in schools

The right to education does not prevent schools from imposing disciplinary measures on pupils, provided they do not breach any other Convention right (for example ill treatment which is contrary to Article 3). A school that imposes a penalty on a pupil will have to show that such a penalty pursued a legitimate aim (such as punishing cheating or ensuring compliance with school rules), and was proportionate.

Penalties imposed may include suspension or exclusion, provided the pupil still has access to alternative state education conforming to the parents' religious and philosophical convictions.

Is Protocol 1, Article 2 relevant to my work?

It may be relevant, especially if you are involved in any of the following:

- teaching or school administration
- providing non-school-based education
- education policy
- provision of funding for schools or other forms of education.

What must a public authority do?

- Where possible, a public authority should try to ensure that policies or decisions do not interfere with the right to education.
- A public authority may be asked to produce reasons for its decisions.
- Public authorities should take action to secure the right to education, as well as refraining from interfering with it.

Protocol 1, Article 2 in practice

Case study

Simpson v United Kingdom (1989)

Parents of children with special needs can argue that the needs of their child require special facilities that may have to be respected by the educational authorities. However, this is not an absolute right, and the authorities will have discretion as to how they allocate limited resources. Authorities can legitimately seek to integrate a child with special needs into a mainstream school, even if this is not what the parents want.

Protocol 1, Article 3
Right to free elections

What does this right mean?

Free elections must be held at reasonable intervals and must be conducted by secret ballot. They must be held in conditions that ensure that people can freely express who they want to elect. The state can put some limits on the way in which elections are held. Also, it can decide what kind of electoral system to have, such as 'first past the post' or proportional representation.

The right to free elections under Protocol 1, Article 3 applies only to those eligible to vote under the domestic laws. In addition, Article 16 of the Convention provides that nothing in Articles 10, 11 or 14 is to be taken as preventing a state from imposing restrictions on the political activity of non-citizens.

Is Protocol 1, Article 3 relevant to my work?

It may be relevant, particularly if you are involved in:

- exercising decision-making powers about voting rights or the right to stand for election
- arranging elections.

What must a public authority do?

- A public authority must respect the voting rights of individuals.
- Where possible, a public authority must enable those with a right to vote to use their vote if they wish to do so.
- Public authorities are required to ensure that elections are conducted freely and fairly.

Protocol 1, Article 3 in practice

Case study

Hirst v United Kingdom (2005)

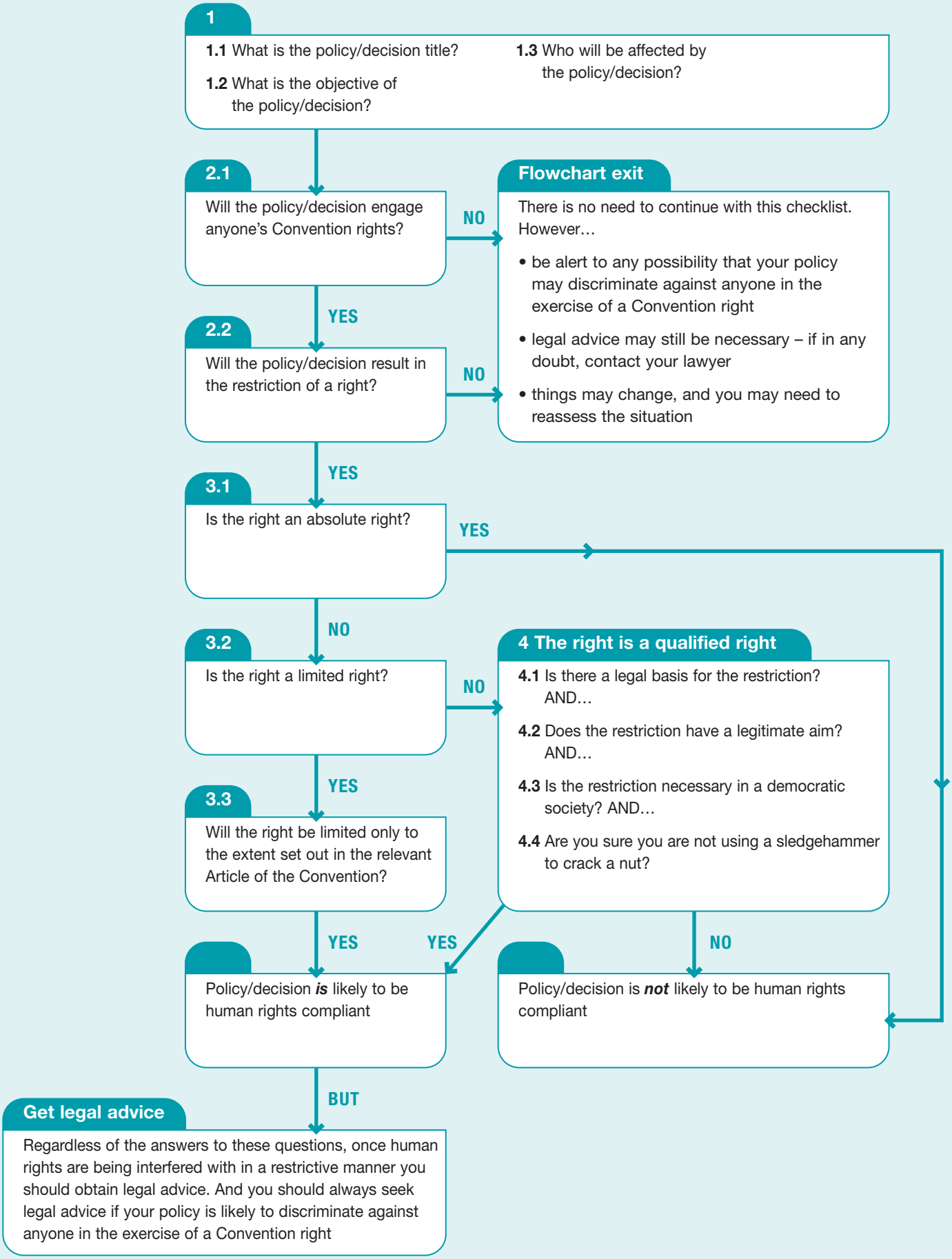
The UK's absolute statutory bar on convicted prisoners voting in Parliamentary elections was found to be in breach of Article 3 of Protocol 1.

The court noted that a prisoner by fact of his imprisonment did not lose the protection of the other guarantees under the Convention and that removal of the vote cut a prisoner off even further from the democratic society in which he lived. The blanket ban on all convicted prisoners sentenced to imprisonment was said to be arbitrary in its effects and indiscriminate in its application. However, the judgment left open the question of whether a ban limited to imprisonable offences of a certain severity or imposed expressly by a trial judge based on the facts of a case would be acceptable.

Human rights flowchart

This flowchart is designed to help you in applying human rights in the workplace. It will be particularly relevant when you are restricting a right – either by balancing one right against another, or when you are balancing the rights of an individual against the interests of the public. It may also be useful when you are making decisions or policies that are previously untested.

More detail on the questions contained in the flowchart can be found in the succeeding pages. Once you have read those and understand the full meaning of the questions contained in the flowchart, it will be a useful prompt to refer back to when you need to make decisions involving human rights.


1
1.1 What is the policy/decision title?
1.2 What is the objective of the policy/decision?
1.3 Who will be affected by the policy/decision?
2.1
Will the policy/decision engage anyone's Convention rights?
NO
Flowchart exit
There is no need to continue with this checklist. However…
• be alert to any possibility that your policy may discriminate against anyone in the exercise of a Convention right
• legal advice may still be necessary – if in any doubt, contact your lawyer
• things may change, and you may need to reassess the situation
YES
2.2
Will the policy/decision result in the restriction of a right?
NO
YES
3.1
Is the right an absolute right?
YES
NO
3.2
Is the right a limited right?
NO
4 The right is a qualified right
4.1 Is there a legal basis for the restriction? AND…
4.2 Does the restriction have a legitimate aim? AND…
4.3 Is the restriction necessary in a democratic society? AND…
4.4 Are you sure you are not using a sledgehammer to crack a nut?
YES
3.3
Will the right be limited only to the extent set out in the relevant Article of the Convention?
YES
YES
NO
Policy/decision is likely to be human rights compliant
Policy/decision is not likely to be human rights compliant
BUT
Get legal advice
Regardless of the answers to these questions, once human rights are being interfered with in a restrictive manner you should obtain legal advice. And you should always seek legal advice if your policy is likely to discriminate against anyone in the exercise of a Convention right

Human rights flowchart explained

1. The policy/operational decision

These questions cover the basics. They ensure that all the information about the new policy/decision is in one place if someone else in the organisation needs to know about it, perhaps to provide additional help or advice.

1.1 What is the policy/decision title?
This is simply a question of labelling the policy/decision clearly so that it may be referred to without confusion.

1.2 What is the objective of the policy/decision?
Here you should set out the basic aim of the policy/decision. What are you setting out to achieve? You could break this section down into three sections:

- Why is the policy/decision being developed?
- Why is it needed?
- What is its purpose?

1.3 Who will be affected by the policy/decision?
To answer this you should look back at the objective you are trying to achieve and think about what groups of people are most likely to be affected by it. Answering this question now is important because it will help you at the next stage when you will be asked to decide whether or not the policy/decision has anything to do with human rights. Knowing who is affected by the policy/decision will help you answer this question. For example, if you are dealing with families, this might raise the question of whether the right to respect for private and family life, protected in Article 8, is involved.

2. Human rights impact

2.1 Will the policy/decision engage anyone's Convention rights?
Here we advise you to refer to Part 2 (page 7) of this guide to look through all the rights and consider whether or not your policy/decision falls into any of the areas that are covered by the Convention rights.

Flowchart exit

If you decide that no Convention rights are engaged, there is no need to continue along the flowchart. However, there are three further points to note:

- First – be alert to any possibility that your policy/decision may discriminate against someone in the protection of a Convention right.
- Second – although this checklist is designed to help you identify any potential human rights impact, it may still be necessary to obtain legal advice. For example, the policy/decision may be particularly controversial or you may not be fully certain about whether or not certain human rights have been engaged.
- Third – even if you decide that the policy/decision does not engage anyone's Convention rights, things may change and you may need to reassess the situation.

2.2 Will the policy/decision result in the restriction of a right?
If you decide that your policy/decision might engage a Convention right, the next step is to look at the nature of this engagement. Will the policy/decision restrict or limit any of the rights it engages? If so, you should log details of how the right is interfered with or limited.

You should remember that interference with a right may not always simply consist of an action that is not compatible with Convention rights; it may also be a failure to take action where a right places a positive obligation on public authorities to take action to preserve a right.

Once you have made your assessment, if you decide that although a right is engaged, the policy will not result in any restriction on that right, or that you are not under a positive obligation to act differently, then you may exit the flowchart, bearing in mind the points mentioned above in the 'Flowchart exit' box.

If, however, you do decide that there is a danger of Convention rights being restricted, it will be necessary to proceed to the next section.

3. Types of right

3.1 Is the right an absolute right?
If the right you are proposing to restrict is absolute, it may not be restricted, and any attempt to do so will be incompatible with the Convention. The prohibition of torture and inhuman or degrading treatment or punishment (Article 3), slavery and forced labour (Article 4) and retroactive laws (Article 7) are all absolute rights and may not be limited in any way. So is the right to hold particular beliefs (the first part of Article 9) and the abolition of the death penalty (Protocol 13).

3.2 Is the right a limited right?
If the right you are proposing to restrict is limited, it may be restricted within the terms set out in the relevant Article. The terms will be different for different rights and they have been explained in relation to the individual rights in Part 2 of this guide. For example, there are six instances where the right to liberty and security set out in Article 5 may be lawfully restricted. These are set out in the section dealing with Article 5 in Part 2 of this guide (see page 15). One example is after conviction by a competent court. There are also some rights where there is no limitation mentioned in the text of the Convention, but where limitations have been read in through decisions of the European Court of Human Rights. For example, the courts have read in some limitations on the right to vote and stand for office (Protocol 1, Article 3).

3.3 Will the right be limited only to the extent set out in the relevant Article of the Convention?
If you decide that you are trying to restrict either an absolute or limited

right, you may exit the flowchart at this point. However, you should consider your policy/decision further because it will either not be compliant with the Convention (if it restricts an absolute right), or you will need to check that your restriction is provided for in the text of the Article (if it restricts a limited right).

If you are restricting a qualified right, then you will need to continue using the flowchart.

4. Qualified rights

In the case of qualified rights, the fact that a policy/decision restricts the right does not necessarily mean that it will be incompatible with the Convention. If a restriction has a legitimate aim, such as public safety, and the restriction itself does not go any further than absolutely necessary to protect this aim, then it is likely that it will be compatible with the Convention. The Convention recognises that there are situations where a state must be allowed to decide what is in the best interests of its citizens, and enables a state, or a public authority acting on behalf of the state, to restrict people's rights accordingly.

The following questions will help you to determine whether or not your policy/decision falls within this category of accepted restrictions.

4.1 Is there a legal basis for the restriction?
Any restriction must have a clear legal basis. The restriction must be set out in law, or in rules or guidance, and it must be communicated effectively to ensure that people to whom it applies can find out about it. This will allow them to prepare to change their behaviour in good time if they are required to do so. That might mean making guidance or other rules publicly available, perhaps via the internet, via other partner organisations, or through cross-agency working.

4.2 Does the restriction have a legitimate aim?
If you are restricting rights, you will need to identify a legitimate aim that you are trying to achieve. A legitimate aim is one that is set out in the text of the articles themselves, such as public safety, the protection of public order, national security or protection of the rights or freedoms of others.

You will find legitimate aims for restricting rights listed in the sections relating to each article in Part 2 of this guide.

If the aim that you want to achieve does not fall within one of those listed in the text of the Article, it is likely that the restriction will not be legitimate. You should seek legal advice.

4.3 Is the restriction necessary in a democratic society?
For a restriction to be necessary in a democratic society there must be a rational connection between the legitimate aim to be achieved and the policy/decision that restricts a person's rights. It is not sufficient to put forward a legitimate aim if, in fact, the restriction will not make a real difference in achieving that aim.

4.4 Are you sure you are not using a sledgehammer to crack a nut?
A policy/decision should be no more restrictive than it needs to be in order to achieve its objective. This is called 'proportionality'. For example, a blanket application of a policy/decision to everyone concerned will often be considered disproportionate, as it does not take into account individual circumstances, and the individual rights of each person affected. It will have the effect of imposing restrictions in circumstances where they are not really needed.

Look at the objectives you identified at paragraph one of this section, and box 1 of the flowchart, and ask yourself whether the objectives can be achieved only by the policy/decision you are proposing. Ask yourself if there is any other less restrictive way of achieving the desired outcome.

If there is another less restrictive way of achieving the desired outcome, but you decide not to adopt it, you will need to be prepared to say why you have made that choice. Your reasons will have to be good ones.

Exiting the flowchart

Even if you conclude that the policy/decision does not infringe one of the other Articles of the Convention, you will need to consider whether it discriminates against anyone in relation to the exercise of their Convention rights, contrary to Article 14. See page 40 for further details of the issues to be considered in relation to Article 14. You should think about the diversity of customers, staff and service users that your organisation works with. You must consider whether the restriction applies only to a particular group or class of people defined by one of the statuses discussed in relation to Article 14 (see page 40). Any differential impact should be noted, even if it is unintentional. Indirect impact also needs to be considered, for example where the restriction applies in principle to everyone but would have a particularly heavy impact on a particular group or class who would find it harder to comply.

If you decide that your restriction does apply unequally in the way a Convention right is enjoyed or protected, you will

need to decide whether or not the differential treatment is justified. The approach here is rather similar to that applied in relation to the qualified rights (see above). It is necessary to consider:

- whether the differential treatment is in pursuit of a legitimate aim?
- whether the differential treatment is proportionate to that aim (i.e. is there no less discriminatory way of achieving the aim)?

If the answer to both these questions is 'yes', then it is likely that differential treatment will be justified.

The case studies in the relevant section of Part 2 will help you when working through this.

Points to remember

It will be useful to bear in mind the following points when reading this guide and also when applying human rights in the workplace:

- Whilst some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), in general the rights of one person cannot be used to 'trump' the right of the general public to be kept safe from a real risk of serious injury or loss of life.
- More than one right may be relevant to a given situation.
- Always be aware of other existing guidance that may be relevant to the decision or policy that you are developing, and consider how it fits in.
- If you are unsure, or a matter is particularly complex, consider seeking legal advice if necessary. You should always take legal advice if you are proposing to interfere with Convention rights in a way which is restrictive, or if you have any concern that complying with human rights is putting other important policy goals such as public safety at risk.

Balancing one person's rights against those of the community

The fact that a policy/decision restricts a Convention right does not necessarily mean that it will be incompatible with the Convention. It is a fundamental responsibility of the state – arising from Article 2 of the Convention itself – to take appropriate steps to protect the safety of its citizens. The state also needs to take into account other general interests of the community. So while some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), others are either limited or qualified in the way described in this guide. In particular, the rights in Articles 8 to 11

can be restricted where it is necessary and proportionate to do so in order to achieve a legitimate aim. Provided a restriction of such a right has a legitimate aim, such as public safety, and the restriction itself does not go any further than necessary to protect this aim, then it is likely that it will be compatible with the Convention. In this way the Convention recognises that there are certain situations where a state is allowed to restrict individual rights in the best interests of the wider community.

Three types of rights

Not all the Convention rights operate in the same way. Some are 'absolute' while others are 'limited' or 'qualified' in nature.

Absolute rights: States cannot opt out of these rights under any circumstances – not even during war or public emergency. There is no possible justification for interference with them and they cannot be balanced against any public interest. Examples of absolute rights are the prohibition of torture and inhuman or degrading treatment in Article 3, and the prohibition of slavery in Article 4(1).

Limited rights: These are rights that are not balanced against the rights of others, but which are limited under explicit and finite circumstances. An example is the right to liberty and security in Article 5.

Qualified rights: These are rights that can be interfered with in order to protect the rights of other people or the public interest.

An interference with qualified rights may only be justified where the state can show that the restriction:

- is lawful – this means that it is in accordance with the law, which must be established, accessible and sufficiently clear
- has a legitimate aim – the restriction must pursue a permissible aim as set out in the relevant Article. Public authorities may only rely on the expressly stated legitimate aim when restricting the right in question. Some of the protected interests are: national security, the protection of health and morals, the prevention of crime, and the protection of the rights of others
- is necessary in a democratic society – the restriction must fulfil a pressing social need and must be proportionate to that need.

Proportionality

The principle of proportionality is at the heart of how the qualified rights are interpreted, although the word itself does not appear anywhere in the text of the Convention.

The principle can perhaps most easily be understood by the saying 'Don't use a sledgehammer to crack a nut'. When taking decisions that may affect any of the qualified rights, a public authority must interfere with the right as little as possible, only going as far as is necessary to achieve the desired aim.

It may prove useful to ask the following questions to determine whether a restrictive act is proportionate or not:

- What is the problem that is being addressed by the restriction?
- Will the restriction in fact lead to a reduction in that problem?
- Does a less restrictive alternative exist, and has it been tried?
- Does the restriction involve a blanket policy or does it allow for different cases to be treated differently?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?
- Does the restriction in question destroy the very essence of the Convention right at issue?

The following case study, based on the case of *R v Secretary of State for the Home Department ex parte Daly* (2001), illustrates these principles.

Case study

A blanket policy was established to allow prison officers to search the correspondence of all prisoners (without them being present) for security purposes. While the prisoners did not claim that legal correspondence should be immune from such examination, they argued that the search should take place in their presence. They feared that prison officers might do more than just briefly examine the legal documents and this might inhibit the willingness of prisoners to communicate freely with legal advisers. The prison service claimed that if the prisoners were present, they might intimidate staff or disrupt the search. The courts held that a blanket policy preventing prisoners from being present was disproportionate because a less restrictive, but equally effective, alternative existed which would allow prisoners to be present unless there was a justification for excluding them.

The margin of appreciation

The European Court of Human Rights has also accepted that there are areas in which national authorities are better placed than the Court to decide what is best for those within their jurisdiction, and so to apply the Convention rights in their own way. This is particularly so where circumstances require rights to be balanced against national security, or wider economic and social needs, for example. This is referred to as the margin of appreciation. Whether the Court allows a wide or narrow margin of appreciation depends on the nature of the right in question and the extent to which views on the issue diverge among the countries which have signed up to the Convention.

This in turn means that decisions of the Court may change over time to keep pace with changing conditions in the signatory states – for this reason the Convention is called a 'living instrument'. It means that even where the European Court of Human Rights has ruled that a practice or policy is within a state's margin of appreciation, this may change in the future if a new consensus evolves across a sufficient number of countries.

Although the margin of appreciation concerns the attitude of the European Court of Human Rights to decisions taken in individual states, courts in the UK have developed a similar approach when considering decisions made by public authorities in the UK. They will allow public authorities a degree of latitude in making decisions, particularly where the public authority is in a better position than the court to assess the issue (for example issues relating to social policy or allocation of resources). However, the courts will be more willing to intervene on issues such as discrimination or fair procedures.

This idea is sometimes known as 'deference' but is better referred to as the concept of a 'discretionary area of judgement'.

Positive obligations

Most of the Convention is concerned with things that the state must not do, and puts states under an obligation to refrain from interfering with a right. However, the Court has decided that in order to make the Convention effective, a number of rights also place positive obligations on states. These require the state to take action to prevent the breach of a right. For example, Article 2 can create a positive obligation to take steps to protect members of the public, for example where a public authority is aware of a real and imminent threat to someone's life, or where a person is under the care of a public authority.

Frequently asked questions

What does the Human Rights Act do?

It makes the human rights contained in the European Convention on Human Rights enforceable in UK law. This means that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. A person who feels that one or more of their rights has been breached by a public authority can raise that human rights issue in the appropriate court or tribunal. If the person is unhappy with the court's decision and has pursued the matter as far as it can go in the UK, they may take their complaint to the European Court of Human Rights, an institution set up by the Convention and based in Strasbourg, France.

Do judges now have more power than elected politicians?

The simple answer is no. Judges must interpret legislation as far as possible in a way that is compatible with the Convention rights. If this is not possible courts can strike down incompatible secondary legislation, or can make a declaration of incompatibility in relation to primary legislation. They cannot strike down primary legislation.

What difference does the Human Rights Act make?

The principal effect of the Human Rights Act is to enable people to enforce their human rights in the domestic courts. The Human Rights Act should mean that people across society are treated with respect for their human rights, promoting values such as dignity, fairness, equality and respect.

Are human rights relevant to every decision I make?

The short answer to this is no. Many everyday decisions taken in the workplace are not affected by human rights. However, by understanding human rights properly you are more likely to know when human rights are relevant and when they are not. This should help you to make decisions more confidently, and ensure that your decisions are sound and fair.

What is a public authority?

The Human Rights Act says that persons carrying out certain functions of a public nature will fall within the definition of a public authority. The courts are still deciding exactly what this means. The following are definitely public authorities:

- central government
- courts and tribunals
- local government
- planning inspectorate
- executive agencies
- police, prison and immigration services
- statutory regulatory bodies
- NHS Trusts.

This list is not exhaustive. If you are unsure whether or not you work in a public authority you should check with your line manager. However, if you are reading this document, it is likely that you do work for a public authority. In any event, following human rights standards, even in matters not strictly covered by the ambit of the Human Rights Act, will be good practice.

Do all new laws have to be compatible with the Human Rights Act?

When a Minister introduces a Bill to Parliament they are required to confirm in writing that, in their view, the Bill is compatible with Convention rights, or that they are unable to say that it is compatible but that they wish to proceed with the Bill anyway. Therefore it is possible for new legislation to be incompatible.

Are all Convention rights guaranteed, whatever the circumstances?

Not all Convention rights are formulated in the same way. While some rights are protected absolutely, such as the right to be free from torture, others are limited in certain defined situations, or qualified so as to take account of the rights of others or the interests of wider society. This is explained in greater detail in Part 3 of this guide.

Who can bring a case under the Human Rights Act?

Any 'victim' can do so. It is not necessary to be a UK citizen. Anyone bringing proceedings must be directly affected by an act or omission of a public authority.

Is any other guidance on the Human Rights Act available?

For further information about human rights and the Act, we recommend:

- *Guide to the Human Rights Act* produced by the Ministry of Justice, available for download on our website: www.justice.gov.uk/about/docs/act-studyguide.pdf
- You will also find human rights guides in most bookshops. One such publication is the *Human Rights Toolkit*, by Jenny Watson and Mitchell Woolf, published by the Legal Action Group. This provides a more detailed practical guide to the Human Rights Act and its impact on public authorities.
- At page 63 we have listed some useful contacts and organisations for further advice and guidance.

Jargon buster

Human Rights Act:

The Human Rights Act 1998. Came into force on 2nd October 2000. It makes certain rights contained in the European Convention on Human Rights enforceable in UK law. These rights are called 'the Convention rights' and they are set out in Part 2 of this handbook.

The Convention:

The European Convention on Human Rights and Fundamental Freedoms. Treaty of the Council of Europe that came into force 3rd September 1953. Signed by the UK on 4th November 1950. Ratified by the UK on 8th March 1951.

Articles:

The Convention is divided up into Articles. Article 1 is introductory whilst each of the Articles from 2 to 12 and Article 14 detail a different human right or freedom. Most other Articles of the Convention deal with procedural issues. Each of the Protocols is also divided up into Articles.

Protocol:

These are additions or amendments to the original Convention. They may be signed and ratified by parties to the Convention and are effective as if they were part of the original Convention. The UK has not signed all of the Protocols.

Legitimate aim:

Any interference with a qualified right for the relevant purpose of safeguarding an interest set out in the Article pursues a legitimate aim.

Proportionality:

This is best defined as not using a sledgehammer to crack a nut. Any restriction must go no further than is necessary in a democratic society to achieve the legitimate aim.

Margin of appreciation:

This is the degree of discretion allowed to the state by the European Court of Human Rights when interpreting and applying Convention rights.

Public authority:

This includes all government departments and other 'core' public authorities such as:

- central government
- courts and tribunals
- local government
- planning inspectorate
- executive agencies
- police, prison and immigration services
- statutory regulatory bodies
- NHS Trusts.

Outside this, private organisations whose functions are of a public nature are included in relation to those public functions.

Ratify:

Ratification is the process by which a member state adopts and agrees to be bound by an international treaty.

Victim:

A victim is someone who is or would be directly affected by an act or an omission of a public body.

Relevant organisations and contacts

Ministry of Justice
Human Rights Division
102 Petty France
Post point 7.23
London
SW1H 9AJ

Tel: 020 3334 3734
Email: humanrights@justice.gsi.gov.uk

Equality and Human Rights Commission Helpline
Freepost RRLL-GHUX-CTRX
Arndale House Arndale Centre
Manchester
M4 3AQ

0845 604 6610 - England main number
0845 604 6620 - England textphone
0845 604 6630 - England fax
Monday - Friday 9:00 am-5:00 pm

Equality and Human Rights Commission Helpline Wales
Freepost RRLR-UEYB-UYZL
3rd Floor
3 Callaghan Square
Cardiff
CF10 5BT

0845 604 8810 - Wales main number
0845 604 8820 - Wales textphone
0845 604 8830 - Wales fax
Monday - Friday 9:00 am - 5:00 pm

Equality and Human Rights Commission Helpline Scotland
Freepost RRLL-GYLB-UJTA
The Optima Building
58 Robertson Street
Glasgow
G2 8DU

0845 604 5510 - Scotland main
0845 604 5520 - Scotland textphone
0845 604 5530 - Scotland - fax
Monday - Friday 9:00 am - 5:00 pm

The Northern Ireland Human Rights Commission
Temple Court
39 North Street
Belfast
BT1 1NA
Tel: 028 90 243987

British Institute of Human Rights
King's College London
7th Floor 39
Melbourne House
46 Aldwych
BT1 1NA
London
WC2B 4LL

Tel: 020 7848 1818
Email: info@bihr.org.uk

Relevant organisations and contacts

Useful websites

DCA: www.humanrights.gov.uk

The British Institute of Human Rights: www.bihr.org/

European Court of Human Rights: www.echr.coe.int/echr. Here you can use HUDOC to search for case law of this court.

Joint Committee on Human Rights (Houses of Parliament): www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm

Liberty: www.libertyhumanrights.org.uk/

Justice: www.justice.org.uk

See the case sheets at the NHSLA site: www.nhsla.com/Publications

Disability Rights Commission: www.drcgb.org/

Commission for Racial Equality: www.cre.gov.uk/

Equal Opportunities Commission: www.eoc.org.uk/

United Nations: www.un.org

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The Human Rights Act and business: friend or foe?

Conor A Gearty and John Phillips***

Prior to the introduction of the Human Rights Act 1998 there were those who predicted with some trepidation that the Act would have adverse, perhaps dire, consequences for business. Twelve years after the commencement of the Act, this article examines whether those fears were justified. Key requirements of business are identified, and the impact of the Act (in respect of its influences on both public and private law) is assessed in relation to those requirements. The conclusion is that in general the Human Rights Act has not been detrimental to business and, perhaps more surprisingly, that sometimes it has led to identifiable advantages for that sector.

A. INTRODUCTION

The Human Rights Act ("HRA") received the Royal Assent on 9 November 1998. It was one of the earliest manifesto commitments to be delivered by the then new Labour Government, and would have been earlier still had it not been for the intervention of other, more pressing, Parliamentary business. As the idea of human rights made its way from political theatre to enacted law, so it found itself scrutinised by a range of parties whose interest in the term had up to then been either tokenistic or non-existent. Into the latter camp fell the world of business, populated by actors for whom the acronym HR conjured up the hiring and firing of people, not the search to make their lives better. So, when Government delayed the date for the measure's implementation in order to prepare the public sector for the rights revolution it had seemingly almost accidentally wrought,[1] the business community went about its own due diligence, half scared, half excited about what lay in store.

By the time of its enactment, everybody had become aware that the HRA was no ordinary Act of Parliament. Its embedding in UK law of the general rights to be found in the European Convention on Human Rights ("ECHR")[2], its partial mapping into UK law of the judgments of the European Court of Human Rights ("ECtHR"),[3] and its insistence that all laws henceforth be interpreted consistently with such rights so far as this was "possible" to do,[4] was a break with a long British tradition of highly particularist

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1. J Croft, "Whitehall and the Human Rights Act 1998" [2001] EHRLR 392.
2. Human Rights Act 1998, Sch.1.
3. *Ibid*., s.2.
4. *Ibid*., s.3.

legislative law-making: here was a law that might not have been out of place even in France. There were all those Strasbourg decisions that suddenly enjoyed honorary status in UK law, not law exactly but required influences on law making. To scare people even more, Professor Sir William Wade of Cambridge came down to London and in a famous lecture pronounced the common law effectively dead, superseded by a clause in the new Act to which hitherto few people had given any attention.[5] By the time Government was finally persuaded (increasingly against its better judgment) to implement the measure, on 2 October 2000,[6] it was not only the judges, the police, the local authorities and central government departments that had been "trained" in its terms, but the top commercial law firms as well—the Freshfields, Clifford Chances, Linklaters and other members of the magic circle.[7] Troops of civil libertarian types had been in and out of their offices, expatiating on the breadth of the rights of (among others) due process, privacy, property and free speech and on the HRA's potentially deep reach into the world of business: competition law enforcement officers would be affected; the law on arbitration would be greatly restricted; legislative interference with property would be sharply inhibited; due process would throttle Government's regulatory role; and much else besides.[8] One over-enthusiastic commentator even pronounced that the ban on slavery would come to the rescue of the embattled "managing agent" and "average underwriter" at Lloyds.[9]

This article is about what happened in the business sector after the HRA came on stream. How has the Act impacted on business? Has it been damaging to the goals of commerce? Has it inhibited capitalist enterprise? Or has it perhaps worked to the private sector's advantage, tying interfering officials up in knots? To answer these questions we need to review the court record, since it is through judicial interpretation of the vague rights in the HRA that the document takes on its true legal shape. The issue is not the same as that of the impact of the HRA on private law, though of course there is overlap between the two.[10] As will become apparent, our view is that the impact of the HRA on business has rarely been negative, has sometimes been beneficial, and has most often been neutral. Even where the impact has been adverse, we would argue that this has been largely in the public interest.

Before we start, however, there is a preliminary matter that needs to be addressed. We must be clear about what business means in the context of our discussion and, crucially, what business regards as its key requirements. Only when we have addressed these two points shall we be able to move on to our detailed assessment of how the HRA has affected this field.

5. H W R Wade, "Horizons of Horizontality" (2000) 117 LQR 217.

6. For the reminiscences of a key political player, see J Straw, "The Human Rights Act: Ten Years On" [2010] EHRLR 576.

7. An expenditure of effort to which one of us can testify directly, having been involved in many such talks between 1997 and 2000.

8. A very good and balanced early study of the whole field was M Smyth, *Business and the Human Rights Act 1998* (Bristol, 2000).

9. N Jordan, "The Implications for Commercial Lawyers in Practice", ch.10 of B S Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Oxford, 1998), 135.

10. For an excellent recent study, see D Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (Cambridge, 2011) (hereafter "Hoffman"). Early treatments of the same issue include R English and P Havers QC, *An Introduction to Human Rights and the Common Law* (Oxford, 2000) and D Friedmann and D Barak-Erez, *Human Rights in Private Law* (Oxford, 2001).

B. THE REQUIREMENTS OF BUSINESS

If we start by describing business as the activity of those engaged in trade or commerce, it is immediately clear that it takes place within a variety of legal structures. There are sole traders, partnerships (limited and unlimited) and a range of corporate vehicles (public and private companies, companies limited by guarantee or shares and so on). In the usual case the central objective of such enterprises is to engage in business with a view to profit and it is in this sense that the term "business" is understood in this article. In saying this, of course, we acknowledge that sometimes profit is not the aim of business activity, as is the case with "not for profit" companies (usually companies limited by guarantee), where the constitution either prohibits the distribution of profits to its members or where the company is not in fact operated to make a profit, although it may do so from time to time. We do not address here business activity in this more limited sense.

Given that the central purpose of business is profit-making, business people will not surprisingly tend to take the view that the law should be shaped so that this goal is facilitated and supported and also that the legal impediments to achieving this purpose are as few as possible (although in the context of our present political culture and economic climate this is not often asserted in such blunt terms). There are two particular aspects to this that require emphasis.

The first is that the range of commercial enterprises is such that the challenge to identify the requirements of the law so far as profit-oriented business is concerned is significant. There is inevitable variety here; the concerns of some will not be the concerns of others. So a sole trader may pay limited attention to the law of employment and probably takes a very different view of the most desirable tax regime to that of a multinational corporation. Indeed the legal needs of different types of business may be in conflict. In terms of the contractual regime governing business dealings, smaller business enterprises may favour a more interventionist approach (either by Parliament or by the courts) in order to prevent the imposition by more economically powerful corporations of contractual terms which may be unduly onerous or allocate the risk unfairly. For example, suppliers to supermarket chains may fall into this category.

The second preliminary matter to note is that the pursuit of profit may be the primary but it is not the only objective of business activity. Both law and a sense of ethics have already intervened to impose other purposes on business. The Companies Act 2006, s.172(1) (and indeed modern corporate theory[11]) now demands that company directors, in promoting the company for the benefit of its members, should consider a variety of other matters, including the impact of its decisions on company employees, its customers, its standards of business conduct and the environment. Although s.172(1) does not specifically make reference to human rights, larger corporate entities are on record[12] as emphasising that they endeavour to incorporate human rights' considerations into their business practices and indeed (in some cases) that they are central to the core values of the business. There is less evidence of this view from small businesses, however, and it may

11. See, generally, M Emberland, *The Human Rights of Companies* (Oxford 2005), esp. 10–13.

12. Joint Committee on Human Rights, *Any of our Business? Human Rights and the Private Sector* (HL 5–1, HC 64–1, First Session 2009–2010, HMSO 2009), paras 43–47, esp. para.45 (the evidence of Tesco and BP).

be that in this sector there is less enthusiasm for a voluntary embrace of human rights principles.[13]

Whilst the matters just addressed make generalisations about what business requires difficult, we believe that it is possible nevertheless to identify certain key elements—what we can usefully call core business needs—which most commercial organisations would support. There are the obvious fundamental requirements. First, business will hope that the law protects its assets (from state and other interferences) while at the same time, secondly, facilitating the profit-oriented exploitation of assets on fair and equitable terms (for instance, in obtaining necessary approvals and consent where these are required to deploy assets in a desired way). Thirdly, business will look to the law to minimise the restrictions that the state and others may impose on the profit-oriented utilisation of their assets. Business wants flexibility in respect of its work practices and tends to view with hostility policies that are regarded as not sufficiently responsive or flexible and as involving the imposition of what is perceived to be over-regulation by the state over a range of issues (such as employment law; environmental controls; matters pertaining to health and safety; company reporting requirements; and the like). Sometimes the complaint will be the opposite one, that the state does not do enough to protect business from hostile third parties. All these are seen as increasing costs, thereby reducing profits. Less obviously, but probably of equal importance, there is, fourthly, the need for legal certainty. Business plans are increasingly driven by the requirements of shareholders and financiers, and their drafters will not want to be undermined by legislative (or indeed judicial) developments (for example, in respect of planning or employment law) that are not reasonably foreseeable. This kind of predictability is also important in terms of a business's contractual rights and liabilities as well as its liabilities to third parties. Fifthly and finally, if things do not turn out as planned, business seeks remedial options and dispute resolution procedures which are effective, expeditious and inexpensive. And by the same token and related to this, if the business itself is to be the subject of legal proceedings it will seek to ensure that the case against it is conducted as fairly as possible.

C. THE IMPACT OF THE HRA

1. Protecting business assets

All businesses have significant commercial assets upon which their profitability depends. These will vary from enterprise to enterprise but will invariably include capital reserves, property, intellectual property rights and confidential information. The most relevant rights in the Convention for these purposes are Art.1 of the First Protocol ("A1P1") (the right to property) and Art.8 (the guarantee of respect for privacy). The first of these is in the following terms:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

13. This is significant. See *ibid.*, para.34 (citing evidence that 99 per cent of UK business is either small or medium-sized); and see further *ibid.*, para.36 (the evidence of the CBI).

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Commercial enterprises clearly and uncontroversially come within its terms as each is by definition a "legal person", so it is not surprising that (in so far as they considered the HRA) such organisations viewed the provision with great optimism, seeing in it a potential protection against state (and indeed other) interference. Traditional human rights lawyers and activists, on the other hand, have never been enthusiastic about this right, fearing that the application of the Article would favour private capital and limit the ability of national governments to implement their economic and social policies. Indeed it had been concerns about just this potential which had made the right to property so controversial when the European Convention was being drafted in the late 1940s, not appearing at all in the original catalogue of rights in the Convention proper (agreed in 1950) and only being included in the heavily diluted form (as set out above) in a 1952 Protocol.[14] With these different philosophical battle lines drawn, how have matters unfolded for business?

We should remind ourselves again that the case law of the ECtHR is a strong influence on the domestic law which is the primary focus of this essay, since this Strasbourg jurisprudence is required to be taken into account by the UK courts in their development of the meaning of the Convention rights.[15] The term "possessions" has been widely defined by the ECtHR as "including claims in respect of which the applicant can argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right"[16] (including, for example, leases, shares, planning permissions, choses in action and intellectual property rights[17]). The ECtHR has also taken a liberal approach to the determination of those persons who have *locus standi* to bring an application before it, that is, those persons with victim status as required by Art.34. The well-established case law of the court has inhibited (indeed almost prohibited) states from seizing property without compensation and has also restrained them from imposing such restrictions on the use of assets so as effectively to amount to a taking.[18]

To this extent this provision undoubtedly protects business from anti-capitalist state actions. Yet, for business, there has been a sharply qualifying sting in the tail, in the form of other developments in European jurisprudence which made it plain that governments should have a wide discretion in implementing legislation which they regard as being in the public interest. This is where the very attenuated nature of the guarantee in the First Protocol has restricted the potential of the measure from the business point of view. As the ECtHR put it in *James* v *United Kingdom*,[19] "the Court, finding the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is in the 'public interest' unless that

14. A W B Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention* (Oxford, 2001), ch.15.
15. Human Rights Act, s.2.
16. *Stretch* v *United Kingdom* (2004) 38 EHRR 12, [32].
17. See, in particular, *Anheuser-Busch Inc* v *Portugal* (2007) 45 EHRR 36, where it was held that even a trade mark application came within the Article.
18. *Lithgow* v *United Kingdom* (1986) 8 EHRR 329; *Papastavrou* v *Greece* (2003) 40 EHRR 361.
19. (1986) 8 EHRR 123, [36].

judgment be manifestly without reasonable foundation". Similarly, in determining the amount of compensation to be paid by the state when confiscating assets, the existence of "legitimate objectives of public interest" may justify payment of less than the full market value, and sometimes no compensation at all.

The general approach of the ECtHR has been carried forward into UK law post-2000. The recent Supreme Court decision of *AXA General Insurance Ltd* v *Lord Advocate*[20] is a compelling recent example of the interaction and application of these elements of the ECHR property right in the British context. Insurance companies sought to challenge the legality of the Damages (Asbestos-related Conditions) (Scotland) Act 2009, which made pleural plaques and other asbestos-related conditions actionable for the purpose of claims for damages for personal injuries. These conditions are benign and do not result in physical harm, so that (prior to the statute's introduction) they were not actionable. This result had arisen from the House of Lords' decision in *Rothwell* v *Chemical & Insulating Co Ltd*,[21] which had held that the existence of actual harm was a prerequisite for an action for personal injuries. Looking at the matter from a business perspective, the difficulty faced by the insurers as a result of this legislation, which in substance imposed a retroactive liability, is obvious. The companies had set aside capital assets to meet expected liabilities only to find that these reserves (post the legislative change) were now wholly inadequate. More funds needed to be found, thereby forcing a reallocation of assets within the petitioners' businesses. (The ability to implement the corporate forward business plans was also undermined, so what was involved here was not merely the need of business to preserve property but also the imperative of certainty.[22])

In the Supreme Court it was accepted that the insurance companies had *locus standi*, since they were "directly affected" by the legislation even though, formally, any claim would be made not against them but against the companies that were primarily liable. This had been an important issue in the lower courts but did not figure as greatly in the Supreme Court as might have been expected, perhaps because, as Lord Brown put it, the Scottish scheme came at "enormous cost to insurers, estimated overall perhaps in billions of pounds".[23] The court was also clear that the capital resources of the insurance companies were "possessions" within the meaning of the First Protocol and that this kind of retroactive interference was something which needed to be justified if it was to survive human rights scrutiny.[24] So far so good for the insurance companies. But then, as so often happens in the Strasbourg property cases, the final hurdle proved insurmountable. The eight-judge Supreme Court was unanimous that, in all the circumstances of the case, the interference had been justified for HRA purposes. The aim of the legislation was legitimate—reducing social injustice.[25] The legislature had been entitled to recognise a social need for those who had been negligently exposed to asbestos (and had developed pleural plaques) to be able to claim damages for such exposure, even though they manifested no demonstrable health problems. Assessing the weight and validity of any alleged grounds of criticism was a matter of political judgement, "not so much an attitude

20. [2011] UKSC 46; [2011] 3 WLR 871.
21. [2007] UKHL 39; [2008] AC 281.
22. The fourth of the business objectives that we earlier identified, discussed further *post*, xxx.
23. [2011] UKSC 46, [71].
24. See Lord Hope's review of the Strasbourg case law in the case: *ibid*., [21–22].
25. *Ibid*., [29–30].

of deference, more a matter of respecting, on democratic grounds, the considered opinion of the elected body by which these choices are made".[26] Here it could not be said that such political judgment was "without reasonable foundation or manifestly unreasonable".[27]

The general pattern of judicial analysis evident in this decision (albeit with somewhat different technical arguments from case to case of course) has been repeated in a range of decisions,[28] both historic and recent, involving other types of legislation which have attempted to interfere with business assets. There is something of a repetitive refrain emerging from our review of the cases: the court recognises the status of the applicant to sue and that it has been deprived of a "possession" (thus, in the jargon of HRA litigation, "engaging" A1P1), but then concludes that the decision to introduce the relevant measure "is not manifestly without foundation". Unsurprisingly, the applicant is unable to show otherwise, since it is a heavy evidential burden to satisfy, tougher even than the traditional *Wednesbury*[29] criteria for mainstream judicial review. Many (including the authors) will see this as the proper approach to the implementation of A1P1, since it means private capital assets cannot impede the introduction of socially relevant legislation.

Business, in terms of the theme and title of our article, may be inclined to see in this line of cases a new friend that is always promising to be of assistance but actually disappoints whenever called upon to help, other than in extreme situations that rarely if ever arise. The sword that the HRA appears to be—capable of being wielded to strike down unwanted laws—is more apparent than real. Yet business should not be too despondent. HRA, s.3 requires that all legislation be interpreted "[s]o far as it is possible to do" in a way that is compliant with the Convention rights. And A1P1 has also conferred upon business a substantive right to challenge legislation when previously it was limited to procedural challenges through judicial review. True, it was only the particular mechanics of devolution that allowed the frontal challenge to the Scottish legislation in *AXA Insurance*, which is all that is available against legislation enacted by the UK Parliament (as opposed to any of its devolved arms).[30] But these declarations carry weight in the political sphere: they force a reply from Government, or at the very least a crisis if no response is forthcoming.[31] This is an extra weapon that can be wheeled out on to the legal battlefield if the state intervention is considered by business legal advisers to be plausibly egregious. It imposes on the state a duty of explanation for legislation for which, prior to the HRA, no such explanation was required either before or after the Royal Assent. And there will undoubtedly be some cases where the challenge will be successful

26. *Ibid.*, [32].

27. *Ibid.*,[33], *per* Lord Hope. *Cf* Lord Brown, who, though more sceptical of the Scottish legislation, nevertheless felt constrained to accept it ("ill-judged though many might regard it to be") on account of "the wide margin of appreciation properly accorded to a democratically elected body determining the public interest by reference, as here, to political, economic and social considerations": *ibid*., [83].

28. See, eg, *Sinclair Collis Ltd* v *Secretary of State for Heath* [2010] EWHC (Admin) 3112; [2011] UKHRR 81; *SRM* v *HM Treasury* [2009] EWCA Civ 788; [2009] UKHRR 1219. See further in relation to taxation matters, even involving retrospective legislation, where the approach is similar: *R (Robert Huitson)* v *Her Majesty's Revenue and Customs* [2011] EWCA Civ 893; [2011] STC 1860; *R (Federation of Tour Operators)* v *Her Majesty's Treasury* [2008] EWCA Civ 752; *National and Provincial Building Soc* v *United Kingdom* (1995) 25 EHRR 127; and generally P Baker, "Retrospective Legislation and the European Convention on Human Rights" [2005] BTR I.

29. *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.

30. See Human Rights Act, s.4.

31. See P Sales and R Ekins, "Rights-consistent Interpretation and the Human Rights Act 1998" (2011) 127 LQR 217.

because the state cannot offer any real justification at all for the deprivation of property; as we have seen, this will be especially likely if it has been effected without compensation. Furthermore, we can never know (but some businesses might) the extent to which the Convention right to property has inhibited Government from actions which it might otherwise taken. A glimpse of such a "might have been" was the discussion of whether or not to compensate shareholders in RailTrack when their property was taken back into public ownership: the political leaders involved knew that their hands were to some extent at least tied by the HRA.[32] HRA, s.19 undoubtedly plays a part here, since it insists that promoters of bills before Parliament declare in advance their view of the human rights compatibility of the measure they are asking parliamentarians to enact.

Aside from providing for the possibility of challenging state legislation which purports to interfere directly with business assets, the HRA has a wider ambit which is also relevant here, since it is capable of application to disputes between two commercial enterprises or to disputes between a commercial enterprise and a private individual. In the parlance of the HRA, the measure has a degree of "indirect horizontal effect". This is for two reasons. First, the robust s.3 mandate on interpretation of statutes is not restricted to cases involving only state actors. The courts are instructed by the leading cases on this provision to strive for a construction that avoids incompatibility (and a consequential declaration of incompatibility) even though "it is not a meaning that [the words] would be given in a non-Convention interpretation".[33] Secondly, even where a statute is not involved in any given case between private parties (corporate or non-corporate), there is the spectre of the HRA's rights nevertheless determining how the judge in such a piece of litigation should apply the common law: under s.6(3)(a), the court is itself designated a "public authority" in these as in all cases and so has a duty to apply HRA rights just as though it were an "ordinary" public body—even where there is neither a statute informing the adjudicative process nor any other public agency in the room. (This is the clause that led to Professor Wade's incendiary remarks about the end of the common law.[34]) It is clear from the case law that has sought to understand these Delphic utterances in the HRA that developments in the common law should at very least be informed by the Convention rights where the issue for adjudication (and on which the common law is being asked to pronounce) is within the ambit of some or other of the Convention rights.[35]

The effect of this twofold horizontal impact (via s.3(1) and s.6(3)(a)) is that the HRA has had an impact on real property law (where there is a strong statutory framework) and on the law relating to confidential information (which is largely governed by the common law). As regards the first of these, property law, some muse that the HRA (through A1P1 and the right to respect for one's home in Art.8) may in the future radically reform property law, so as to create "human property rights".[36] For the moment business will be

32. See *Weir* v *Secretary of State for Transport* [2005] EWHC 2192 (Ch), esp. [287–298]. The claimants withdrew their claim that there had been a *de facto* expropriation.

33. *Wilson* v *First County Trust Ltd* [2001] EWCA Civ 633; [2002] QB 74, [42]. See also *Ghaidan* v *Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557 .

34. See *supra*, fn.5.

35. See R Brownsword, "Contract Law and the Human Rights Act 1998", in M Furmston (ed), *The Law of Contract* (London, 2010) (hereafter "Brownsword"), [1.223]. Brownsword robustly states that, since legislation has to be read down to equate with Convention rights, it "surely follows" that common law principles should be similarly interpreted.

36. K Grey and S F Grey, *Elements of Land Law*, 5th edn (Oxford, 2009), 116.

pleased that, as a result of s.3(1), the HRA is clearly capable of being invoked to prevent interference with their property assets, even where it is not the state that is doing the interfering—just so long as there is a statutory peg upon which s.3(1) can then hang one or more of the Convention rights. Thus, in *PW & Co* v *Milton Gate Investments Ltd*,[37] Neuberger J (as he then was) very much envisaged a positive role for the HRA in the context of construing provisions of the Property Law Act 1925 in accordance with the Convention. He said:[38]

"If one approaches the question by reference to fairness it does not appear to me to be unfair that the [HRA] should be capable of being invoked to produce the result which the parties clearly intended at the time when they entered into their contracts . . . ".

On the facts the HRA was influential in the court's decision, which avoided the palpably unjust consequence of a landlord's being unable to recover either possession or any rent whatsoever in respect of a significant part of its premises (occupied by another business) for a period of up to 13 years. Similarly, it has been held in an influential Strasbourg decision that A1P1 was violated when a council (acting in a private capacity and therefore in this instance for HRA purposes not a public authority under s.6) refused to permit a tenant to exercise the option to renew a business tenancy.[39] More controversially, the relevant provisions of the Limitation Act 1980 and the Land Registration Act 1925 were initially held by the ECtHR (by a bare four to three majority, sitting as a Chamber) to be incompatible with A1P1 in so far as they operated to deprive the registered owner of title to the land as a result of occupation by squatters. This ruling, which overturned a considered House of Lords opinion on the issue, was however set aside on appeal, with the Grand Chamber finding the UK's squatters' laws to be justified, given the wide margin of appreciation accorded the authorities in circumstances such as these.[40]

This reassertion of deference by Strasbourg in the squatting case was not at all surprising—it was the activist Chamber ruling which had been the shock. Generally speaking, both the European and UK judges have been sensibly limited in the interventions they have made. The intuition for human rights has been counteracted by a similar intuition against too much interference in a field that seems to the judges (rightly, we would suggest) far from the core of what human rights should be about. Balancing a commitment to human rights, therefore, has been an understandable concern to preserve a stable and coherent system of property rights. This is something that is also, of course, in the interests of business, the need for certainty as we earlier described it. In *Pennycook* v *Shaws (EAL) Ltd*,[41] where a failure to serve the correct statutory notice led to loss of a right to renew a business tenancy, it was nevertheless held to be in the public interest, and with "obvious economic benefits to both landlord and tenant", to have certainty in the procedural mechanisms governing renewal. There are other similar cases.[42] Clearly, rulings in particular cases may favour one section of business rather than another, and views may differ in particular cases as to whether the adjustment of property rights

37. [2003] EWHC 1994 (Ch); [2004] Ch 142.
38. *Ibid*., 174.
39. *Stretch* v *United Kingdom* (2004) 38 EHRR 12.
40. See *J A Pye (Oxford) Ltd* v *United Kingdom* (2007) 46 EHRR 1093 (Grand Chamber). Note especially the court's view of the margin of appreciation, at [71].
41. [2004] EWCA Civ 100; [2004] Ch 296 , esp. at [41].
42. Eg, *C A Webber (Transport) Ltd* v *Railtrack Plc* [2003] EWCA Civ 1167; [2004] 1 WLR 320.

through the application of the HRA is appropriate. Yet the overall impression is that the impact of the HRA in respect of property law as it affects business has been sensible, pragmatic and has led to equitable outcomes. There is no sign—yet anyway—of the radical revolution anticipated by some. "Human property rights" remain for the future, if at all.

Turning now to the law of confidential information, legal developments in respect of the judge-made law relating to the protection of business information have been eye-catching. Here the predominant driving force has been Art.8 and the work has been done through s.6(3)(a), there being no statute in the background upon which to hang the rights' analysis. Many businesses are understandably concerned about their ability to protect their confidential business assets (such as technology, marketing plans, client lists and so on) from being obtained by their competitors. For some businesses their very existence will depend on their being able to do so. The traditional protection (absent the influence of Art.8) for preserving confidentiality was based upon an express or implied contractual right or the equitable duty of confidence. The common law cause of action rooted in the duty of confidence (as set out in *Coco* v *AN Clark (Engineers) Ltd*[43]) requires proof: first, that the information has the necessary quality of confidence, that it is "relatively secret" or inaccessible to the public; secondly, that the information must have been imparted to another in circumstances importing an obligation of confidence; and finally, that there has been an unauthorised use or disclosure of the information.

Astute businesses will put in place policies which require employees and persons with whom they negotiate to enter into non-disclosure agreements. Efforts are also made to ensure that information retains a quality of "relative secrecy" and when disclosed (in the absence of a non-disclosure agreement) that it is being done on a confidential basis. But procedures tend not to be comprehensive because, as Megarry J observed in *Coco* v *AN Clark (Engineers) Ltd*,[44] "business men [and women] naturally concentrate on their business and very sensibly do not constantly take legal advice before opening their mouths or writing a letter, so that business may flow and not stagnate". There is also the deterrent of cost in devising and implementing appropriate policies. So there are clearly potential gaps in the traditional common law framework.

Here the HRA may well lead to improved protection for confidential business information. In respect of private information, it is now reasonably clear that the first and second requirements of the equitable duty of confidence have been replaced (as a result of the impact of Art.8) by a more general enquiry as to whether or not the information is private.[45] If it is, then the obligation of confidence will arise. The dominant view is that the obligation will be imposed if the recipient of the information knows or ought to know that there is a reasonable expectation that the information should be kept confidential.[46] Arguably, corporate entities possess some "private" information such as financial documents, minutes of board meetings and internal correspondence which will come

43. [1968] FSR 415.

44. *Ibid*., 425.

45. *Campbell* v *MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457; *Douglas* v *Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125, [83]. See generally T Aplin, "The Future of Breach of Confidence and the Protection of Privacy" (2007) 7(2) OUCLJ 137; G Phillipson, "Privacy: the Development of Breach of Confidence—the Clearest Case of Horizontal Effect", ch.7 of Hoffman (*supra*, fn.10).

46. *Campbell* v *MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, [85] and [134]; *Douglas* v *Hello! Ltd (No 3)* [2005] EWCA Civ 595; [2006] QB 125, [82].

within the scope of the reformulation, but this "extended" action for breach of confidence (as it is sometimes called) has not as yet brought commercial information within its scope.[47] Some argue strongly against such an extension, not least because the removal of the requirement that the information must be confidential would be anti-competitive (possibly having an adverse impact on the patent system, to take one example) since commercial enterprises would then be able to restrain the use of information which might otherwise be in the public domain.[48] Yet, for individual business claimants, there would be benefits arising from the new formulation. There would be no necessity to prove that the information was confidential, or that it was imparted in circumstances of confidence. In particular, the absence of the latter requirement as an ingredient of the cause of action would have the advantage that information obtained by stealth would be protected, when presently it is not. More generally, meritorious claims which sometimes presently fail because a business has not adopted the correct internal procedures (for example, in respect of the execution of non-disclosure agreements) would now be more likely to succeed.

In the short term at least, on the current state of authorities, it is perhaps unlikely that confidential information will be encompassed by this extended action for breach of confidence. There is, however, another possibility, arising either where a statute can be found to take the issue out of the realm of pure common law and into the realm of s.3(1), or where the opposing party can be characterised as a public body to whom s.6(1) straightforwardly applies. In either of such circumstances business may be assisted in restraining the disclosure of information through the application of A1P1. Thus, in *Veolia ES Nottinghamshire Ltd* v *Nottinghamshire County Council*,[49] it was held that confidential information was a "possession" within the meaning of the First Protocol as being "a well-recognised species of property". Accordingly, the Audit Commission Act 1988, s.15(1) was required to be read down to exclude from its ambit certain confidential information of a financial nature. At one level the decision has a narrow compass, since one of the litigants was a public authority and it related to the interpretation of specific legislation. Yet, more widely, it is now possible that A1P1 will be raised by private litigants in the context of an action for breach of confidence with a consequent potential to influence the present elements of the action (independently of the effect of Art.8) In this context the HRA may turn out to be a rather helpful friend to business.

2. Facilitating the making of profit from assets

As we have seen, businesses need to be able to maximise profit from their assets if their needs are to be fully met. Part of the role of the state is to inhibit such behaviour in the name of the greater good: not every business can do whatever it wants with its property, turn to wherever a profit beckons, deploy its assets in any kind of new way that it is judged will play well with shareholders whatever its impact might be on society or the immediate environment. In order to control business behaviour, the state obliges business to obtain permissions for a whole range of activities (in the form of licences, planning permissions and so on). It is important for business that such permissions are granted by the authorities

47. See T Aplin, "A Right to Privacy for Corporations?", in P Torremans (ed), *Intellectual Property and Human Rights* (London, 2008), 475–505, where the relevant authorities are discussed.

48. Aplin, *supra*, fn.45.

49. [2010] EWCA Civ 1214; [2010] UKHRR 1317.

fairly in accordance with the law and that, if they are not, there is an appropriate remedy available to those affected. Has the HRA assisted (or indeed impeded) the ability of business to challenge this kind of state decision-making? The key provisions are once again A1P1 and also, in this context, Art.6(1). We return to the first of these at the end of this section: recent case-law suggests that the HRA may be about to unleash an important new protection for business in the form of a novel action for damages for unlawful state actions which are in violation of corporate Convention rights. But first there is Art.6 to consider.

The text of the right is distinctly unpromising from a business point of view. The bulk of it is concerned in a quite detailed way with fairness in the criminal process, and even that small part of it which is not (part of the first sentence of Art.6(1)) does not appear relevant at first glance: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". As the wording suggests, the original idea behind this was to extend guarantees of fairness into the civil as well as the criminal sphere, with the "determination" of "civil rights" referred to being intended to cover court actions between private parties. However, over time, in a series of cases which were sometimes very controversial and decided by wafer-thin majorities, the ECtHR inexorably expanded the remit of the right.[50] We need not dwell on the details here: first, tribunals were brought within its reach; then regulatory bodies; then local planning authorities; and so on until the point was reached where all pecuniary claims asserting economic rights came to be considered presumptively within the Article so long as some kind of relevant "determination" involving a dispute (in the French version "contestation") could be established.[51] This emerging jurisprudence meant that when it came into force in 2000, the HRA could potentially operate as a mechanism for challenging state decision-making, over and above the system of judicial review already in place. This ECtHR oversight, it should be said, revealed inconsistencies of approach, with some cases stressing the need for a review of facts as well as the law and others saying that this was not required.[52] So how has Art.6(1) played out?

Even before implementation across the whole United Kingdom in October 2000, the quirks of devolution had allowed Scottish courts first bite at the issue and in one such early case a corporate developer struck terror into planning departments everywhere, successfully arguing that a Reporter (in English terms an Inspector) into a planning proposal was not sufficiently separate from the relevant government department to make his or her findings independent for Art.6 purposes and, furthermore, that the court's capacity to review any such decisions was too restricted to cure the resulting procedural defect.[53] State-oriented sceptics of human rights licked their lips in anticipation of the collapse of the planning system into a kind of litigious free-for-all, but in its first major decision under the HRA, on 9 May 2001, the House of Lords unanimously imposed a UK-wide view that was different and altogether more deferential, in the important case of *R (Alconbury*

50. For a good survey of the cases, see D J Harris, M O'Boyle and E P Bates, C M Buckley, *Harris, O'Boyle and Warbrick's Law of the European Convention on Human Rights*, 2nd edn (Oxford, 2009), 210–235.

51. *Editions Périscope* v *France* (1992) 14 EHRR 597.

52. Contrast *W* v *United Kingdom* (1987) 10 EHRR 29 and *Kingsley* v *United Kingdom* (2002) 35 EHRR 177 with *Bryan* v *United Kingdom* (1995) 21 EHRR 342.

53. *County Properties* v *Scottish Ministers* 2000 SLT 965 (OH).

Developments Ltd) v *Secretary of State for the Environment*.[54] The matter at issue in planning cases such as this was largely one of policy and as such was primarily for ministers and the parliamentarians and electorate to which they were responsible. The courts needed to back out and the means of reversal deployed by their Lordships in *Alconbury* was via acceptance that in the overall context of planning law the appeal process was sufficient for Art.6 purposes. Duly chastened, the Scottish judges fell into line.[55] The HRA has not had a large impact on the planning process since then.[56]

The same has also been broadly true of public decision-making more generally, at least so far as Art.6(1) is concerned. Of course, public bodies need to act in a way that is compatible with Convention rights generally and this is as much the case with businesses as with anyone else.[57] But, where the issue is solely one of the "determination of a civil right" (ie, Art.6 alone), then the traditional grounds of judicial review have been invariably held to be sufficient by the UK courts, so far at least as business litigants involved in challenging licensing-type decisions are concerned.[58] The pre-existing framework of judicial review has not found itself in need of radical overhaul. True, this might be because of an increasing (albeit as yet incomplete) embracing of the test of proportionality within that old system of oversight, since the deployment of this new head of legality to public decision-making takes the overseeing judicial body much closer to the facts than did traditional *Wednesbury* review, thereby making Art.6(1) compatibility much easier to establish.[59] So perhaps it is fairer to say that Europe and traditional judicial review have met half-way. However we choose to characterise it, however, it is reasonably clear that Art.6(1) has not created significant new space for the challenging of governmental regulation.

Turning now to A1P1, this has not generally been of significant benefit for businesses seeking to overturn state decisions which limit or deny the ability to utilise profit-making assets. In *R. (Malik)* v *Waltham Forest NHS Primary Care Trust and Secretary of State for Health*,[60] the High Court found the suspension of the claimant from the medical performers' list to be unlawful as a breach of the Protocol. However, this decision was overturned in the Court of Appeal. For Auld LJ, the judge in the court below had "wrongly concluded that the personal right of Dr Malik to practise in the National Health Service flowing from his inclusion in the performers list was a 'possession' within Art.1".[61] Even where the Protocol applies, the heavily diluted nature of the right reduces its impact. In *R (Bizzy B Management Ltd)* v *Stockton on Tees Borough Council*,[62] for example, not even the demolition of the claimant company's property (pursuant to an

54. [2001] UKHL 23; [2003] 2 AC 295.
55. See *County Properties Ltd* v *The Scottish Ministers* [2002] SC 79.
56. See Clayton and Tomlinson, *The Law of Human Rights* (Oxford, 2009), [11.57].
57. *R (Daly)* v *Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.
58. See *Tomlinson, Ali and Ibrahim* v *Birmingham CC* [2010] UKSC 8; [2010] 2 AC 39 for a comprehensive analysis of the Art.6 case law. Mostly the issues arise in the pure public law context.
59. *R (Daly)* v *Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532. *Cf R (Association of British Civilian Internees: Far East Region)* v *Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397.
60. [2007] EWCA Civ 265; [2007] 1 WLR 2092.
61. *Ibid*., [48]. Rix and Moses LJJ delivered concurring judgments.
62. [2011] All ER (D) 114 (Aug). See also *Global Knafaim Leasing Ltd* v *Civil Aviation Authority* [2010] EWHC (Admin) 1348; [2010] UKCLR 1459 (apparently excessive charges payable for the release of a detained aircraft held to be proportionate).

order which the local authority had refused to defer) was thought to be an interference with their Convention right to the enjoyment of their property.

There is one caveat on this narrative of deference, however, and it may turn out to be a very important one. Certainly the decision of Lindblom J in *R (Infinis Plc and Infinis Re-Gen Ltd)* v *The Gas and Electricity Markets Authority*[63] is a fairly recent one and may yet go to appeal. If it survives intact, it has the potential to provide a strong extra card for business to play against Government—one that includes not only the ethical cachet of human rights but the trump card of money as well. The issue in the case was a simple one: had the defendant authority acted lawfully when it refused the claimants' accreditation under the relevant statutory orders for the purpose of running two generating stations owned by them? The question was not whether there had been a discretion wrongly exercised, but rather whether the claimants had had a legal entitlement to which they had been denied on account of the defendant's error of law. After a long and careful review of the facts, the judge held that, on a close reading of the statutory provisions governing the matter, the authority had indeed acted unlawfully. The claimants had presented their case as one rooted not only in legal entitlement in this way but as also involving a breach of their First Protocol right to a "pecuniary benefit to which they were statutorily entitled".[64] Interestingly, the defendant seems to have accepted that the breach of the right followed as a matter of course from the initial finding of illegality.[65] The effect of this was, however, to open the door to a damages jurisdiction that might otherwise have been rather less easy to unlock.[66] This was on account of the way that HRA, s.8 allows the award of damages where on the basis of various criteria "the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made". Giving the judgment of the Court of Appeal in *Anufrijeva* v *Southwark London Borough Council*,[67] Lord Woolf CJ had suggested that the successful claimant "should in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed" and, where "the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded".[68] This approach was subsequently approved in the House of Lords.[69]

Having reviewed the guidance from the domestic courts and also the Strasbourg decisions to which the HRA section on damages specifically directed him,[70] Lindblom J in *Infinis*[71] felt emboldened to rule as follows on the issue of just satisfaction:

> "I do not believe the claimants would receive just satisfaction from quashing and mandatory orders alone. No claim in private law is available to them. If damages are not awarded they will not recover what is due to them under the relevant statutory provisions. . . . I have held the claimants' argument on accreditation to be well-founded. Though acting in good faith, the Authority misapplied the statutory scheme, and the claimants were unlawfully denied that to which they were statutorily entitled. Their rights under [A1P1] were thus breached. Just satisfaction requires that damages be

63. [2011] EWHC (Admin) 1873.
64. *Ibid*., [103].
65. *Ibid*.
66. See generally J N E Varuhas, "Damages", ch.11 of Hoffman (*supra*, fn.10).
67. [2003] EWCA Civ 1406; [2004] QB 1124.
68. *Ibid*., [59].
69. *R (Greenfield)* v *Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673.
70. Human Rights Act 1998, s.8(4).
71. [2011] EWHC (Admin) 1873, [106].

awarded to them. If this outcome is repeated in other cases still to come, the precedent is set only by an understanding of the relevant statutory and contractual provisions which, as a matter of law, I have concluded is right. That, in my judgment, would not be a good reason for departing from the principle of '*restitutio in integrum*'."

And so far as the case before him was concerned there was no particular difficulty in coming to a specific sum:[72]

"In this instance, there will be no lasting imponderables. A clearly calculable loss has flowed directly from the Authority's unlawful decision. And there is, at least at this stage, no active dispute about the figures which the claimants have presented to the court . . . ."

The sums of money involved were considerable: the total loss contended for by the claimants, subject to mitigation, amounted to £2,656,743.84.[73] The matter of the precise award was stayed with the court to decide in the absence of agreement, but it is not likely to be other than very large.

When the HRA was first mooted and in the period after enactment and before implementation, no issue concerned ministers more than the question of damages. Section 8 was designed to keep their level down, and the Law Commissions were asked to report on the jurisprudence of the Strasbourg court so as to ensure a consistent practice.[74] The early cases seemed to support the executive's hope that damages under the HRA could be kept under control.[75] Now, after *Infinis*, that can no longer be taken for granted. Regulators will have the "judge over their shoulder"[76] and a cheque book or credit card to one side when they are making these difficult judgments about the application of the law to corporate supplicants desirous of maximising revenue from their assets and with enough funds for the kind of legal advisers who will have the quality to be able to leap upon any mistake.

Is there a new trend here towards damages award? While it is too early to answer that question either way (and as we have already said, the issue is likely to go further up the appellate system in one form or other), there is another piece of evidence for this, in a case decided the year before *Infinis*, namely *R (The London Reading College Ltd)* v *Secretary of State for the Home Department*.[77] Here a regulatory decision by the UK Border Agency which was adverse to the financial interests of the claimant college was found to have been unlawful because procedurally unfair. So far so good—a rather typical public law case. But then, responding to the submissions of counsel, the judge, Neil Garnham QC, said this:[78]

"I have found that the withdrawal of the licence was carried out in a manner that was procedurally unlawful. In my judgment it must follow that that revocation was not '*subject to the conditions*

72. *Ibid*., [107].
73. *Ibid*.
74. Law Commission, Scottish Law Commission, *Damages under the Human Rights Act* (Law Com 266; Scot Law Com 180, Cm 4853, HMSO, 2000).
75. *Anufrijeva* v *Southwark London Borough Council* [2003] EWCA Civ 1406; [2004] QB 1124*; R (Greenfield)* v. *Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR 673.
76. Treasury Solicitors, *The Judge Over Your Shoulder*, 4th edn, with an introduction by Sir Gus O'Donnell (January 2006).
77. [2010] EWHC (Admin) 2561; [2010] ELR 809.
78. *Ibid*., [67] and [68] (emphasis in original).

provided for by law' since those conditions include, as a matter of domestic law, procedural fairness.

It follows that there has been a breach of A1P1. I will hear argument from counsel as to the appropriate order in respect of the assessment of damages for that breach."

It is worth noting that here the issue was not one of statutory entitlement but rather of the wrongful (because procedurally inept) exercise of a discretion. The "must follow" of Garnham QC may have wide implications if other judges feel under a similar obligation. If all such cases are to attract damages under the HRA so long as they can be brought within the rather broad framework of possession under A1P1, then the HRA will have added greatly to the armoury of litigants seeking to challenge administrative decisions in a wholly unexpected way. In this sphere at least, the HRA will have become a great friend to business, albeit at what might arguably be thought to be the expense of the public interest.

3. Minimising restrictions on the use of assets

If deploying assets to profitable effect is a core concern of business, protecting those same assets from too many externally-imposed restrictions is another. Business is accustomed to (and indeed accepts) a clear and certain regulatory framework, but it is important that any business plan is not undermined by new restrictions which are not reasonably foreseeable. Here the story is once again of a fairly benign HRA from the business point of view. Where the Act has been intrusive in a way that has not always been welcomed by the enterprises which have been on the receiving end of its attention, the commercial sectors affected have been few, and arguably in each case the public interest has required, or at least explained, the engagement. In this section we consider three such business areas, related to the environment, enterprises attracting public protest, and the media respectively.

The first of these engages the HRA only indirectly and then very slightly. There is of course no right to environmental protection in the Act. The ECtHR has, however, worked creatively with the right to respect for privacy in Art.8 so as to grow out of its words a positive obligation on the part of a state to ensure that its laws restrict the polluting effect of business enterprises within its jurisdiction. The leading cases are *Lopez Ostra* v *Spain*[79] and *Guerra* v *Italy*,[80] albeit there was in each case an important element of culpability on the part of the authorities in that they had failed to enforce their own planning laws. *Hatton* v *United Kingdom* was an altogether more ambitious attempt to force the hand of the British Airport Authority (a private body) with regard to its management of the noise problem generated by aircraft at Heathrow airport. Having enjoyed an initial success in a Chamber's ruling,[81] the applicants eventually lost before the Grand Chamber,[82] a substantial majority of judges being clear that the Convention could not be turned into an environmental charter by dint of a set of positive obligations unselfconsciously forcing themselves into fields which had hitherto been conceived of as of high policy. As a dissenting judgment of four of the judges in the Grand Chamber put it, the ruling "gives

79. (1994) 20 EHRR 277.
80. (1998) 26 EHRR 357.
81. (2001) 34 EHRR 1.
82. (2003) 37 EHRR 611.

precedence to economic considerations over basic health conditions in qualifying the applicants' sensitivity to noise as that of a small minority of people".[83] It may be that British judges have been happy to explain their inactivity on the environmental front by reference to the stern "hands-off" that the Strasbourg court appears in *Hatton* to have issued. Whatever the reason, the activity has been slight and has not created additional environmental impediments to business activity. Not even the obvious problem of the limitation of the tort of nuisance to those with interests in land has been explicitly revised in light of the Convention's much wider commitment to the privacy of the home, proprietary interest or no proprietary interest.[84]

So far as the second of the areas of interest in this part is concerned, it is well known that some commercial operations engage in controversial activities which attract protest from concerned members of the public. Among the more important of the rights protected in the HRA are those related to civil liberties, the right to freedom of expression in Art.10 and, even more relevantly for present purposes, the right to freedom of assembly in Art.11. The impact of these political rights on private business has, however, been slight. As we have already noted, the Convention and its Strasbourg and UK case law clearly focus on state rather than on private action and, following on from the logic of this, while the judges have been heavily engaged where they have been analysing police power, they have been altogether more passive when it has come to asking questions of non-state agencies defending the private sphere. A case decided in Strasbourg shortly before enactment of the HRA is instructive on the general point. In *Appleby* v *United Kingdom*[85] the applicants were refused permission to collect signatures for a petition in a private shopping centre. Even to have a chance of success in Strasbourg the protestors had to force the case into a form recognisable to the European judges, so they argued that the state had had a positive duty to facilitate their protest. They lost: the court was clear that there was no obligation to organise matters on this part of private commercial property so as to permit the exercise of the applicants' civil liberties. Protestors could go back to the traditional high street and set up their stall (however deserted it might be now that there was a new mall to which everyone went). The question of whether there was a direct obligation on the shopping centre owners to allow protestors on to their property did not even arise; and, while it would be theoretically possible for the British courts to work the HRA's potential horizontality to this effect, it has to be said that it is most unlikely. And, even if the judges were so minded, it might well be that they would choose to grow the common law by narrowing the capacity for trespass in such cases rather than by going for the quick fix of the HRA.[86]

Where the Act has the potential to have an impact has been in controlling what the police can do to restrict protest which is taking place in a public area for sure but which is targeted at a particular private enterprise close to where the protest has gathered. In *Gillan* v *United Kingdom*[87] the Strasbourg court found a breach of Art.10 where the police

83. *Ibid*., [118].

84. See *Hunter* v *Canary Wharf Ltd* [1997] AC 655. See *Dobson* v *Thames Water Utilities Ltd* [2009] EWCA Civ 28; [2009] 3 All ER 319, where *Hunter* was followed (at [31]), albeit in a case where the defendant was a public authority for HRA purposes (at [37]) and so there was a different, more straightforward, route to damages.

85. (2003) 37 EHRR 783.

86. See *Director of Public Prosecutions* v *Jones* [1999] 2 AC 240 for how it could be done.

87. (2010) 50 EHRR 1105.

had been found to have been protecting an arms fair from exposure to protest in an over-zealous way—in doing so the Strasbourg judges took a different view from that of what had been a unanimous ruling from the House of Lords.[88] The instantly recognisable example of such targeting would, however, be that of a picket of an industrial concern, with the police having historically exercised their broadly based common law power to prevent breaches of the peace to stop things getting out of control in such situations.[89] Interestingly, however, there has been little judicial activity in this area since enactment of the HRA,[90] probably on account of the extent to which the conflict point is already heavily regulated by specific laws. One situation has been litigated a very great deal—this is the stand-off between the police and demonstrators outside a controversial private business enterprise dedicated to animal research, Huntingdon Life Sciences Laboratories.[91] However, the Act has not had a radical inhibiting effect on the legislation against harassment which has been deployed by the private companies in civil proceedings to seek to prevent the protests to which they are being subjected. It has been altogether more on the margins than that, a guide to the structuring of judicial discretion rather than a call to civil libertarian arms. So, while Arts 10 and 11 might have gone down another route, we can clearly see that, as interpreted by both the Strasbourg and UK courts, the provisions have certainly not been antagonistic to business even if in this context it would be going too far to call them friends.

Turning now to our final field under this head, the media, the story is a somewhat ironical one. Newspapers were among the very first advocates of the HRA, with arguments for incorporation of the Convention transcending the political divisions with which the British print media are so often associated. Made aware of the potential of the Convention by a series of eye-catching Strasbourg decisions (not least the early ruling in favour of the *Sunday Times* on the Thalidomide litigation,[92] as well as the notorious series of *Spycatcher* cases in the 1980s[93]), editors saw in the guarantee of freedom of expression in Art.10 a chance to liberalise Britain's relatively stringent libel laws. They were right about this: since its enactment, the courts have indeed lightened their touch in this area with a series of liberal rulings which arguably would not have taken the shape they did without the influence of the HRA. But rather late in the day the newspapers and their advisers came upon two aspects to the proposed HRA which were less to their taste: first, that the European Convention contained a right to privacy as well as a right to freedom of expression; and, second, that the new law would as drafted potentially allow individuals to assert this right in court against newspapers (on account of the Act's indirectly

88. *R (Gillan)* v *Metropolitan Police Commissioner* [2006] UKHL 12; [2006] 2 AC 307.

89. *Piddington* v *Bates* [1961] 1 WLR 162.

90. See H Collins, "The Protection of Civil Liberties in the Workplace" (2006) 69 MLR 619. An early and prescient analysis is K D Ewing, "The Human Rights Act and Labour Law" (1998) 27 ILJ 275. For a recent somewhat broader discussion, see H Arthurs, "The Constitutionalisation of Employment Relations: Multiple Models, Pernicious Problems" (2010) 19 *Social Legal Studies* 403.

91. There is a good review of the case law at *Novartis Pharmaceuticals UK Ltd (for and behalf of all members of the Novartis Group) and A R Grantham (for and on behalf of the employees of the Novartis Group of Companies)* v *STOP HUNTINGDON ANIMAL CRUELTY ("SHAC"), Avery, Avery and James* [2009] EWHC 2716 (QB); [2010] HRLR 8.

92. *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245.

93. See eg *The Observer and the Guardian* v *United Kingdom* (1991) 14 EHRR 153; *Sunday Times* v *United Kingdom (No 2)* (1991) 14 EHRR 229.

horizontal impact).[94] A rather comic effort by the then chair of the Press Complaints Commission to use his membership of the House of Lords to secure an exemption for the press from the effect of the Act proved unavailing, albeit with the Government conceding a new clause (now s.12) which stressed how important the press was and how careful the judges ought to be before imposing *ex parte* injunctions on it. So, when the Act came fully on stream in October 2000, those elements of the media with a commercial interest in the invasion of the privacy of persons judged newsworthy sat back and waited with a degree of trepidation to see what would happen.

Their fears were well-justified. It is so well known as not to need accounting in any detail here: how the HRA has essentially facilitated the emergence of a kind of tort of privacy in this country, or at least a new jurisdiction based on the protection of confidential information.[95] The story is often presented (not least by the press itself) as one in which the judges are attacking liberty by clamping down on its freedom of speech but actually it is easier to understand if viewed in commercial terms. The first case was particularly instructive in this regard, a dispute about whether a magazine with no agreement to cover a celebrity wedding could nevertheless publish spoiler pictures of the event in order to steal a march on a rival.[96] The next big decision stopped the media from announcing to the world the new identities of the boys responsible for the notorious Jamey Bolger killing, then just about to be released from prison.[97] Since then a succession of footballers, actors, and the occasional business-person, journalist and politician has succeeded in protecting themselves and their families from media intrusion by calling in aid Art.8.[98] The jurisdiction is not unqualified, with the courts being clear that privacy must always be balanced against the legitimate demands of free speech.[99] Strasbourg, too, has no inclination to push this too far, as the crusading privacy campaigner Max Mosley has found to its cost.[100] But the new laws here are likely to have had a damaging effect on the profits of those media outputs whose success was to a great extent dependant on successful intrusion. Without the impetus of the HRA it is very unlikely any similar jurisdiction would have been developed by the courts off their own bat. And certainly until the telephone hacking scandal (and possibly still) there has never been any appetite for legislation in this area, politicians being easier to intimidate than high court judges.[101]

Whilst it is clear that certain sections of the media have been adversely affected by the impact of Art.8, and consequential developments in the law of privacy, it requires emphasis that this jurisprudence has also resulted in some positive benefits for business. It is, of course, open to non-media business to avail itself of the new jurisdiction. One business, Trafigura, achieved a high degree of notoriety on account of its having obtained

94. The relevant parliamentary debates are in J Cooper and A Marshall-Williams, *Legislating for Human Rights. The Parliamentary Debates on the Human Rights Bill* (Oxford, 2000), 168–177, 217–230.

95. We have already considered this from a broader business point of view when we were assessing the impact of the HRA on the protection of business assets: see *ante*, text to fnn 45–??. On the media aspect see G Phillipson, "Privacy: The Development of Breach of Confidence—The Clearest Case of Horizontal Effect?", ch.7 of Hoffman (*supra*, fn.10).

96. *Douglas* v *Hello! Ltd* [2001] QB 967.

97. *Venables* v *News Group Newspapers Ltd* [2001] Fam 430.

98. Phillipson, *supra*, fn.95, has the details.

99. See most recently *In re British Broadcasting Corporation* [2009] UKHL 34; [2010] 1 AC 145.

100. *Mosley* v *United Kingdom* (2011) 53 EHRR 30.

101. See the extraordinary attack on Mr Justice Eady by Paul Dacre, the editor of the *Daily Mail*: "Mail editor accuses Mosley judge", BBC website, 10 November 2008: news.bbc.co.uk/1/hi/uk/7718961.stm.

a so-called "super-injunction"[102] (although on the whole the courts have sensibly not permitted arguments in favour of corporate privacy to inhibit proper news reporting as opposed to celebrity gossip). Furthermore, as discussed elsewhere, Art.8 has enabled business to challenge state powers to inspect and seize business assets, and may lead to improved protection for confidential business assets.[103] Additionally, business (including the media) has been fortunate that the right to freedom of expression in Art.10 has not negated its ability to protect and enforce intellectual property rights, in particular, copyright and trade marks.[104] The impact of Art.10 has so far not been very significant apart from the establishment of a somewhat higher threshold for obtaining interim injunctive relief.[105] All in all, aside from a sensible restraint upon excesses of some sections of the media, the HRA cannot be viewed as imposing increased restrictions on the use of business assets.

4. Delivering certainty

The function of contract law is perceived in different ways. Some argue that its purpose is to promote economic efficiency.[106] Others say that altruism should be the underlying rationale and, indeed, that contract law should be a vehicle for the distribution of wealth (from rich to poor).[107] These views are unlikely to be applauded by business and indeed there is some empirical evidence[108] that many business people pay little attention to doctrinal legal rules when either negotiating contracts or enforcing them. Yet those who do address their minds to the question of what laws are most suitable to business dealings consider that legal contractual rules should be clear and certain, with easily enforceable remedial options, coupled with a freedom to negotiate terms with little interference by the courts or the legislature. This approximates to the classical model of contract theory, where, as Professor Atyiah has put it, "contract law is seen as an instrument of market planning".[109]

102. On which see the recent authoritative report: Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice* (2011).

103. See *post*, text to fn.142. In *BKM Ltd* v *BBC* [2009] EWHC (Ch) 3151: one company whose poor standards in its care homes were about to be exposed by the BBC relied (it might be thought somewhat opportunistically) on the right to privacy of the residents in their effort to prevent transmission. It may not come as a surprise to learn that the application before Mann J was unsuccessful.

104. See, eg, *Ashdown* v *Telegraph Group Ltd* [2001] EWCA Civ 1142; [2002] Ch 149, [31] (literary copyright viewed as "not normally constituting a significant encroachment on freedom of expression"); *Levi's* v *Tesco* [2002] ETMR (95) 1153 (Art.10 not impacting on rules relating to international exhaustion); *Twentieth Century Fox* v *British Telecommunications Plc* [2011] EWHC 1981 (Ch); [2012] 1 All ER 806 (Art.10 not operating to prevent granting of injunction against internet service provider).

105. See Human Rights Act 1998, s.12(3) and its interpretation in *Cream Holdings Ltd* v *Banerjee* [2004] UKHL 44; [2005] 1 AC 253; *Miss World Ltd* v *Channel Four Television* [2007] EWHC 982 (Pat). The applicant must show that he or she will "probably" (ie, "more likely than not") succeed at the trial, but even then there may be departures from this general approach.

106. For an overview see R Craswell, "In That Case, What is the Question? Economics and the Demands of Contract Theory" (2003) 112 Yale LJ 903.

107. See D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harv L Rev 1685; AT Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale LJ 472.

108. See S Macaulay, "Non-Contractual Relations in Business" (1963) 28 *American Sociological Review* 55.

109. P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979), 681.

Whilst English law has to an extent moved away from this classical model, it is fair to say that as it stands it largely meets the business requirement of certainty. There has been no widespread adoption of a general duty of good faith and there has been a firm rejection of the notion that the validity of contracts can be challenged on the general basis of "inequality of bargaining power". True, there has been some legislative control exercised over the terms that can be validly incorporated within a contract, even between businesses when using standard forms, but the results are relatively predictable and do not cause undue uncertainty. Indeed, as indicated in our introduction, some sections of smaller business will regard this control as beneficial in that it limits the ability of economically stronger businesses to impose an unfair allocation of contractual risk.[110] All in all, the current model of contract law suits business and it would not have welcomed any application of the HRA which would have had the effect of introducing new and possibly uncertain legal principles. There were some well-informed specialists who predicted far-reaching effects for the HRA in this field. Professor McKendrick wrote that "Convention rights may yet turn out to be a time bomb ticking away under the law of contract".[111] And so, what has happened since October 2000? Has the time-bomb gone off? Is it there at all?

Clearly, many provisions of the HRA are unlikely ever to have any impact on substantive contract law, either because they are directed to individual rights which are not likely to be affected by contractual arrangements or because they are procedural in effect. Thus, in *Wilson* v *First County Trust Ltd (No 2)*,[112] the House of Lords held that Art.6 was "a procedural guarantee of the right to have issues judicially determined" and could not impose any kind of new reading on the Consumer Credit Act 1974, s.127(3), a well-established provision of substantive law denying to a loan agreement the quality of enforceability. On other occasions the HRA may not have any impact simply because it is not needed, the common law having delivered the kinds of protection upon which it would have insisted—but without needing the HRA to make the change. Thus, in the old case of *Horwood* v *Miller's Timber and Trading Co Ltd*[113] (decided long before the HRA) a credit agreement was concluded on terms that were highly prejudicial to the borrower, with this party having undertaken not to change his employment, or residence, or part with any of his possessions without the lender's consent. He also went so far as to assign his salary to the lender. It has been correctly stated[114] that this factual matrix would now infringe Art.4 (prohibiting slavery and servitude), but the court in any event held that the loan agreement was contrary to public policy. Alternatively, it might have been regarded as invalid on the basis that it was an unconscionable bargain. So any unfairness and derogation from individual rights was easily resolved within the frame of accepted contractual doctrine.

110. This analysis leaves aside the extensive legislative control of consumer credit contracts, but this can be viewed as an aspect of state regulation rather than private contract law.

111. E McKendrick, *Contract Law*, 5th edn (Basingstoke, 2003), 17. The prediction is also made in the current (9th) edn (2011), 14.

112. [2003] UKHL 40; [2004] 1 AC 816. For an excellent analysis of this case, see F D Rose, "Commercial Law", ch.13 of Hoffman (*supra*, fn.10), 309–316.

113. [1917] 1 KB 305.

114. See Brownsword (*supra*, fn.35), [1.229].

Case law developments have also occurred without the HRA even after its having come into force. One (not unrealistic) suggestion[115] was that Art.8 might be engaged where a bank with no constructive notice of a husband's improper conduct in inducing his wife to give a guarantee (supported by a legal charge over the matrimonial home) seeks to repossess the family house. But in *Royal Bank of Scotland* v *Etridge*[116] it was held (without any reliance on the HRA) that the bank is fixed with the relevant constructive notice simply by knowledge that the relationship is that of husband and wife, and in practice the bank almost always has that knowledge. Additionally, the current banking procedure is for the bank to ensure that any wife giving a guarantee in respect of her husband's debts receives independent advice.

On the face of it, A1P1 appeared to have the greater capacity to remould the existing contractual framework, especially since, on one view, the denial of contractual rights in certain contexts can be a deprivation of a "possession", a term which, as we have seen, has been given a fairly wide meaning by the Strasbourg court. However, as is well known (and as was illustrated earlier in this article), that same court has long taken a fairly relaxed approach to this property right, readily permitting state interferences in ways that the starker language of other rights would not have allowed. It is not surprising, therefore, that the English courts have so far shown little inclination to apply A1P1 in a way that would effect changes to the existing contractual framework, even though the horizontal capacity of the HRA (which we have earlier discussed) would permit a development along these lines. *Mahmud Al-Kishtani* v *Shanshal*[117] is a good illustration of what is involved here. The claimant argued that there was an infringement of A1P1 because of the common law rule which denies (in some circumstances) the right of the party to an illegal contract to recover benefits conferred by the contract. In the Court of Appeal, at least, Holman J considered that the Protocol may not be engaged at all since the relevant statute deprived the claimant of any remedy whatsoever, so that he was not being deprived of a "possession". And all members of the Court of Appeal held that the statute was in the public interest because of the provisions of the statute itself (which allowed for some flexibility and discretion by the state to grant exemptions) and, significantly, in respect of our debate, the common law doctrine of illegality itself, which the court was clear was "an ancient, firmly established, well-defined and accessible principle of our law".[118] Similarly, in *Horsham Group Properties* v *Clark*,[119] it was held that the exercise of the statutory right of a mortgagee to appoint a receiver and to sell residential property pursuant to a provision in a mortgage deed does not violate A1P1, but merely "reflects the bargain habitually drawn between mortgagors and mortgagees for nearly 200 years".[120] Like business, it appears that our courts very much favour common law contact principles undiluted by the application of the HRA.

115. H Beale and N Pittman, "The Human Rights Act 1998 in English Tort and Contract Law", ch.7 of Friedman and Barak-Erez (*supra*, fn.10).

116. [2001] UKHL 44; [2002] 2 AC 773. For more detailed discussion and the commercial background, see J C Phillips, *The Modern Contract of Guarantee*, 2nd edn (England) (London, 2010), 254–274.

117. [2001] EWCA Civ 264; [2001] Lloyd's Rep Bank 174.

118. *Ibid*., [69].

119. [2008] EWHC 2327(Ch).

120. *Ibid*., [44]. Note, however, that the basis for the court's decision on the human rights point in *Horsham* was a couple of House of Lords' decisions which have since been superseded (*Manchester City Council* v *Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441), so on its precise reasoning the ruling may be open to doubt. Additionally, and surprisingly, there was also no discussion of Art.8.

One area of contract law, however, has seen a great deal of activity. There was from the outset an immediate potential impact of the HRA because of the widespread and increasing practice of the public sector contracting out its functions to the private sector. Were such private contracting parties within the remit of the HRA as public bodies without the need to resort to any kind of horizontal application, direct or indirect? Section 6(3)(b) defines public authority as including "any person certain of whose functions are functions of a public nature". Section 6(5) then further explains that, "in relation to a particular act, a person is not a public authority by virtue only of subsection 3(b) if the nature of the act is private". Business therefore needed to be prepared for the HRA to apply and to regulate its activities if it was acting as someone "certain of whose functions are functions of a public nature", as opposed to performing a purely private act (in which case it was horizontality—discussed above—or nothing).

No further guidance appeared in the statute as to what might be entailed in these terms. In particular there was no schedule of public authorities for the purpose of the Act or any kind of deeper indicator as to what a "public function" might be. Early case law oscillated between expansive and narrow readings of the provisions. Business must have been initially relieved (and no doubt also somewhat surprised) as the court rulings tended in an ever-narrower direction, and especially when it was held in the House of Lords decision of *YL* v *Birmingham City Council*,[121] that a private company (Southern Cross) was not acting as "someone certain of whose functions are functions of a public nature" when providing residential care and accommodation to the residents through individual contractual arrangements which it had entered into with them. This was so even though Southern Cross was also acting pursuant to a contract with a local authority concluded in order to fulfil its statutory duty to provide residential accommodation to those in need and when the cost of care was being paid (in the main) by the Council. Whilst (as all members of the House of Lords agreed) the factors to be taken into account in determining whether or not an act is "public or private" are varied (and will include the extent to which the body carrying out the relevant function is exercising statutory powers and is publicly funded), for the majority a significant element was the fact that the services were being provided by a private company for profit. Lord Scott of Foscote said this:[122]

> "Southern Cross is a company carrying on a socially useful service for profit. It is neither a charity nor a philanthropist. It enters into private law contracts with the residents in its care homes and with the local authorities with whom it does business. It receives no public funding, enjoys no special statutory powers and is at liberty to accept or reject residents as it chooses . . . and to charge whatever fees in its commercial judgment it thinks suitable. It is operating in a commercial market with commercial competitors."

Similarly Lord Mance (albeit more shortly) emphasised that, "in providing care and accommodation, Southern Cross acts as a private profit earning company".[123]

Followers of human rights issues will be very much aware that the majority view in *YL* v *Birmingham City Council* has been stridently criticised, with widespread support for the minority view that the company undertook functions of a public nature (even though they were undertaken by a private company) because it was a "task for which the public, in the

121. [2007] UKHL 27; [2008] 1 AC 95.
122. *Ibid*., [26].
123. *Ibid*., [116].

shape of the State, have assumed responsibility at public expense . . . and in the public interest". The issue took on added poignancy with the revelation by BBC's Panorama programme in 2010 of widespread abuse of residents in at least one of the company's care homes, inhuman and degrading treatment that according to the majority in *YL* would not (in this technical HRA sense at any rate) have been in breach of their human rights. Fortunately for the integrity of human rights law, by then there had been specific legislation[124] expanding the term "public authority" to reach the kind of situation that had given risen to the facts in *YL*. There has been further pressure from the Joint Committee of Human Rights to undo what it has described as the unnecessarily limiting effect of the decision.[125]

It will not come as a surprise that business is not as keen as the Joint Committee on undoing the broader effects of *YL*. The commercial intuition is that private business, operating as it does in a competitive environment, should be treated differently from the public sector in terms of the controls placed upon it, and that this should be the case even when it is operating in a market which has been created by a policy of privatisation to which Government has committed itself. Yet, on closer inspection, business did not universally applaud the decision, being concerned that the range of factors and the broad contextual approach in determining whether or not the function was public or private meant that future decisions (involving different forms of public sector involvement) would be difficult to predict, potentially necessitating expensive litigation.[126] This uncertainty provides an on-going difficulty for business. Indeed, it might be argued that a better outcome for business would have been the certainty of an expansive application of the HRA via s.6(3)(b), or even for that matter (recalling our earlier discussion) a horizontal application of the HRA to all commercial activities. The rights in the HRA are not so frightening that they must at all costs be avoided, especially where this must then involve the uncertainty inherent in endless nit-picking about whether this or that function is or is not sufficiently public to attract the Act or so private that it can avoid doing so after all. The rational approach for business is surely to assume application of the HRA in all its activities and leave expensive litigious hair-splitting to commercial colleagues less able or willing to take the longer view.

There is one other area of importance to business where the HRA has had some effect, and which accordingly merits specific mention here: contracts of employment. As the HRA, in the main, governs individual rights, it might have been expected that it would have a direct impact[127] on employees' rights with a consequent negative impact on certainty. However, its influence on contracts of employment has from the outset been

124. Health and Social Care Act 2008, s.145.

125. Joint Committee on Human Rights, *Fifteenth Report* (HL 81, HC 440, Session 2007–2008, HMSO, 2008), 41–48. See further Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 77, HC 410, Session 2006–2007, HMSO, 2007): Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 39, HC 382, Session 2003–2004, HMSO, 2004).

126. See the views expressed in Joint Committee on Human Rights, *Any of our Business? Human Rights and the Private Sector* (*supra*, fn.12), [140–141].

127. There has, of course, been significant indirect impact arising from Convention rights, as well as more specific EU legislation, eg, the Employment Equality (Sexual Equality) Regulations 2003 (SI 2003/1661); Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660). The breadth of this legislation leaves little scope for reliance on the Human Rights Act. See generally H Oliver, "Discrimination Law", ch.10 of Hoffman (*supra*, fn.10).

controlled by its jurisdictional limitations. The Employment Tribunal has no power to entertain claims directly based on a breach of the HRA and employees of private enterprises (not being "public authorities") were precluded from bringing a claim in the courts under the ordinary routes laid down in the HRA itself.[128] Nevertheless, it is now accepted that violations of the HRA may be relevant to the determination of whether a dismissal is unfair for the purpose of the HRA. Indeed, Mummery LJ was of the view (perhaps alarmingly for private business) that "in the case of such a basic employment right there would normally be no sensible grounds for treating public and private employees differently".[129] When substantive issues relating to the HRA have arisen in the context of dismissal proceedings, however, the general pattern of decisions appears quite favourable to business. So, where the employee's allegation is that a change in working hours or the requirements of a company dress code interferes with the right to freedom of religion (Art.9), courts and tribunals appear readily to accept that solutions proposed by employers to accommodate the employee's needs are reasonable and proportionate.[130] It is true that in the future other issues may arise in relation to the interaction of employment law and the HRA. Employees dismissed for disclosing information in breach of a confidentiality clause may invoke the right of privacy and those refusing to move to another geographical location contrary to a mobility provision may rely on the right to respect for family life (both rights being capable of being deduced from Art.8). But so far it cannot be said that the HRA has been applied so as adversely to affect employers' rights pursuant to contracts of employment. Indeed, it has been rather responsive to its needs. From the perspective of three leading employment lawyers (writing in 2005), the implications of the HRA for employment law were not "particularly encouraging".[131] In 2011 business should be quite pleased with the outcomes. It may have found an unexpected friend.

We can conclude from the foregoing that, aside from the circumstances where business is undertaking a public function, there is little evidence that the existing contractual framework will be changed significantly by the HRA. There are, however, a couple of lurking dangers for business, which should not be dismissed. The first is that it is arguable that the courts, as public authorities, should not only construe legislation and the common law in a way that is compatible with Convention rights, but that they should also engage in the same exercise in respect of the terms of the contract itself.[132] So, for example, if the terms of the contract provide that a lender can enforce a charge over commercial property (leading to repossession of the property) upon a breach of condition, the accepted position in English contract law is that the lender can proceed to enforcement if there is any breach of that term, however trivial. But an application of A1P1 might lead to an interpretation of the term which requires proof of the serious breach, leading to less certainty as to when a contract can be terminated. It should be said, however, that the courts have not yet interpreted contractual terms in the light of A1P1 and, if the general approach taken so far

128. See the position summarised in *Copsey* v *WBB Devon Clays Ltd* [2005] EWCA Civ 932: [2005] ICR 1789.

129. *X* v *Y* [2004] EWCA Civ 662; [2004] ICR 1634, [57].

130. *Copsey* v *WBB Devon Clays Ltd* [2005] EWCA Civ 932; [2005] ICR 1789; *Eweida* v *British Airways Plc* [2010] EWCA Civ 80; [2010] ICR 890; *Cherfi* v *G45 Security Services* [2011] UKEAT 0379_10_2405.

131. H Collins, K D Ewing, A McColgan, *Labour Law Text and Materials*, 2nd edn (Oxford, 2005), 561. See also, generally, H Oliver, "Discrimination Law", ch.10 of Hoffman (*supra*, fn.10).

132. See Brownsword (*supra*, fn.35), [1.235].

is any guide, are unlikely to do so, at least in a way that affects the parties' agreement.[133] Such an approach could also justifiably be regarded as in conflict with the well-developed, contextual rules for the construction of contracts and as having the effect of imposing a bargain upon the parties to which they have not agreed.

Secondly, there are those who argue in favour of a "strengthened horizontal" application of Convention rights to private law, so that there will be an obligation upon the courts to create "tools" for "the absorption of constitutional human rights into private law".[134] Indeed, as we have seen, the impact of Art.8 is that the action for breach of confidence has developed to a point where there is now no requirement to show a relationship of trust and confidence. In contract one possible "tool" for the development of Convention principles might be reliance on implied terms in accordance with the usual criteria for implication; that is, they must be necessary and reasonable. One suggestion is that "a robust reading of indirect horizontality" would permit the incorporation of an implied duty of good faith.[135] This would then open up the way for the engagement of Articles of the HRA which might limit the freedom to contract, for example, a party's refusal to contract with another person because of his/her political beliefs would presumably engage Art.9 (freedom of thought). It is not probable that this development will flow from the HRA. The English judiciary is in general opposed to the incorporation of the duty of good faith into English law[136] and (unlike the law in respect of privacy and confidential information) there is no specific Convention right in the HRA which has an immediate and direct connection with such duty.

5. Managing disputes effectively

At first glance it might have been thought that the HRA posed a serious challenge to the desire that most businesses have to settle their legal arguments speedily and effectively. After all, Art.6(1)'s guarantee of procedural fairness in the "determination of civil rights" is extensive, suffocatingly so from the perspective of many commercial enterprises who find themselves caught up in such disputes. However, the reality is that the HRA has little or no effect here. This is on account of the operation in English domestic law of the Strasbourg court's well-developed principle of waiver, under which certain rights can be given up (and Art.6(1) is the paradigmatic example in the case law) so long as the decision to do this is unequivocal and that the waiver in issue does not "run counter to any important public interest".[137] Thus, in *De Placito* v *Slater*,[138] the appellant failed in his argument that an undertaking he had given as part of a compromise was a breach of his

133. See *Drake Insurance Plc* v *Provident Insurance Plc* [2003] EWCA 1834; [2004] QB 601, [88–89], *per* Rix LJ, stressing the need for certainty. Some earlier flirtation with the application of Convention notions of proportionality to remedies for non-disclosure in the context of insurance contracts has not been subsequently followed. See the excellent discussion by FD Rose, "Commercial Law", ch.13 of Hoffman (*supra*, fn.10), 316–320.

134. A Barak, "Constitutional Human Rights and Private Law", in Friedmann and Barak-Erez (*supra*, fn.10), 30.

135. Brownsword (*supra*, fn.35), [1.231].

136. See, eg, extrajudicially, Mr Justice Vos, "Men Behaving Badly or Why is Good Faith in the Contract Process shunned by English Contract Law?" (Paper presented to Chancery Bar Association Conference, 21 January 2011).

137. *Håkansson and Sturesson* v *Sweden* (1990) 13 EHRR 1.

138. [2003] EWCA Civ 1863; [2004] 1 WLR 1605, esp. [51].

implied right to a court under Art.6. In *Stretford* v *Football Association*[139] the Court of Appeal sought to close down this area to further litigation, stressing both the availability of the doctrine of waiver but also drawing attention to the range of remedies available to disputants either within the Arbitration Act 1996 (where the dispute was governed by its terms) or at common law.[140] What promised to be a rich source of litigation when the HRA was enacted has never really got going: rights may be inalienable in the world of rhetoric, but this has proved not to be the case in the realm of law.[141]

If the Act has been neutral so far as dispute resolution is concerned, then it has been actually helpful when it has come to resisting the enforcement of the law by the state. As we have already noted, the HRA resolutely refuses to distinguish between natural and legal persons for the operation of most of the Convention rights. In taking this line it is following the jurisprudence of the Strasbourg court. Decisions at European level mean that Art.8 now embraces the right to respect for the privacy of a company's registered office and business premises, thus enabling business to challenge powers given under national legislation to inspect and seize business documents.[142] This position has been taken despite judicial and academic views that in some contexts the protections of privacy should not extend to companies "because they have no sensitivities to wound and no selfhood to protect".[143] Whilst this is obviously true, it would be prejudicial to business in the context of the application of the HRA to draw a sharp distinction between companies and individuals. In any case, in many situations this dichotomy is fallacious because the corporate entities involved in litigation are no more than legal vehicles (established for legitimate purposes of limiting liability or for tax reasons), designed to disguise the fact that the business is operated by an individual, or a small number of individuals. Yet of course the advantages of the HRA in restricting state enforcement must not be exaggerated: the courts are more than ready to allow a fair degree of discretion to state authorities in cases such as these, with (to choose one example) the unsuccessful frontal assault on seizure orders (then known as *Anton Piller* orders) surviving challenge in Strasbourg despite the court's recognition that the invasion of privacy in issue had been "disturbing, unfortunate and regrettable".[144]

139. [2007] EWCA Civ 238; [2007] Bus LR 1052; [2007] 2 Lloyd's Rep 31.

140. And, at the same time, *Sumukan Ltd* v *Commonwealth Secretariat* [2007] EWCA Civ 243; [2007] Bus LR 1075; [2007] 2 Lloyd's Rep 87. An influential High Court decision decided before these had been *El Nasharty* v *J Sainsbury Plc* [2007] EWHC (Comm) 2618; [2008] 1 Lloyd's Rep 360.

141. See *Re Blackspur Group Plc; Eastway* v *Secretary of State for Trade and Industry* [2006] EWHC (Ch) 299, where counsel's reliance on Art.6 in relation to disqualification proceedings was judicially described as "extravagant": at [36], *per* Lightman J. See FD Rose, *supra*, fn.133, for a more detailed treatment of this issue, including the extent to which, even apart from waiver, current arbitration law is broadly consistent with the underlying principles and policies of the Convention.

142. *Niemietz* v *Germany* (1993) 16 EHRR 97; *Societe Colas Est* v *France* (2004) 39 EHRR 17 (extending Art.8 to corporations); *Varec SA* v *Belgium* [2008] 2 CMLR 24 (concluding business secrets fell within Art.8 for this purpose).

143. *R* v *Broadcasting Standards Tribunal, ex p BBC* [2001] QB 885, 900, per Mustill LJ. Similarly Hale LJ (as she then was) at 899; *Douglas* v *Hello (No 3*) [2007] UKHL 21; [2008] 1 AC 1, [118], per Lord Hoffmann, [256] per Lord Nicholls of Birkenhead. See also Aplin, *supra,* fn.47.

144. *Chappell* v *United Kingdom* (1989) 12 EHRR 1, [63], agreeing with the Court of Appeal's description of an aspect of the case in these terms.

Most public law decisions involving the imposition of a penalty can be taken to be presumptively within "the civil right" in Art.6(1).[145] For the most part, so long as judicial review is thought to be doing its job, which has generally been the case with regard to these cases in so far as they have involved the business sector, then the impact of the right has not been as great as perhaps some businesses—seeking to challenge regulatory decisions inhibiting their use of assets—would have liked. But there may be exceptional cases where Art.6 creates additional rights for business. In relation to proceedings to enforce antitrust provisions, the fact that punitive penalties may be imposed means, on one view,[146] that they amount to "core" criminal proceedings, thus necessitating the beefed-up protection accorded criminal matters in Art.6(1), including an initial determination by an independent tribunal (and not merely a guarantee of later judicial review). In a recent government consultation paper examining possible changes to existing procedures, two out of the three options put forward in fact proposed the establishment of such a tribunal (which represents a change from the present scheme).[147] If adopted, the HRA will have had a direct influence on the form of antitrust enforcement structures, with the advantage that business will be able to contest the complaint in an initial hearing, rather than simply challenge an administrative determination that has already been made.

D. CONCLUSION

We end this necessarily broadly drawn survey by returning to the questions we posed at the introduction, seeking now to offer some tentative answers—tentative not only on account of the vast field we have sought to cover but also because the judicial record can of course change and new impacts forcing fresh readings may be just around the litigious corner. First, we asked how has the HRA impacted on business? The answer would appear to be not a very great deal. Whilst the legislation (perhaps surprisingly) has led to some identifiable advantages to business, on the whole it has been neutral so far as commercial enterprises have been concerned, with the judges not permitting its wide language to tempt them into positions either unduly aggressive or over-conciliatory towards enterprise. Indeed, a neutral impact is a very positive outcome for business. It cannot legitimately complain that the HRA has resulted in another layer of regulation or unacceptable uncertainty. Neither the creation of "human property rights" nor the reworking of contract law anticipated by some has occurred. The licence for inconvenient employee individuality has not materialised. Even the decision to step outside judicial due process altogether (via arbitration agreements) has not produced any HRA noise—rather we have seen something of the opposite, with the judges performing intelligent analytical tricks to show why, here, the Act should never apply. In this as in other areas there appears to be

145. See, eg, taxation penalties (*Bassysillan Community Forum* v *Commissioners For Her Majesty's Revenue Revenue and Customs* [2011] UKFTT 257 (TC), following *Jussilla* v *Finland* (2007) 45 EHRR 39) and disciplinary proceedings brought by the Securities and Futures Authority (*R (Fleurose)* v *Securities and Futures Authority* [2001] IRLR 764.

146. See generally, J Aitken and A Jones, "Reforming a World Class Competition Regime: The Government's Proposal for the Creation of a Single Competition and Markets Authority" [2011] Comp Law 95, esp. 104–107.

147. *Ibid*., 108–116. See in detail Department for Business Information and Skills, *A Competition Regime for Growth: a Consultation on Options for Reform* (March 2011).

something of a basic judicial intuition at work: if a case is perceived to be one involving the interests of business or commerce (as opposed to a mainstream civil liberties matter such as free speech or anti-terrorism law), then the judges seem to be starting their reflections with an assumption against the interests of claimants of this sort. Something like this appears to have occurred in *AXA Insurance*, just as it did in earlier Strasbourg decisions involving rich "victims" such as the Duke of Westminster[148] or the owners of shipbuilding yards.[149]

But this is not to say, to answer our second question from the introduction, that the HRA has been damaging to the goals of commerce. Losing cases you have launched yourself to undermine a hostile governmental act is not the same as being put in a worse position by the actions of others when such actions would not have been possible but for the existence of the HRA. The latter has happened only very rarely. Perhaps it is only those sectors of the media whose profits used to be substantially improved by reportage of the private lives of public figures who can unequivocally say, because of the effect of Art.8, that the Act has (to paraphrase our third introductory question) inhibited their capitalist enterprise. But even here, as we have seen, other sectors of the media have benefited from the HRA's loosening up of libel laws in the name of free speech and, additionally, the application of Art.8 has also led to legal developments which benefit business generally.[150] In any event, as we observed earlier, there can often be a broad public interest in controlling profit and many would believe (as we do) that cracking down on press invasiveness of this sort falls into just such a category.

Our final question was as to whether the HRA might even have "worked to the private sector's advantage, tying interfering officials up in knots". There is no doubt that all public authorities now have a wider set of obstacles to negotiate when they wish to act than was the case in the past. If a Convention right is involved in a decision an official has to make, then care needs to be taken to be rights-compliant and of course this slows the administrator down, and leaves him or her more vulnerable to review. That said, the HRA has not in practice produced reams of new knots for officials to unravel before they can move against business. The controls that were already in place before the HRA—a presumption against abuse of rights; a strong tradition of judicial review; a keen commitment to the principle of legality—render the new constraints in the measure more duplicatory of what was already there than draconian in their devising of new obstacles to official action. And the judicial intuition against using the HRA in the business context just referred to has always been on stand-by, ready to help out authority where the HRA has threatened to do serious mischief. The one exception to this broadly pro-government story—admittedly a potentially huge exception—is the ruling on damages in the *Infinis* case. If readings of statutory powers by public authorities are at risk of being retrospectively overruled by courts, and if these official mistakes are then to be characterised as breaches of human rights (in particular the right to property) warranting the payment of compensation, perhaps on a large scale, then the HRA will certainly have a major impact which will be likely to be very positive for the businesses concerned, less so for the wider public (and tax-payer) interest. It remains to be seen whether this line of cases will bed down.

148. *James* v *United Kingdom* (1986) 8 EHRR 123.
149. *Lithgow* v *United Kingdom* (1986) 8 EHRR 329.
150. As discussed above: see text to fnn 43–49, 142.

There has in recent years been quite a head of steam built up against the HRA by certain media and some political parties. The critique has sometimes associated the HRA with other concerns about the inhibiting effect of health and safety legislation (the "nanny state") and the impact of equality legislation ("political correctness gone mad"). We do not doubt that there are reasons why one could credibly argue to repeal the HRA, just as one could choose passionately to defend it. One could even argue that the HRA is neither here nor there, given the fast expanding human rights jurisdiction being developed by the European Court of Justice.[151] But it seems to us that the one thing that cannot really be done is to argue that the HRA ought to go because it is damaging to the business interest. It is sometimes the friend of business and sometimes its foe—but more often it is just a remote relative.

151. On which see A O'Neill, *EU Law for UK Lawyers* (Oxford, 2011), ch.6.