



A Parliamentarian's Guide
to the Human Rights Act

LIBERTY
PROTECTING CIVIL LIBERTIES
PROMOTING HUMAN RIGHTS

Published by
The National Council for Civil Liberties

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First published September 2010 by Liberty

Liberty
The National Council for Civil Liberties
21 Tabard Street
London SE1 4LA

www.liberty-human-rights.org.uk

ISBN: 978-0-946088-58-4



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Preface

Welcome to Liberty's first Parliamentarian's Guide to the Human Rights Act. This book is intended to inform and explain the legislation that protects our fundamental freedoms – how the Act works, what the rights mean and dispelling the myths that have sprung up around it.

Liberty (the National Council for Civil Liberties) is a cross-party, non-party organisation that has been at the heart of the struggle for rights and freedoms in Britain for over 75 years. Through times of poverty and plenty, we have learned that our rights are not to be chosen or dropped on an electoral whim but are the golden thread that runs directly from Magna Carta to the Human Rights Act – protecting the vulnerable from the powerful and ensuring even those who govern are accountable to the rule of law.

The values in the Act mirror those found in similar legislation throughout the free world. Free speech, fair trials, respect for private life and the prohibition on torture are values which distinguish democrats from dictators and terrorists. Contrary to a great deal of media reports, there is nothing in the HRA which sets the criminal above the victim. Nearly all of the rights are informed and qualified by the need for public protection and many human rights' cases have involved victims challenging governments for gross failures to protect them.

The Human Rights Act is neither magic wand nor computer programme. It does not end vital debates about competing rights and freedoms. It does, however, provide the vital framework for such debate amongst people of good will.

Shami Chakrabarti

Director of Liberty

September 2010

Introduction

The Human Rights Act 1998 (HRA) is an integral part of the British constitution. It impacts on many areas of law in the UK and on the actions of all public bodies. It provides for greater openness and transparency in government decision-making and acts as a crucial check on executive power. It has been recognised worldwide and used as a model for Charters of Rights in other jurisdictions. Yet, despite its relative simplicity it is often misunderstood and misrepresented.

This Guide to the Human Rights Act is intended to assist parliamentarians in understanding how the HRA operates in practice and what the rights contained within it mean. We hope that this Guide will be of use to parliamentarians in fulfilling all of their many and varied functions, whether scrutinising new legislation and government policies or advising constituents.

Casework and surgeries are, of course, a significant part of an MP's workload. In making representations on behalf of constituents, an understanding of what the HRA does and does not do is invaluable. In addition, many parliamentarians are also involved with parliamentary committees, All Party Parliamentary Groups, reviews and inquiries. All of which will likely involve discussion and the need for knowledge of the HRA and the rights contained within it.

This Guide sets out the origins of the HRA and explains how it operates, looking at the respective roles of Parliament, the courts and public authorities. It provides an up-to-date and easy to read explanation of all the rights contained in the HRA together with case studies demonstrating how the rights operate in practice. It also addresses the most common and prevalent myths and misunderstandings about the HRA – separating fact from fiction. Included at the end of the Guide is an updated version of the full text of the HRA for ease of reference.

We trust that you will find this to be a useful and handy reference guide to an Act which protects and promotes fundamental rights and freedoms in the UK.

Background to the HRA

The UK has a long and proud history of recognising rights and freedoms. From Magna Carta in 1215, to the Bill of Rights of 1689, to the development of common law principles, it is clear that Britain can legitimately lay claim to helping to develop and foster ‘the spirit of liberty’.

However, Magna Carta is silent on the right to be free from undue State interference in our personal life. The Bill of Rights of 1689 says nothing about freedom from discrimination or the right to free expression. And any legislation can override centuries of the common law in an instant.

Universal Declaration of Human Rights

It was not until the Universal Declaration of Human Rights (UDHR) of 1948 that human rights were formally recognised in international law. Following the horrors of the Second World War, the international community recognised in the Universal Declaration the inherent dignity and equal rights of all people and the need to protect human rights.

European Convention on Human Rights

The European Convention on Human Rights (ECHR), adopted two years after the UDHR was proclaimed, sought to take the first steps to enforce many of the rights contained in the UDHR.

The UK played a major role in proposing, negotiating and drafting the ECHR and the Convention was ultimately adopted by the Council of Europe – a Council first proposed by Winston Churchill during WWII and established in 1949.

The UK signed the ECHR on 4 November 1950 – the day the Convention was formally adopted – and became the first state to ratify the Convention on 8 March 1951.

Under international law the UK has been bound by the ECHR since 1953 when the Convention came into force. The people of the UK have had the right to take cases to the European Court of Human Rights in Strasbourg since 1966.

Protection in UK law

Despite being bound at an international level, for many years British judges and public authorities were not bound to observe these human rights as a matter of UK law. Anyone claiming that the UK Government (or police or social services etc.) had breached their fundamental rights had to make a claim before the Strasbourg court.

From the 1970s to 1998, frequent calls were made for the UK to have its own Bill of Rights – a law that would protect and promote civil liberties and human rights in the UK which was enforceable in British courts. Calls for such a law came from all sides of the political divide.

A Government White Paper in October 1997 proposed the introduction of a Human Rights Bill. The proposed Bill would incorporate the ECHR into UK law.

The Human Rights Bill was introduced into Parliament on 23 October 1997 and the Human Rights Act (the HRA) received Royal Assent on 9 November 1998. The HRA completely came into force on 2 October 2000.

How does the HRA work?

The HRA provides that the human rights contained in the European Convention on Human Rights form part of UK law in three ways:

- 1 All UK law must be interpreted, so far as it is possible to do so, in a way that is compatible with HRA rights.
- 2 If an Act of Parliament breaches these rights the courts can declare the legislation to be incompatible with rights. This does not affect the validity of the law – the HRA maintains parliamentary sovereignty as it remains up to Parliament to decide whether or not to amend the law.
- 3 It is unlawful for any public authority to act incompatibly with human rights (unless under a statutory duty to act in that way), and anyone whose rights have been violated can bring court proceedings against the public authority.

It is clear from this that the HRA is not the same as, for example, the US Bill of Rights or the German Basic Law, which entrench rights and allow courts to strike down incompatible legislation.

Instead, the HRA preserves the long-held doctrine of parliamentary sovereignty – as Parliament alone can decide whether or not to repeal or amend legislation. This is in stark contrast to the European Communities Act 1972 which allows UK law to be overridden if it conflicts with directly enforceable EU law.

The HRA adopts a ‘dialogue model’ – where the courts have been invited by Parliament to indicate when legislation is incompatible with human rights but allows Parliament to decide if, and how, it will respond.

In interpreting questions about human rights the courts must ‘take into account’ any decisions made by the European Court of Human Rights but only to the extent that the Court considers them to be relevant. This does not bind UK courts – rather it requires the courts to take into account relevant judgments, much like they do under common law rules of statutory interpretation.

Parliamentary procedure

Under the HRA, and with the establishment of the Joint Committee on Human Rights, Parliament has a significant role to play in upholding and promoting fundamental rights and freedoms.

Statements of Compatibility

Section 19 of the HRA requires any Minister who is in charge of a Bill in both Houses of Parliament to lay, before the Second Reading of the Bill, a statement which says that in the Minister's view the Bill is either compatible with human rights, or that it is incompatible but that the Government nevertheless wishes to proceed with the Bill.

This is an executive statement giving the personal opinion of the Minister introducing the Bill – it is not binding on Parliament or the courts. It is intended to encourage Ministers and the civil service to consider the human rights implications of proposed legislation before it is introduced.

The statement of compatibility can often act as a trigger for prompting debate within Parliament about the compatibility of draft legislation. Explanatory Notes (which accompany Bills) also now include detailed information as to why the legislation is considered to be compatible with human rights. This means that detailed policy justification for proposed measures is provided which in turn helps to inform parliamentary debate.

Joint Committee on Human Rights

The Joint Committee on Human Rights (JCHR) first met in January 2001. It is a Parliamentary Committee consisting of 12 members appointed from both the House of Commons and the House of Lords. Its establishment was intended to coincide with the coming into force of the HRA.

The JCHR's task is to consider human rights issues in the UK, by scrutinising draft legislation to consider compatibility with human rights. It also undertakes thematic inquiries on issues relating to human rights and makes recommendations to Parliament. The JCHR also looks at the Government's response to human rights judgments and scrutinises any Remedial Orders that amend legislation in response to these judgments.

The JCHR plays an extremely important role in scrutinising legislation and in ensuring there is greater transparency in government decision-making. The

Committee's reports and expertise are often cited in parliamentary debates and its work ensures that Parliament has an informed voice on human rights that is independent of the Executive.

Remedial Orders

If a court has found UK legislation to be incompatible with human rights, this does not affect the validity of the legislation. It is up to Parliament to decide whether to amend the relevant legislation. Section 10 and Schedule 2 of the HRA provide a mechanism whereby amendments can be made by a Remedial Order. If a Minister considers there are compelling reasons to do so, he or she can make an order to amend legislation in order to remove an incompatibility recognised by the courts. A draft of the Order must be laid before Parliament for 60 days and then approved by resolution of both Houses before it can be made. The only exception is in respect of urgent orders which allow for an interim order to be made which will have no effect if not approved by both Houses within 120 parliamentary days. This is intended to ensure that clear breaches of human rights can be dealt with swiftly, rather than waiting for a legislative slot which can often take months if not years.

Interpretation of legislation

Section 3 of the HRA provides:

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.

This requirement to interpret laws compatibly with human rights applies to anyone interpreting the law – be it a court or tribunal or public authority acting under the law.

This interpretation clause applies to all legislation – including laws passed before the coming into force of the HRA.

An important qualification in section 3 is the requirement that laws be interpreted compatibly with human rights only “so far as it is possible to do so”. It does not give the courts power to make new laws as any interpretation must be consistent with the Act being interpreted.

Section 3(2) of the HRA provides that this interpretative power does not affect the validity, operation or enforcement of any Act of Parliament.

If an Act of Parliament requires subordinate legislation to be made (such as Orders or Regulations) that is incompatible with human rights, that subordinate legislation will not be affected by section 3. However, if the subordinate legislation could have been drafted differently and could have complied with human rights the courts can strike down the subordinate legislation. This is similar to the courts' existing powers to strike down subordinate legislation that is outside the power of the primary Act – as subordinate legislation does not have the same status as primary legislation which has been fully considered by Parliament.

Case study

In 2004 the House of Lords used section 3 to interpret a 1977 Act compatibly with the right to non-discrimination.

Mr Godin-Mendoza lived with his same-sex partner for almost 30 years. His partner had a protected tenancy in the property they lived in. After his partner died the landlord sought to evict Mr Godin-Mendoza. Under the Rent Act of 1977 a person living with a protected tenant "as his or her wife or husband" was to be treated as if they were a surviving spouse, even if unmarried, and entitled to be treated in the same way as the protected tenant. The landlord argued that as a homosexual partner Mr Godin-Mendoza was not entitled to the same level of protection.

Using section 3 of the HRA, the House of Lords interpreted the provisions of the Rent Act as treating homosexual and heterosexual couples equally, allowing Mr Godin-Mendoza to remain in his house.

Declarations of incompatibility

Section 4 of the HRA provides that if a higher court (such as the High Court, Court of Appeal or Supreme Court) considers that a provision in an Act of Parliament is incompatible with human rights, it can make a declaration of incompatibility.

This is a declaration by the Court that it considers a particular legislative provision to be incompatible with human rights. Section 4(6) specifically states that a declaration of incompatibility does not affect the validity, operation or enforcement of the law. So the law will not automatically change as a result of a declaration of incompatibility being made. Instead, Parliament must decide whether it wishes to amend the law.

In the first ten years of the HRA being in force less than 30 declarations of incompatibility were made.

Case study

Mrs Bellinger was born in 1946 and registered as a male. However, from a young age Mrs Bellinger saw herself as being female, lived as a woman from 1975 and in 1981 underwent surgery for gender reassignment. In 1981 Mr and Mrs Bellinger went through a ceremony of marriage. However, the law as it stood stated that a marriage would be void unless the parties are 'respectively male and female'. Mrs Bellinger sought a declaration that the marriage was valid.

The House of Lords held that the law could not be interpreted as applying to transsexuals, as using the interpretative power under section 3 of the HRA in this case would result in a major change in the law and give marriage a 'novel and extended meaning'. The House of Lords considered it was up to Parliament to make any changes to the law and therefore issued a declaration of incompatibility.

As a result of this decision and an earlier European Court of Human Rights decision, the Government introduced, and Parliament enacted, the Gender Recognition Act 2004 which allows those who have undergone gender reassignment the chance to have their new gender legally recognised.

Duty on public authorities

Section 6 of the HRA provides:

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

This obligation does not apply if under the law the public authority could not have acted differently.

What is a public authority?

A public authority includes a court or tribunal and any person whose functions are functions of a public nature.

People and bodies that exercise functions of a public nature include:

- police officers;
- local authorities;
- Government departments;
- statutory bodies (for example the Information Commissioner's Office; the Serious Organised Crime Agency, the Office of Fair Trading etc.);
- prison managers and staff;
- some private bodies in certain circumstances if contracted to carry out work on behalf of a public authority – e.g. if publicly funded to perform work that is work generally carried out by government (so for example, privately run prisons are considered to be public authorities);
- nursing and personal care accommodation providers (designated under the Health and Social Care Act 2008).

What is not a public authority?

- Parliament, and anyone exercising a function in connection with proceedings in Parliament (such as MPs and peers in Parliament);
- anyone acting in a private capacity (for example a police officer in his or her private life);
- a private company not exercising functions of a public nature – i.e. a private company that receives no public funding, is under no statutory obligation to perform its functions etc.

One of the main aims of the duty on public authorities to respect human rights is to ensure that all decisions and actions taken by such bodies properly take into account individual rights and fundamental freedoms.

Remedies for breach by a public authority

If a public authority has been found to have breached human rights the court has the discretion to:

- Grant traditional ‘judicial review’ relief as the courts do in other civil cases – reviewing the lawfulness of a decision by a public authority. If the court concludes that a decision is unlawful it can, among other things, declare that the public authority acted unlawfully, cancel the decision or prevent a public authority from acting in a certain way. In most situations if a decision is found to be unlawful the court will remit the issue back to the public authority to make the decision again.
- Award compensation to the extent the court considers it necessary, just and appropriate (see section 8 of the HRA). The courts often take into account the conduct of the person seeking compensation in deciding whether to grant compensation.

This is in addition to the courts’ power to make a declaration that the law (rather than the decision made under the law) is in breach of human rights.

Case study: judicial review

In 2005 Mr Wood, an anti-arms trade campaigner, attended the AGM of a company involved in organising trade fairs for the arms industry. The police, who were aware that anti-arms campaigners were likely to attend the AGM, determined there may be unlawful activity and demonstrations. As a result, police were positioned around the venue and an official police photographer took photographs of people entering and leaving it. A number of photographs were taken of Mr Wood, and police followed him after he left the AGM to try to ascertain his identity. There was never any suggestion that Mr Wood had acted in any way unlawfully, either in attending the AGM, during it or after it had finished.

However, the photographs taken of Mr Wood were then retained by the police for future use by the police Public Order Branch. These images were liable to be distributed to police officers at future public events. Police guidelines allowed for the retention of such images for at least a year and longer if it was determined that they had ‘ongoing significant intelligence value’ (which was left undefined).

Mr Wood brought judicial review proceedings under the HRA against the police force that held his images. The Court of Appeal held that the police had no obvious cause to take Mr Wood’s photograph and retaining the photos breached his right to privacy under Article 8 of the HRA. As a result the Court ordered the photographs to be destroyed.

Case study: compensation

On Boxing Day 2005 a violent altercation took place in a North London café, following which a 22 year old man's ear was bitten off. The victim reported the matter to the police and just over a week after the incident gave a detailed witness statement and identified his alleged attacker in an identification parade. The victim alleged that following this incident he was threatened with reprisals by his attacker. A man was arrested shortly afterwards and charged with wounding with intent to cause grievous bodily harm and witness intimidation.

On the eve of the trial the prosecution effectively dropped the case on the basis that the victim could not be put before the jury as a reliable witness as he had a mental health condition, namely a history of psychotic illness. As a result no evidence was offered against the alleged attacker who was subsequently acquitted on all counts.

The High Court held that the decision to terminate the prosecution of a serious assault on the ground that the victim could not be put before the jury as a credible witness because of his mental health condition breached Article 3 of the HRA – the prohibition on inhuman and degrading treatment. The decision not only humiliated the victim and discriminated against him, but by dropping the case the State had failed to provide proper protection against serious assaults through the criminal justice system. As a result of this finding the victim was awarded £8,000 in compensation.

What do the rights mean?

There are fifteen substantive rights contained in the HRA. Some are absolute rights that can never be limited – but most can be limited in certain circumstances.

All the rights are to be read together with Article 17 of the ECHR which provides that none of the rights give anyone a right to engage in any activity that aims to destroy other people’s rights and freedoms or limit them in ways not set out in the Convention.

In addition, section 11 of the HRA provides that nothing in the HRA limits any pre-existing rights a person may have outside of the rights in the HRA. This means that the rights contained in the HRA represent a ‘floor’ for rights protection alongside which pre-existing rights can continue to exist and on which other rights can be built. The rights in the HRA are in no way a ceiling for rights protection.

Most of the rights and freedoms found in the HRA can be limited. The types of limitations allowed are generally set out in the description of the right itself. For example, the prohibition on forced labour does not apply to prisoners forced to perform work within the prison, and the right to life is not breached by a police officer acting in self-defence.

Absolute rights

There are a few absolute rights that can never be limited in any circumstance. Infringements on absolute rights can never be justified in the public interest. The following rights are considered to be absolute rights:

- the prohibition on torture and inhuman and degrading treatment;
- the prohibition on slavery;
- the right to a fair trial;
- the right not to be charged or convicted of a retrospective criminal offence (i.e. charged for conduct which was not criminal at the time it occurred).

Limiting rights

All other rights can be expressly or impliedly limited or qualified.

The following rights can be limited in narrowly defined circumstances (further detail on the limitations of each of these rights can be found on subsequent pages):

- right to life;
- the right to liberty;
- the right to marry;
- protection of property;
- the right to education;
- the right to free elections.

The following rights are qualified rights, which can be limited in the circumstances set out in the text of the right – which generally requires that any limitation be set out in law, seek to achieve a legitimate aim, and be necessary in a democratic society and proportionate:

- the right to respect for private and family life;
- freedom of religion;
- freedom of expression;
- freedom of assembly and association.

Limitations to be lawful

Any limitations on rights must be ‘prescribed by law’ or be ‘in accordance with law’. This requires not only that the provisions limiting the right be set out in legislation or the common law, but it must also be accessible and set out with enough precision so that people know how to comply with it.

So, for example, if an Act of Parliament gives discretion to public authorities (i.e. to the police or civil service), that power must not be left open-ended – the Act must clearly indicate the scope of the discretion and how it should be exercised.

Legitimate aim

Any limitation on rights must pursue a legitimate aim. Many of the rights set out in the HRA list the type of aims that will be considered to be legitimate, which include limitations imposed:

- in the interests of national security;
- in the interests of public safety;

- for the prevention of disorder or crime; or
- for the protection of health and the rights and freedoms of others.

In general the courts accept that measures put forward by a democratic government seek to pursue a legitimate aim. The question most often turns on whether the measures are necessary and proportionate.

Necessary and proportionate

Central to the human rights framework is finding a fair balance between the public interest as a whole and the protection of an individual's human rights.

If qualified rights are to be limited any such limitation must be 'necessary in a democratic society'. This means that the measure must be shown to seek to deal with a pressing social need, within a society that tolerates and respects differing views.

Proportionality requires that the measures taken be both shown to be necessary in a democratic society and the least intrusive way of achieving the legitimate aim sought.

In carrying out this balancing test some factors that might be relevant include:

- the nature of the right being interfered with and its importance to the individual who is affected;
- the extent of any interference with human rights – the greater the interference the less likely it will be considered proportionate;
- whether there were other ways to achieve the same aim that would be less intrusive and result in fewer restrictions on human rights;
- whether the measures differentiate between different types of cases and situations or simply impose a blanket policy without regard to the merits of an individual case;
- whether there are effective safeguards or controls over the measures used, including the possibility of legal redress or compensation.

Case study

The National DNA Database, which stores DNA taken from persons arrested for a recordable offence, was held to be in breach of Article 8 of the ECHR – the right to private and family life. While the European Court of Human Rights held that the database served a legitimate purpose (the prevention and detection of crime), and it was properly established by law, it found that the database failed the proportionality test.

At the time that the Court considered the matter, the database held indefinitely the DNA of anyone who had had their DNA taken on arrest, regardless of whether they were subsequently charged or convicted, and made no distinction as to the seriousness of the alleged offence, the type of alleged offence or the age of the accused etc. This retention policy was therefore held to be “blanket and indiscriminate”. As such, the Court found that the retention of DNA in these circumstances failed to “strike a fair balance between the competing public and private interests”.

Right to life

Article 2

The right to life contained in Article 2:

- imposes an obligation on the State to protect the right to life;
- prohibits the State from intentionally killing; and
- requires an effective and proper investigation into all deaths caused by the State.

Protects the right to life

Article 2 requires that the Government take steps to safeguard the lives of everyone within the UK's jurisdiction:

- by having effective criminal legislation (i.e. making murder and manslaughter an offence) and properly enforcing it;
- by requiring the police to take reasonable steps to protect an individual's life if they know or ought to know that there is a real and immediate risk to a person's life – although this should not impose an impossible or disproportionate burden on the authorities; and
- by requiring the State to take appropriate steps to prevent accidental deaths by having a legal and administrative framework in place to provide effective deterrence against threats to the right to life.

Prohibits intentional killing

The State is expressly forbidden from taking life. However, there will be no breach of Article 2 if death results from the use of force that is no more than absolutely necessary:

- in self-defence or the defence of any person from unlawful violence;
- to lawfully arrest someone or prevent the escape of a person lawfully detained; or
- to take action lawfully to quell a riot.

The key test here is that the use of force is no more than 'absolutely necessary'. This requires that consideration be given to all dangers and risks and whether a situation was planned and controlled.

The Government must also ensure that police and security services that are faced with situations where the use of lethal force is possible must be appropriately trained, instructed and given strict guidance as to when officers can use arms.

Investigations and inquests

Article 2 also requires that there be an effective official investigation into deaths resulting from the State's use of force and where the State has failed to protect life. Such an investigation must:

- be brought by the State on its own initiative (i.e. relatives of the victim should not have to push for an inquiry);
- be independent and effective;
- be reasonably prompt;
- be open to public scrutiny and involve the victim's next of kin.

Case study

In 2000 Zahid Mubarek, a 19 year old Asian man, was beaten to death in a youth detention facility by his white cellmate who had a history of racist and violent behaviour:

While the Director General of the Prison Service accepted responsibility for the death no public inquiry or inquest into the death was held – rather a number of internal investigations were carried out which did not allow for any public involvement, let alone the involvement of Zahid's family. The Secretary of State refused the family's request for a public inquiry.

Using Article 2 of the HRA the family was able to get the Home Secretary to order a public inquiry into Zahid's death which fully investigated the failures that led to his death and the detention centre's disregard of racism within the facility.

No torture, inhuman or degrading treatment

Article 3

The prohibition on torture and inhuman or degrading treatment or punishment is one of the most important provisions in the HRA. It is an absolute right – in no circumstances will it ever be justifiable to torture someone.

- Inhuman acts will amount to torture when used to deliberately cause serious and cruel suffering.
- Treatment will be considered inhuman when it causes intense physical or mental suffering.
- Treatment or punishment will be degrading if it humiliates and debases a person beyond that which is usual from punishment.

There are a number of obligations on the UK in respect of this prohibition, both negative (prohibiting public authorities from doing things) and positive (requiring the State to take certain action).

Prohibition on torture and inhuman and degrading treatment or punishment

The most obvious obligation prevents State officials from torturing a person or subjecting them to inhuman or degrading treatment. This applies anywhere the UK exercises jurisdiction, which can include places outside the UK, as well as in UK prisons, hospitals, schools etc. Government policies that put a person in a situation where they face inhuman or degrading treatment may also breach Article 3.

Torture evidence

UK courts and tribunals must not admit evidence obtained through torture, even when the torture was not committed by UK authorities.

Deportation to torture

The absolute prohibition on torture and ill-treatment also applies to prohibit the UK from deporting a person to another country when substantial grounds have been shown that he or she would face a real risk of being tortured or subjected to ill-treatment in that country.

Investigations and prevention

Like the right to life, the prohibition in Article 3 requires an official and effective investigation to take place where there are credible allegations of serious ill-treatment by public officials.

Article 3 also requires that public authorities take steps to prevent torture and ill-treatment. This requires laws in place to adequately protect vulnerable groups from ill-treatment and for public officials to act to protect vulnerable people from harm inflicted on them by others.

Case study

From 1971 to 1975 the authorities in Northern Ireland exercised a series of extrajudicial powers of arrest, detention and internment of terrorist suspects. Five interrogation techniques were used on suspects interned in Northern Ireland, which consisted of:

- forcing detainees to remain standing 'spread eagled' in stress positions for hours on end;
- hooding detainees' heads;
- subjecting detainees to loud and continuous hissing noises;
- sleep deprivation;
- food and drink deprivation.

The European Court of Human Rights held that these techniques caused, if not actual bodily injury, at least intense physical and mental suffering, led to acute psychiatric disturbance and were humiliating and degrading. As such the UK was held to be in breach of Article 3 by allowing its security forces to use such techniques.

No slavery or forced labour

Article 4

Although the slave trade was abolished centuries ago, modern day slavery persists with many workers, often migrants, forced into performing compulsory work for little or no wages in conditions where they are effectively prevented from escaping.

The prohibition on holding a person in slavery or servitude is absolute and can never be justified.

The prohibition on requiring a person to perform forced or compulsory labour does not include lawful work required of prisoners or military service; work required during an emergency or other work or service that forms part of normal civil obligations (for example, jury service).

A person is subjected to forced labour when the person does not voluntarily consent to perform work but does so because of threats made, either physical or psychological.

The State is under an obligation to ensure laws are in place to protect people from slavery, servitude and forced labour, including by having anti-trafficking legislation and making it an offence to subject someone to such practices.

State authorities are also obliged to protect victims or potential victims of Article 4 ill-treatment from real and immediate risks which are known, or ought to be known, by the authorities. There is also an obligation to investigate any allegations of slavery, servitude or forced or compulsory labour.

The UK is also under a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other states concerned in the investigation of events which occurred outside their territories.

Case study

A young Togolese girl was forced to work as a servant and child carer for families in France. She was rarely paid, was required to work up to 16 hours a day with very little time off, slept on a mattress on the floor, had her passport confiscated and was effectively prevented from leaving.

The European Court of Human Rights held that France, in not providing specific and effective protection to victims of forced labour, was in breach of Article 4.

UK law was liable to the same criticism until the passage in 2009 of section 71 of the Coroners and Justice Act 2009, which made holding another person in slavery or servitude or subjecting them to forced or compulsory labour a criminal offence.

Right to liberty

Article 5

The right to liberty and security protects the right of a person not to be arbitrarily deprived of their liberty.

Deprivation of liberty

What constitutes a deprivation of liberty will depend on the circumstances. Obvious cases are absolute deprivations (such as imprisonment or forced detention). Article 5 is not concerned with mere restrictions on liberty of movement. The difference between restrictions on liberty and deprivation of liberty is one of degree or intensity and depends on the type of measure imposed, its duration and effects and how it is implemented.

Exceptions

A person can only be lawfully deprived of their liberty when this is done in accordance with law, is proportionate and carried out in the following circumstances:

- detention following court conviction;
- arrest or detention for failing to observe a lawful court order or to fulfil a legal obligation;
- arrest or detention on remand – i.e. to bring a person before the courts if reasonably suspected of having committed an offence; if reasonably necessary to prevent the commission of an offence; or to prevent a person escaping justice (but not preventative detention). Detention must be proportionate in the circumstances;
- detention of children by lawful order for educational supervision or in secure accommodation, care etc;
- detention which is lawful, necessary and proportionate to prevent, as a matter of last resort, the spread of infectious diseases, lawful detention on mental health grounds or other like grounds;
- arrest or detention to prevent unauthorised entry into the country or for deportation or extradition. Detention will cease to be lawful if proceedings for deportation or extradition are not actually in process or not carried out diligently.

Procedural safeguards

Article 5 also includes a number of procedural safeguards for anyone who is arrested or detained.

Reasons to be given for detention

Article 5(2) requires that anyone arrested must be promptly informed as to why he or she has been arrested and what the charge against them is. This must be conveyed to them in a language which he or she understands. The purpose of this requirement is to enable the person to challenge the lawfulness of their arrest. This requirement is not only limited to the criminal context but also applies to detention on mental health grounds and immigration detention etc.

Brought before a court

Article 5(3) gives everyone arrested or detained on suspicion of having committed an offence the right to be promptly brought before a judge. This is intended to impose a strict time limit on pre-charge detention.

There is also an entitlement to trial within a reasonable time and release on bail. The presumption is that bail should be granted and if it is to be denied it must be justified by relevant and sufficient reasons.

Right to go before a court

Article 5(4) provides that everyone deprived of their liberty is entitled to bring court proceedings to challenge the lawfulness of the detention. Such a challenge must be speedily decided by a court and if the detention is ruled unlawful his or her release must be ordered. If detention is ongoing this provision requires regular review of the lawfulness of the detention.

Victims of unlawful detention entitled to compensation

Article 5(5) provides that victims of unlawful arrest or detention have an enforceable right to compensation.

Case study

The Anti-Terrorism Crime and Security Act 2001 was passed within weeks of the Twin Towers atrocity. Part 4 of the Act provided that any foreign national who was suspected of being a terrorist (but not convicted or even charged) could be indefinitely detained without charge or trial if he or she could not be deported.

The Government acknowledged this measure breached the right to liberty, but sought to derogate from its obligations under the Convention. The House of Lords held that the derogation was invalid as the Government could not show that the measure was strictly required, particularly as it only applied to foreign nationals and not UK suspects.

The House of Lords held that this measure was a clear breach of the right to liberty and was also discriminatory. The Law Lords upheld the fundamental nature of the right to liberty noting that indefinite detention without trial wholly negates the right to liberty for an indefinite period.

The House of Lords made a declaration of incompatibility, and the law was repealed in response.

Right to a fair hearing

Article 6

The right to a fair trial is fundamental to the rule of law and to democracy itself.

The right applies to both criminal and civil cases, although certain specific minimum rights set out in Article 6 apply only in criminal cases.

The right to a fair trial is absolute and cannot be limited. It requires a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The procedural requirements of a fair hearing might differ according to the circumstances of the accused.

The right to a fair hearing, which applies to any criminal charge as well as to the determination of civil rights and obligations, contains a number of requirements

- 1 There must be real and effective access to a court (although there are limited exceptions in the case of vexatious litigants, minors, prisoners etc). To be real and effective this may require access to legal aid.
- 2 There must be a hearing before an independent and impartial court or tribunal established by law (including unbiased jurors).
- 3 The hearing and judgment must be made public. Hearings can, however, be held in private where:
 - it can be shown to be necessary and proportionate and in the interest of morals, public order or national security in a democratic society, or
 - it is in the best interests of a child; or
 - it is required for the protection of the private life of the parties ; or
 - it is strictly necessary in special circumstances where publicity, in the court's opinion, would prejudice the interests of justice.
- 4 The hearing must be held within a reasonable time. What is reasonable depends on the complexity of the case, its importance, the behaviour of both the applicant and competent authorities, and the length of time between the conduct in question (i.e. when the offence was committed or contract breached etc) and when the trial takes place.
- 5 The applicant must have a real opportunity to present his or her case or challenge the case against them. This will require access to an opponent's submissions, procedural equality and generally requires access to evidence relied on by the other party and an oral hearing.

- 6 The court of tribunal must give reasons for its judgment.
- 7 There must be equality of arms between the parties, so, for example, the defence has the same right to examine witnesses against them as the prosecution has and both parties have the right to legal representation etc.
- 8 In criminal cases, there is a right to silence and a privilege against self-incrimination (although it may be possible to draw adverse inferences from suspects remaining silent).
- 9 An accused person must have the right to effective participation in their criminal trial. Except for strictly limited exceptions, an accused is entitled to be physically present at his or her hearing to give evidence in person and be legally represented.

Determination of civil rights and obligations

The determination of a person's civil rights and obligations applies to private rights owed to individuals personally, and not to purely public rights owed to society at large. So, for example, the following areas are generally considered to be governed by the Article 6 right to a fair trial:

- property rights;
- right to practise a profession;
- family rights;
- right to compensation;
- right to engage in commercial activities;
- some employment decisions;
- control orders;
- anti-social behaviour orders etc.

But the following areas are not considered to be 'civil' rights and therefore do not fall within Article 6:

- entry or removal of immigrants;
- tax obligations;
- right to stand for public office.

Criminal charges

Whether proceedings are criminal, and so governed by Article 6, depends on whether the offence is categorised as being criminal (although this is not determinative); the nature of the offence; and the type of penalty applicable.

Right to be presumed innocent until proven guilty

Article 6(2) concerns the right of every person charged with a criminal offence to be presumed innocent until proven guilty according to law.

Provisions which require defendants to prove elements of their defence (reverse onus provisions) may breach this right, particularly if a legal burden of proof is placed on the defendant (requiring them to prove that the case against them is not true).

Minimum rights in criminal trials

Article 6(3) also guarantees the following minimum rights that apply in criminal trials:

- the right for an accused to be promptly informed of the accusation against him or her – this must be in a language which he or she understands and the charge must be detailed and adequately precise;
- the right to have enough time and facilities to prepare a defence;
- the right to legal representation, including the right to either defend oneself in person or through legal assistance chosen by the accused; for legal aid to be provided if a person cannot afford legal representation; and when the interests of justice require it;
- the right to examine witnesses against an accused and for an accused to present witnesses for their defence – this right does not prevent vulnerable witnesses from giving evidence in alternative ways, either anonymously or via video-link etc., as long as the entirety of the evidence against the accused is not presented anonymously;
- the right for an accused to have the free assistance of an interpreter if he or she cannot understand the language used in court.

Case study

The control order regime enacted by the Prevention of Terrorism Act 2005 (and still in force at the time of publication) imposes severe restrictions, including house arrest, on anyone suspected of being involved in terrorism-related activity. Under the policy, the Secretary of State makes a decision as to whether a control order should be made and the courts then consider the decision made. In many cases, control orders have been made on the basis of closed material – where the person subject to the control order has never been given the chance to see the case against them.

The House of Lords held in June 2009 that this breached the right to a fair trial under Article 6. The Law Lords held that a person subject to such a restrictive order had to be given sufficient information to know the essence of the case against him or her. It was held that there could never be a fair trial if the case against a person was based solely or to a decisive degree on closed materials and where any open material consists only of general assertions. The Court held that in conducting control order hearings judges must consider whether material needs to be disclosed to ensure the fairness of the trial.

No punishment without law

Article 7

Article 7 provides that:

- no-one can be found guilty of a crime that was not a crime under the law at the time it was committed – the prohibition on retrospective criminalisation; and
- anyone found guilty of a criminal offence cannot have a heavier penalty imposed on him or her than that which was applicable at the time the offence was committed.

Under this right crimes and penalties can only be prescribed by law. Such law must be clear in its definition so that people know what acts or omissions are criminal in nature.

Retrospective offences

It is fundamental to the rule of law that behaviour is only punished if it contravenes a law that predates the offending behaviour. Article 7 provides effective safeguards against arbitrary prosecution, conviction and punishment.

This prohibition does not apply, however, to criminal offences that were offences recognised by international law at the time they were committed. This is intended to capture war crimes, genocide and crimes against humanity etc., which remain punishable in UK courts even if committed before these were specific offences in UK law.

Heavier penalties

There must be certainty around any applicable penalties to be imposed for criminal conduct. What constitutes a ‘penalty’ is to be considered with reference to whether the measure was imposed following a criminal conviction; the classification of the measure; its nature and purpose; how it is made and implemented and its severity. So, for example, the courts have held that obligations to register on sex offenders registers are not ‘penalties’, but retrospective confiscation orders are considered to be penalties.

In relation to sentencing, Article 7 also requires that any favourable changes to sentencing laws or practices since the commission of the offence and delivery of final judgment be applied.

Case study

In 1995 the owner of a company in Estonia was charged with tax evasion which related to alleged forgery and fabrication of documents between 1993 and 1994. The charges were brought under legislation that only came into force in January 1995. Before this date, while the activities were regulated they were only subject to criminal sanction if a person had already been first subjected to administrative sanction for a similar matter. The company owner had not been subjected to administrative sanction previously and therefore under the law in force at the time the conduct took place he could not expect that he would be subject to criminal conviction. The European Court of Human Rights held there had been a breach of Article 7 as the 1995 law had been applied retrospectively.

Right to a private and family life

Article 8

Everyone has the right to respect for his or her private and family life, home and correspondence. This right is subject to proportionate and lawful restrictions.

Article 8 is a broad-ranging right that is often closely connected with other rights such as freedom of religion, freedom of expression, freedom of association and the right to respect for property.

The obligation on the State under Article 8 is to refrain from interfering with the right itself and also to take some positive measures, for example, to criminalise extreme breaches of the right to a private life by private individuals.

Private life

The concept of a right to a private life encompasses the importance of personal dignity and autonomy and the interaction a person has with others, both in private or in public.

Respect for one's private life includes:

- respect for individual sexuality (so, for example, investigations into the sexuality of members of the armed forces engages the right to respect for a private life);
- the right to personal autonomy and physical and psychological integrity, i.e. the right not to be physically interfered with;
- respect for private and confidential information, particularly the storing and sharing of such information;
- the right not to be subject to unlawful state surveillance;
- respect for privacy when one has a reasonable expectation of privacy; and
- the right to control the dissemination of information about one's private life, including photographs taken covertly.

Family life

Article 8 also provides the right to respect for one's established family life. This includes close family ties, although there is no pre-determined model of a family or family life. It includes any stable relationship, be it married, engaged, or de facto; between parents and children; siblings; grandparents and grandchildren etc. This right is often engaged, for example, when measures are taken by the State to separate family members (by removing children into care, or deporting one member of a family group).

Respect for the home

Right to respect for the home includes a right not to have one's home life interfered with, including by unlawful surveillance, unlawful entry, arbitrary evictions etc.

Respect for correspondence

Everyone has the right to uninterrupted and uncensored communication with others – a right particularly of relevance in relation to phone-tapping; email surveillance; and the reading of letters.

Limitations

Article 8 is a qualified right and as such the right to a private and family life and respect for the home and correspondence may be limited. So while the right to privacy is engaged in a wide number of situations, the right may be lawfully limited. Any limitation must have regard to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

In particular any limitation must be:

- in accordance with law;
- necessary and proportionate; and
- for one or more of the following legitimate aims:
 - the interests of national security;
 - the interests of public safety or the economic well-being of the country;
 - the prevention of disorder or crime;
 - the protection of health or morals; or
 - the protection of the rights and freedoms of others.

See pages 16–17 for more information about lawful limitations on rights.

Balancing rights

The right to respect for a private life often needs to be balanced against the right to freedom of expression. For example a public figure does not necessarily enjoy the same respect for their private life as others, as matters of public concern might justify the publication of information about that person that might otherwise interfere with the right to privacy.

Case study

In 2003 a journalist and a peaceful protester were stopped and searched by police officers using powers under section 44 of the Terrorism Act 2000. As originally drafted section 44 allows police to stop and search anyone within a designated area without any need for suspicion of any kind. An area can be designated whenever the person making it (generally a police chief) 'considers it expedient' for the prevention of acts of terrorism.

The European Court of Human Rights held that this broadly drafted power breached the right to a private life. The Court held that a forced search of a person and their belongings clearly interfered with the person's private life. As such, any limitation had to be shown to be in accordance with law, pursue a legitimate aim and be necessary and proportionate. In this case section 44 was held to fail the first test. The Court held that the powers of authorisation and stop and search were not properly constrained and were not subject to adequate legal safeguards against abuse. The Court held that as "there is a clear risk of arbitrariness in the grant of such a broad discretion to the police officer" the power was not in accordance with law and therefore the limitation on the right to a private life could not be justified.

Freedom of religion

Article 9

The right to freedom of thought, conscience and religion includes:

- the freedom to change religion or belief;
- the freedom to exercise religion or belief publicly or privately, alone or with others;
- the freedom to exercise religion or belief in worship, teaching, practice and observance; and
- the right to have no religion (e.g. to be atheist or agnostic) or to have non-religious beliefs protected (e.g. philosophical beliefs such as pacifism or veganism).

Freedom of religion does not prevent there being a state church, but no one can be forced to join a church, be involved in its activities or pay taxes to a church.

The role of the State is to encourage tolerance and all religions or non-religions, if regulated, must be regulated with complete neutrality.

The right to exercise, or manifest, one's religion or belief will not generally be considered to be interfered with if a person is left with a choice as to whether or not to comply with his or her religious obligations. However, there will be interference if restrictions make it practically difficult or almost impossible to exercise the religion or belief.

Limitations

Article 9 is a qualified right and as such the freedom to manifest a religion or belief can be limited, so long as the limitation:

- is prescribed by law;
- is necessary and proportionate; and
- pursues a legitimate aim, namely:
 - the interests of public safety;
 - the protection of public order, health or morals; or
 - the protection of the rights and freedoms of others.

See pages 16–17 for more information about lawful limitations on rights.

Note also section 13 of the HRA which emphasises the importance of the right to freedom of thought, conscience and religion. It provides that if a court or tribunal's decision might affect the exercise of the right by a religious organisation or its

members, the court or tribunal must have particular regard to the importance of the right.

Case study

Mr Işık, a Turkish citizen, was required by Turkish law to specify his religion on his identity card. The local registry office recorded his religion as 'Islam'. However, Mr Işık's religion is Alevi, which is a Turkish religion influenced by Sufism and certain pre-Islamic beliefs. Mr Işık sought to have the religion listed on his identity card changed to Alevi, which was rejected.

The European Court of Human Rights held that the requirement to include a person's religion on an identity card violated the right to freedom of religion – as the right also includes the right not to have to manifest a religion or belief. Requiring a person to state their religion on their identity card was not shown to be necessary and risked exposing religious minorities to discriminatory treatment.

Freedom of expression

Article 10

The right to freedom of expression is crucial in a democracy – information and ideas help to inform political debate and are essential to public accountability and transparency in government.

Article 10 gives everyone the right to freedom of expression, which includes the freedom to hold opinions and to receive and impart information and ideas without State interference.

This includes the right to communicate and to express oneself in any medium, including through words, pictures, images and actions (including through public protest and demonstrations).

The type of expression protected includes:

- political expression (including comment on matters of general public interest);
- artistic expression; and
- commercial expression, particularly when it also raises matters of legitimate public debate and concern.

For obvious reasons political expression is given particular precedence and protection. Artistic expression – vital for fostering individual fulfilment and the development of ideas – is also robustly protected.

To ensure that free expression and debate is possible, there must be protection for elements of a free press, including protection of journalistic sources.

The right to free expression would be meaningless if it only protected certain types of expression – so (subject to certain limitations) the right will protect both popular and unpopular expression, including speech that might shock others.

Interferences on free expression usually involve restrictions on publication; penalties for publication (such as criminalising speech or awarding damages); requiring journalists to reveal their sources; imposing disciplinary measures or confiscating material.

Limitations

Article 10 is a qualified right and as such the right to freedom of expression may be limited. Article 10 provides that the exercise of this freedom “since it carries with it duties and responsibilities” may be limited as long as the limitation:

- is prescribed by law;
- is necessary and proportionate; and
- pursues a legitimate aim, namely:
 - the interests of national security, territorial integrity or public safety;
 - the prevention of disorder or crime;
 - the protection of health or morals;
 - the protection of the reputation or rights of others;
 - preventing the disclosure of information received in confidence; or
 - maintaining the authority and impartiality of the judiciary.

In considering questions of proportionality the potential for a ‘chilling effect’ on expression, the value of the particular form of expression, the medium used for the expression (i.e. newspaper or television) will all be taken into account, along with other considerations as set out on pages 16–17.

Article 10 also provides that it does not prevent the Government from requiring the licensing of broadcasting, television or cinema enterprises, although such restrictions must still be in accordance with law and be necessary and proportionate.

In cases where free expression might be affected section 12 of the HRA requires courts to have particular regard to the importance of the right and to not impose injunctions without the other party being first notified unless there is strong justification for doing so.

Case study

In 2001 a journalist at the Financial Times (FT) received a copy of a leaked document about a possible company takeover by Interbrew. The FT published the document and three other newspapers (The Times, The Independent and The Guardian) and the news agency Reuters, also reported on the issue and referred to the leaked document. Interbrew brought proceedings against the news groups seeking to identify who leaked the document to the FT. The UK Court of Appeal ordered the FT’s journalistic source to be disclosed to Interbrew, using a common law principle (the Norwich Pharmacal principle) and the Contempt of Court Act.

The newspapers and news agency applied to the European Court of Human Rights, relying on the Article 10 right to freedom of expression. The Court held that the disclosure order interfered with the right to freedom of expression. The Court emphasised the chilling effect of journalists being seen to assist in the identification of anonymous sources. It found that Interbrew’s interests in finding the source of the leak did not outweigh the public interest in the protection of journalistic sources.

Right to protest and freedom of association

Article 11

Right to protest

Everyone has the right to freedom of peaceful assembly. This is a right closely linked to the right to freedom of expression. It provides a means for public expression and is one of the foundations of a democratic society.

The right applies to protest marches and demonstrations, press conferences, public and private meetings, counter-demonstrations, ‘sit-ins’, motionless protests etc.

The right only applies to peaceful gatherings and does not protect intentionally violent protest.

There may be interference with the right to protest if the authorities prevent a demonstration from going ahead; halt a demonstration; take steps in advance of a demonstration in order to disrupt it; and store personal information on people because of their involvement in a demonstration.

The right to peaceful assembly cannot be interfered with merely because there is disagreement with the views of the protesters or because it is likely to be inconvenient and cause a nuisance or there might be tension and heated exchange between opposing groups.

There is a positive obligation on the State to take reasonable steps to facilitate the right to freedom of assembly, and to protect participants in peaceful demonstrations from disruption by others.

Freedom of association

Everyone has the right to freedom of association with others. This includes the right to form and to join trade unions and to join with others to pursue or advance common causes and interests. It also includes the right to formally join or create associations.

Necessarily included in the right of association is the freedom not to associate with others. There is no right for any individual to join a particular association if other members of the group decide not to include them or to expel them on the basis that their membership was not compatible with the aims and interests of the association. However, in relation to trade unions, if a decision not to include a person has adverse employment consequences, any such decision must not be unreasonable or arbitrary.

Freedom of association also protects the right to refuse to join an association. This does not include professional regulatory bodies set up by the State to regulate professions, as these are not considered to fall within the definition of an 'association'.

Limitations

Article 11 is a qualified right and as such the right to protest and the freedom of association may be limited so long as the limitation:

- is prescribed by law;
- is necessary and proportionate; and
- pursues a legitimate aim, namely:
 - the interests of national security or public safety;
 - the prevention of disorder or crime;
 - the protection of health or morals; or
 - the protection of the rights and freedoms of others.

The requirement to give notice of plans to stage an assembly in advance will not necessarily breach the right to protest as long as notification doesn't become a hidden obstacle to exercising freedom of assembly.

Article 11(2) also states that this right will not prevent lawful restrictions being placed on the exercise of these rights by members of the armed forces, the police or the administration of the State. However, this has been narrowly interpreted to require convincing and compelling reasons for any such restrictions to be valid.

Case study

In early 2003 around 120 protestors travelled by three coaches from London in order to demonstrate against the Iraq war at a Royal Air Base in Gloucestershire. Five kilometres from the Air Base, police, who were aware the group was travelling to the protest, stopped the coaches. Police searched the coaches and seized a number of items including helmets, overalls, scarves, scissors and a safety flame belonging to a small number of protestors.

The police then took the decision that while there was no proper basis to arrest anyone for breach of the peace, they would turn the coaches back and prevent the group from attending the protest. As a result, everyone in the coach were induced back on to the coaches (under the impression they would be on their way to the protest), but then forced to return to London for the 2½ hour journey. The coaches had a police escort the entire way and were prevented from stopping anywhere, even for people to relieve themselves.

One of the protestors sought judicial review against the police under Articles 10 and 11 of the HRA. The House of Lords held that the police's actions breached the protestors' rights to free expression and protest. As there had been no imminent threat to breach of the peace, the police's actions in limiting the right to protest was not done in accordance with law. It was also held to be an indiscriminate and disproportionate restriction on the claimant's right to protest, as there was no reason to view the claimant as anything other than a committed peaceful demonstrator.

Right to marry

Article 12

Article 12 guarantees the right to marry to men and women of marriageable age and the right to found a family, according to UK laws.

It is left up to other pieces of our domestic law to provide the detail and substance that gives effect to this right. So for example, rules concerning the appropriate marriageable age; issues of capacity and consent; the prohibition on bigamy and incest etc., can be detailed in other legislation.

However, laws and rules on marriage must not be arbitrary and must not interfere with the essence of the right – they must not deprive a person or category of person of full legal capacity of the right to marry or substantially interfere with their exercise of the right. So, for example, laws that impose unnecessary delays or restrictions that serve no legitimate purpose may breach this right.

The Courts have held that the right to marry includes a right for transsexuals to marry. However, at the time of publication UK law does not provide for homosexual couples to marry.

Case study

In 2004 laws were introduced to prevent so-called ‘sham marriages’ among people who were subject to immigration control (except for those marrying in the Anglican church). However, the laws applied to all non-UK or European nationals subject to immigration control, regardless of whether there was any suggestion that the marriage was not genuine.

The House of Lords held that this blanket policy – applying as it did irrespective of questions regarding the genuineness of a proposed marriage – was discriminatory and a disproportionate interference with the right to marry.

As Baroness Hale said, marriage still has deep significance for many people, and denying to members of minority groups “the right to establish formal, legal relationships with the partners of their choice is one way of setting them apart from society, denying that they are ‘free and equal in dignity and rights’”.

No discrimination

Article 14

All of the rights and freedoms contained in the HRA must be protected and applied without discrimination. Article 14 requires there be no discrimination in the application of human rights on any ground, and this includes (but is not exhaustive of) grounds such as:

- sex;
- race;
- colour;
- language;
- religion;
- political or other opinion;
- national or social origin;
- association with a national minority;
- property;
- birth;
- or any other status (including, for example, sexual orientation or marital status).

Article 14 does not provide for a free-standing right to non-discrimination but requires that all other HRA rights be secured without discrimination. For Article 14 to apply it does not require that a breach of another right has to be made out, but the facts of the case must at least fall within the ambit of another HRA right. For example, this means that discrimination in the privacy sphere can only be found where the issue in question is held to engage the right to private life.

Discrimination occurs when a public authority, for no objective or reasonable reason:

- treats a person less favourably than others in similar situations on the basis of a particular characteristic;
- fails to treat people differently when they are in significantly different situations;
- or
- applies apparently neutral policies in a way that has a disproportionate impact on individuals or groups.

It is not the case that all discrimination is unlawful. However for discriminatory law or treatment to be found to be lawful, weighty and objectively justifiable reasons must be advanced. In determining whether there is an objective or reasonable justification for the measures imposed a public authority needs to demonstrate that the measures were advanced to pursue a legitimate aim and there

is a reasonable relationship of proportionality between that aim and the measures applied. For discrimination to be justified on grounds such as race, sex, nationality, religion or sexual orientation there will need to be particularly strong or serious reasons to justify it.

Case study

A long-term unmarried couple in Northern Ireland sought to adopt together the woman's 10 year old son. The boy's natural father had no contact with him and the mother's partner had effectively acted as the boy's father his entire life. The adoption application was refused solely on the basis of laws that said that unmarried couples could not adopt.

The House of Lords held that there was no rational basis for having a blanket rule that unmarried couples could never adopt, and the rule was therefore discriminatory. It held that although it was open to Parliament to say that in general terms married couples may be more suitable adoptive parents than unmarried ones, it cannot rationally be assumed that no unmarried couple can be suitable adoptive parents. As such the law breached Article 14 (in conjunction with the Article 8 right to a family life).

Protection of property

Article 1 of the First Protocol

The protection of property gives every person the right to peaceful enjoyment of their possessions. This imposes an obligation on the State not to:

- interfere with peaceful enjoyment of property;
- deprive a person of their possessions; or
- subject a person's possession to control.

However, there will be no violation of this right if such interference, deprivation or control is carried out lawfully and in the public interest.

The concept of property and possessions includes tangible things like land and money but also includes contractual rights; shares; leases; claims for compensation; intellectual property rights; statutory rights to benefits etc.

The genuine, effective exercise of this right does not only depend on the State's duty not to interfere, but it may also require positive measures to protect property to be taken. This is particularly the case where there is a direct link between the measures a property owner may legitimately expect from the authorities and the effective enjoyment of his or her possessions. So, for example, a public authority's negligence that leads to property destruction may breach this right.

This right also imposes an obligation on the government to take necessary and reasonable steps to protect property, for example in the event of natural disasters, but only to the extent that is reasonable in the circumstances.

Any interference with this right must be subject to conditions provided for by law and must achieve a fair balance between the general public interest and the protection of an individual's property rights.

What is considered to be in the public interest is often left to the Government to decide, but any interference must strike a fair balance between the demands of the general interests of the community and the requirements of the individual's fundamental rights. A lack of appropriate compensation would be likely to be considered disproportionate.

Case study

In 1969 a UK local authority granted a 22 year building lease to Mr Stretch, which required him to build six industrial buildings on the land at his own expense. It included an option to renew for another 21 years. Mr Stretch entered into the lease on the understanding it would be a 43 year long lease. In 1990 Mr Stretch gave notice of his intention to exercise the option to renew, but the new local authority refused to renew the lease as it said the option to renew was unlawful. The UK courts upheld its decision.

The European Court of Human Rights held as the option to renew had been an important reason why Mr Stretch entered into the lease, depriving Mr Stretch of the benefit of renewing the lease (when he expected to get future returns from his investment) was a disproportionate interference with Mr Stretch's peaceful enjoyment of his possessions.

Right to education

Article 2 of the First Protocol

Students' right to education

No one can be denied the right to education. This encompasses a right:

- to an effective education (that is adequate and appropriate);
- to access to existing educational institutions;
- to be educated in the national language; and
- to obtain official recognition when studies have been completed.

This does not require the State to establish new types of education, rather it gives individuals a right to access educational facilities that already exist.

The right to education requires that the State regulate education but such regulation must not injure the substance of the right or conflict with any other human rights. If a pupil is excluded from school the exclusion must be both necessary and proportionate.

The right extends to primary, secondary as well as higher education. The right belongs to the student, who must not be denied the right to education (and not their parent).

The right to education includes a freedom to set up private schools, but this freedom is subject to regulation by the State to ensure there is a proper educational system, and does not include a right to subsidies for providing that education.

Parents' right to respect for their convictions

Article 2 of the First Protocol also provides that the State must respect the right of parents' religious and philosophical convictions in respect of education and teaching. This aspect of the right is closely aligned to the right to freedom of religion in Article 9. This right belongs to the parent rather than the student.

What constitutes a philosophical conviction (being a belief, beyond an idea or opinion) includes convictions that are worthy of respect in a democratic society, are compatible with human dignity and do not conflict with the student's right to education.

This right does not prevent the State from setting and planning the school curriculum, but it does require the matters in the curriculum to be conveyed in

an objective, critical and pluralistic manner so that parents' different religious and philosophical convictions are respected.

When it first agreed to be bound by this Article the UK entered a reservation to it to say that it accepts the need to respect parents' religious and philosophical convictions but that it would do so only so far as it is compatible with providing efficient instruction and training and unreasonable public expenditure was avoided.

Case study

Two Scottish mothers took a case to the European Court of Human Rights arguing that the then policy of compulsory corporal punishment, which they fundamentally disagreed with, failed to respect their philosophical convictions. The son of one of them had been excluded from school for almost one year for failing to agree to submit to corporal punishment.

The Court held that a blanket policy that failed to provide for any exemptions for individual students if their parents' religious or philosophical convictions required it, failed to comply with the second part of the right to education. It also held that excluding the son for almost one year from schooling breached his right to education, as he could have only returned to school if his parents had acted contrary to their convictions.

Right to free elections

Article 3 of the First Protocol

The right to free elections is crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.

By agreeing to Article 3 of the First Protocol, the UK has undertaken 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.

Right to vote

This gives a right to individuals to vote. Needless to say, it is a right and not a privilege. This right is closely linked to the right to freedom of speech and freedom of assembly, as it guarantees respect for pluralism of opinion in a democratic society.

The right to vote is not absolute – conditions can be imposed so long as they pursue a legitimate aim, are proportionate and do not thwart the free expression to the opinion of the people in choosing the legislature.

Conditions may be set on the right to vote such as minimum age requirements and, in some circumstances, residency. But such restrictions cannot impair the very essence of the right to vote. In particular, disenfranchisement is a very serious matter and it will require a discernible and sufficient link between the sanction of disenfranchising someone and the conduct and circumstances of the person being disenfranchised. A blanket, automatic restriction that applies regardless of individual circumstances will be in breach of the right to vote.

The right to stand for elections

There is also a right to stand for election to the legislature, which includes a right to sit as a member of the legislature once elected. There can be restrictions on who is eligible to stand for election but eligibility procedures must contain sufficient safeguards to prevent arbitrary decisions.

Case study

At the time of publication, under UK electoral law, anyone in prison serving a sentence on the day of an election is denied the right to vote at any parliamentary or local government election. This applies regardless of the length of the person's sentence (it applies across the board to those serving from one day to life imprisonment), or the nature or seriousness of the offence for which they were imprisoned.

In 2005 the European Court of Human Rights considered this restriction on the right to vote. It accepted that the right to vote was not absolute but that any limits imposed had to pursue a legitimate aim and be proportionate. It accepted that the limit on prisoner voting may be regarded as pursuing the legitimate aim of preventing crime by sanctioning the conduct of convicted prisoners and also the aim of enhancing civic responsibility and respect for the rule of law. However, it held that such a general, automatic, indiscriminate and blanket restriction on a vitally important right was disproportionate.

Myths and Misunderstandings

Since its passage there has been very little public education about the rights and freedoms contained in the Human Rights Act and how it works. As a result, many myths and misunderstandings have sprung up about the HRA – including who it does and doesn't protect and what values it contains.

Against this backdrop constituents may well raise with parliamentarians their concerns about the effect of the HRA. Set out below are some common misunderstandings about the HRA combined with an explanation of how the HRA actually operates in practice.

The HRA gives too much power to unelected judges

Unlike most Bills of Rights and constitutional documents around the world, the HRA does not give the courts any power to strike down legislation. Rather, it adopts a rather British compromise – maintaining parliamentary sovereignty and setting up a dialogue model between the courts and Parliament. Under the HRA, if one of the higher courts finds legislation to be incompatible with human rights it can issue a declaration of incompatibility leaving it up to Parliament to decide how best to respond.

The HRA also gives the courts the power to interpret legislation compatibly with human rights, but only “so far as it is possible to do so”. This is a new type of statutory interpretation but one that fits within usual common law powers of the courts to apply and interpret laws – something the courts have been doing for hundreds of years. The courts will look to the intention of Parliament when interpreting legislation. One of the cornerstones of our democratic system is an independent judiciary that interprets and applies the law. Judicial decision-making is fundamental to the rule of law, and the powers given by the HRA to the courts fall squarely within this historic function.

The HRA is a charter for criminals and terrorists – it does nothing for victims

The HRA protects the rights of everyone. The protection of victims of crime and human rights abuses lies at the heart of human rights law. Indeed many of the rights protected under the HRA can be limited in the interests of public safety, in order to protect national security or to prevent an offence being committed. The Human Rights Act also puts positive obligations on the State to protect victims. The HRA

requires serious offences like murder, terrorism and rape to be investigated by the police, and requires the State to take practical steps to protect people whose rights are threatened by others. The Act specifically states that those suspected of or convicted of crimes can be deprived of their liberty. Human rights law has given bereaved relatives the right to an independent public investigation into the circumstances surrounding the death of their loved ones, and the right to be involved in the investigation.

The HRA hasn't prevented the introduction of new laws that breach human rights

As the HRA does not affect parliamentary sovereignty it cannot prevent the Government from bringing forward new legislation or policies, including those that infringe human rights. And yes, the HRA hasn't prevented numerous authoritarian laws being passed just as, for example, the US Bill of Rights didn't prevent the passing of the USA PATRIOT Act or the establishment of internment at Guantanamo Bay. As with all Acts of Parliament, it is only after laws have been enacted that the courts can turn to interpret them and if they do find legislation to be incompatible with human rights they can make a declaration of incompatibility. The rights in the European Convention were intended to be the bare minimum of rights – a floor not a ceiling – enabling states to build on rights. The HRA was never intended to encapsulate all of the rights to be enjoyed in the UK or to act as a constitutional document that could prevent other laws being passed. It is up to Parliament to ensure that all new laws respect fundamental rights and freedoms, with the HRA acting as a check on executive and legislative power after its exercise.

The HRA has been imposed on us by the EU

The HRA was independently passed by the UK Parliament in 1998. It incorporates the Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention was adopted by the Council of Europe in 1950 – a body set up after WWII to promote democracy, human rights and the rule of law in Europe. This body is completely separate to the EU. The UK played a major role in the negotiations and drafting of the Convention which it voluntarily adopted in 1951.

The HRA has created a compensation culture

The remedies available under the HRA are focused on bringing any infringement of human rights to an end. A claim based on breach of human rights is not the same as a case brought under the law of negligence, where the purpose of the claim is to obtain damages. In human rights claims compensation is a secondary consideration and often not awarded at all. The HRA provides that compensation can only be awarded once all the circumstances of the case are taken into account, including what other relief is available. There is no right to compensation – it is only awarded when it is necessary to ensure ‘just satisfaction’. The courts will also consider the behaviour of an applicant before awarding damages. Very few human rights cases involve awards of damages.

The HRA is all about rights and not about responsibilities

Human rights and responsibilities are inextricably bound together. Rights mean little if others do not take responsibility to protect them. And most rights are not absolute – instead they can be limited if necessary to protect the rights of others. So, for example, the right to free speech explicitly carries with it duties and responsibilities, for example, not to incite violence or wilfully defame others. The HRA also explicitly states that none of the rights can be interpreted as implying that anyone has the right to intentionally destroy other people’s human rights or limit them more than is allowable under the HRA. While many rights come with responsibilities rights are also universal and inalienable in nature. Self-evidently a person could not, for example, be denied a right to a fair trial because they are suspected of having committed a crime.

The HRA prevents us from deporting foreigners

There is no general prohibition in the HRA on the deportation on non-nationals. If the Government decides that a citizen of another country who has limited ties to the UK should no longer be permitted to stay and can be safely sent back to their country of origin there is nothing in the HRA to prevent this. However, under international human rights law the absolute prohibition on torture prevents countries from sending a person anywhere where there is a substantial risk that the person will be tortured. This is entirely logical. If we abhor torture we must also abhor the outsourcing of torture – if governments were only prohibited from torturing their own citizens but permitted to send people to places of torture, there would be little distinction between deportation and extraordinary rendition. Even before the HRA was enacted the Convention Against Torture, the European

Convention on Human Rights and the International Convention on Civil and Political Rights prohibited the UK from deporting people to places of torture.

Depending on the facts of each individual case a person's right to a family life may be interfered with in some cases if deported. Home Office policy is to consider the facts of each case, including the reason for the deportation (i.e. whether a serious or minor offence has been committed), the length of time the person has been in the UK and whether the person has young children born in the UK or a British spouse etc. This is the type of balancing exercise that would as a matter of policy be carried out by the Home Office regardless of the HRA, but the HRA has provided greater transparency, accountability and oversight of Home Office decisions in this area.

Because of the HRA public bodies are frightened of making the wrong decision and criminals end up being released early

In November 2004 sex offender Anthony Rice was released from prison on parole after having served 16 years of a life sentence for a violent attempted rape. He had previous convictions for rape and indecent assault. In August 2005 he raped and murdered Naomi Bryant while on release on licence. The following year a review carried out in relation to the Parole Board's decision to release concluded that part of the reason for the early release was based on a misunderstanding of human rights considerations. Following this it was widely reported that Rice was freed 'because of his human rights'. In reality, there is no evidence the Parole Board even considered human rights. Rice was freed because of a series of mistakes, including that relevant information about Rice's past crimes – including a serious assault on a five year old – was not made available to the Parole Board. The Joint Committee on Human Rights has concluded that Rice was not released because of human rights considerations – a finding that the author of the 2006 review has himself endorsed. There is no human rights objection to continued incarceration of a convicted dangerous offender who had not yet served his full sentence. In fact, the right to life under Article 2 of the HRA requires the State to take steps to protect life. It is because of the right to life that Naomi Bryant's mother has been able to secure an inquest into the circumstances leading to the death of her daughter. There is no evidence that any criminal has been released from prison early on the mistaken belief that this was required by the HRA.

Prisoners have the right to access hardcore pornography because of human rights

In 2001 there were numerous media reports that the serial killer Dennis Nilsen was using human rights law to demand access to hardcore pornography in prison. Since then it has been widely reported that human rights law gives prisoners access to hardcore pornography. However, while Dennis Nilsen tried to claim he was entitled to hardcore pornography under human rights law, the court denied him permission even to bring the claim, on the basis there was no arguable case that his human rights had been breached. He was subsequently not provided with access to hardcore pornography.

Police can't put up 'Wanted' posters of dangerous criminals on the run because of their human rights

Since 2007 there have been numerous reports that police are unable to release photographs of dangerous criminals on the run because this would breach their human rights. However, the HRA itself protects the right to life and imposes an obligation on the State to protect people from serious criminal attack. In some circumstances the Government may actually be under a duty under human rights law to publicise photographs of dangerous convicted criminals if this would protect others. The right to privacy can be limited for the protection and detection of crime as long as it is necessary and proportionate to do so – seeking to locate dangerous criminals and warn the public is certainly not a breach of human rights law.

Police gave Kentucky Fried Chicken to a burglar because of his 'human rights'

In 2006 a suspected car thief fleeing police was besieged on a roof for 20 hours. During the course of the 20 hour stand-off the police negotiating team gave the man Kentucky Fried Chicken and cigarettes. It was widely reported that the police did this in order to protect the man's 'well-being and human rights'. There was clearly no human right engaged – there is no human right to KFC, nor indeed to be provided with any food in such a situation. Rather, the police were using general negotiating tactics to encourage him to come down from the roof.

The right to privacy in the HRA prevents free media reporting

The HRA protects both the right to privacy and the right to free expression. At times these rights can come in to conflict with one another and when they do a balancing exercise is required. The HRA has, on numerous occasions, strengthened the free press. In particular the right to free speech (enshrined in Article 10) will protect media reports that are of public concern and in the public interest. Indeed, the right to free speech finds its only protection in UK law under Article 10 of the HRA. Article 10 has protected journalists from being required to disclose their sources and has provided protection of investigative reporting. However, it will not protect reports that are obviously false and may not protect intrusive reports relating to the private lives of individuals. In some cases the right to privacy, in conjunction with the common law, will prevent media reports into the private lives of celebrities when it is not in the public interest to report such private details.

The HRA prevents rapists and paedophiles from registering their details (including their online identities) on the sex offenders register

There is nothing in the HRA that prevents convicted sex offenders from being required to register on the sex offenders register. The right to privacy under Article 8 of the HRA can be limited if it is necessary and proportionate to protect public safety. The courts have held that registration on the sex offenders register does not breach human rights law. In 2010 it was, however, wrongly reported that plans to require sex offenders to disclose email addresses and online identities (for example, on Facebook) had been shelved because it would breach offenders' human rights. Instead the European Court of Human Rights has held that the requirement to provide information to the police for inclusion on the sex offenders register is proportionate given the gravity of the harm which may be caused to the victims of sexual offences if an offender were to reoffend. Our Supreme Court has held that while life-long registration on the register can be justified, there should be a mechanism to provide simply for a review of the requirement to remain on the register long-term. A review would consider an individual's circumstances and may well lead to a decision to continue to require registration.

British common law and Magna Carta protected our rights long before the HRA

The UK has a long and proud history in leading the development and recognition of fundamental rights and freedoms. In fact, many of the rights in the HRA had their genesis in principles that emerged from Magna Carta, the 1689 Bill of Rights, the Habeas Corpus Acts and the common law. However, the common law is liable to be overridden at any time by statute and provides no possible recourse when rights are undermined. There is also nothing in Magna Carta or other historic legislation that protects free speech, personal privacy, the right to protest, non-discrimination etc. Many of the rights we have long taken for granted found no protection in domestic law until the HRA gave effect to them. Until the advent of the HRA British residents had to rely solely on the good-will of government for protection or take the long and costly route to the European Court of Human Rights. While the freedom of a person to do anything that is not prohibited by law is an important part of our constitution this principle gives no protection to individuals from misuse of power by the state or public bodies.

The HRA is not sufficiently ‘British’ so the UK doesn’t benefit from the ‘margin of appreciation’ before the European Court of Human Rights

The European Court of Human Rights (ECtHR) gives a margin of appreciation to member states to allow for political and cultural variations between the 47 different countries that have signed up to the Convention on Human Rights. It will also be applied where the ECtHR considers national authorities are better placed to make assessments of proportionality about rights protection. How much emphasis is placed on the margin of appreciation will depend on the nature of the human right at issue (for example, religious freedom might attract the principle whereas torture will not); the reason why the State has limited the right; and whether there are differing approaches to the issue within member states or if a country is alone in limiting the right in that way. Some commentators have suggested that only a clear and codified ‘British Bill of Rights’ would lead the ECtHR to give the UK the benefit of our home-grown values – that it requires a constitutional document like the German Basic Law before the ECtHR will defer to domestic practice. This is not how the margin of appreciation has been applied by the ECtHR (the margin of appreciation is solely an international doctrine and is not available to UK courts). The adoption of a differently named ‘British Bill of Rights’ or indeed a written constitution would have no added effect in ensuring the ECtHR applied a greater margin of appreciation to the UK.

References

Background to the HRA

The Universal Declaration on Human Rights was proclaimed by the General Assembly of the United Nations on 10 December 1948.

The Convention for the Protection of Human Rights and Fundamental Freedoms (otherwise known as the European Convention on Human Rights) was adopted on 4 November 1950 and came into force on 3 September 1953 after ten states had ratified it.

Government Green Paper *Bringing Rights Home: Labour's plans to incorporate the ECHR into UK law*, December 1996.

Government White Paper *Rights Brought Home: the Human Rights Bill*, October 1997.

How does the HRA work?

Interpretation provision case study: *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557.

Declaration of incompatibility case study: *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467.

Remedies – Case study: judicial review: *R (on the application of Wood) v Metropolitan Police Commissioner* [2009] EWCA Civ 414; [2009] 4 All ER 951.

Case study: compensation: *R (B) v Director of Public Prosecutions* [2009] EWHC 106 (Admin).

What do the Rights mean?

For a more detailed consideration of all of the rights in the HRA, see: John Wadham et al, *Blackstone's Guide to the Human Rights Act 1998*, 5th edition (2009); and Sweet and Maxwell, *Human Rights Practice* (Jessica Simor ed).

For meaning of 'prescribed by law' see: *Gillan and Quinton v United Kingdom*, Application no. 4158/05, 12 January 2010, European Court of Human Rights (ECtHR), especially paragraphs [76]–[77].

Proportionality: *S and Marper v UK* (2008), Applications Nos. 30562/04 and 30566/04, 4 December 2008 (ECtHR).

Right to life

Protect the right to life: *Osman v UK*, Application No. 23452/94; (1998) 29 EHRR 245 (ECtHR).

Duty to prevent accidental deaths: *Oneriyildiz v Turkey*, Application No. 48939/99; (2004) 18 BHRC 145 (ECtHR).

Prohibits intentional killing: *McCann v UK*, Application No. 18984/91; (1995) 21 EHRR 97 (ECtHR) and *Nachova v Bulgaria*, Application No. 43577/98; (2005) 42 EHRR 933 (ECtHR).

Case study: *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2004] 1 AC 653.

No torture

Prohibition on ill-treatment – Government policies: *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66; [2006] 1 AC 396.

Torture evidence: *A v Secretary of State for the Home Department (No. 2)* [2005] UKHL 71; [2006] 2 AC 221.

Deportation to torture: see *Chahal v UK*, Application No. 22414/93; (1996) 23 EHRR 413 (ECtHR) and *Saadi v Italy*, Application No. 37201/06; (2008) 49 EHRR 730 (ECtHR).

Prevention: *A v UK*, Application No. 25599/94; (1998) 5 BHRC 137 (ECtHR); *Z v UK*, Application No. 29392/95; (2001) 34 EHRR 97 (ECtHR); and *E v UK*, Application No. 33218/96; (2002) 36 EHRR 519.

Case study: *Ireland v UK*, Application No. 5310/71, 18 January 1978 (ECtHR).

No slavery

Obligation to protect: *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010 (ECtHR).

Case study: *Siliadin v France*, Application No. 73316/01; (2005) 43 EHRR 287.

Right to liberty

Control orders: *Secretary of State for the Home Department v JJ* [2007] UKHL 45; [2008] 1 AC 385.

Case study: *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 1 AC 68.

Right to a fair hearing

Criminal charges: *Engel v Netherlands*, Application No. 5100/71; (1976) 1 EHRR 647.

Case study: *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28; [2009] 3 All ER 643.

No punishment without law

Registration on sex offenders register: *Adamson v UK*, Application No. 42293/98, 26 January 1999.

Confiscation orders: *Welch v UK*, Application No. 17440/90; (1995) 20 EHRR 247.

Sentencing: *Scoppola v Italy*, Application No.10249/03, 17 September 2009, (ECtHR).

Case study: *Veeber v Estonia (No. 2)*, Application No. 45771/99; (2003) 39 EHRR 125 (ECtHR).

Right to privacy

Limitations on rights: see *S and Marper v UK* (2008), Applications Nos. 30562/04 and 30566/04; (2008) 48 EHRR 1169 (ECtHR).

Balancing rights: see *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457.

Case study: *Gillan and Quinton v the United Kingdom*, Application No. 4158/05, 12 January 2010 (ECtHR).

Freedom of religion

Case study: *Işik v Turkey*, Application No. 21924/05, 2 February 2010 (ECtHR).

Free speech

Importance of types of expression: see *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at [148].

Case study: *Financial Times Ltd and others v the United Kingdom*, Application No. 821/03, 15 December 2009.

Right to protest

Protection of assemblies from violent disruption: *Plattform 'Ärzte für das Leben' v Austria*, Application No. 10126/82; (1988) 13 EHRR 204.

Prior authorisation: see *Aldemir v Turkey*, Applications No. 32124/02, 18 December 2007 (ECtHR).

Right to protest not to be limited because causes nuisance: *R (Tabernacle) v Secretary of State for Defence* [2009] EWCJ Civ 23 at [43].

Freedom to disassociate: *Cheall v UK*, Application No. 10550/83; (1985) 42 DR 178 (EComHR); and *RSPCA v Attorney General* [2002] 1 WLR 448.

Refusal to join an association: *Young, James and Webster v UK*, Application Nos. 7601/76 and 7806/77; (1981) 4 EHRR 38.

Case study: *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55; [2007] 2 AC 105.

Right to marry

Case study: *R (Baiai and ors) v Secretary of State for the Home Department* [2008] UKHL 53; [2009] AC 287.

No discrimination

Indirect discrimination: *DH v Czech Republic*, Application No. 57325/00, 13 November 2007, (ECtHR).

Case study: *Re P (adoption: unmarried couple)* [2008] UKHL 38; [2009] AC 173.

Protection of property

Case study: *Stretch v UK*, Application No. 44277/98; (2003) 38 EHRR 196 (ECtHR).

Right to education

Right to education encompasses: *Belgian Linguistics (No. 2)*, Application No. 1474/62; (1968) 1 EHRR 252 (ECtHR).

Case study: *Campbell and Cosans v UK* (1982) 4 EHRR 293.

Right to free elections

Case study: *Hirst v UK (No. 2)*, Application No. 74025/01; (2005) 42 EHRR 849 (ECtHR).

Myths and Misunderstandings

Power to unelected judges: see Lord Bingham at para [42] in *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 1 AC 68: “But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself ... [it] is wrong to stigmatise judicial decision-making as in some way undemocratic.”

Compensation culture: see *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 2 All ER 240.

Release of sex offender on parole: See Joint Committee On Human Rights - Thirty-Second Report, Session 2005-06, [28]-[39] and ‘Sex attacker freed from jail to kill mother as his human rights deemed ‘more important than safety of others’’, *Daily Mail*, 22 February 2010.

Prisoners’ access to pornography: see ‘Serial killer’s legal aid porn bid’, *Daily Mail*, 26 October 2001; ‘Prisoners win their claim that hardcore porn is a human right’, *Telegraph*, 10 November 2002.

Wanted posters: see ‘Wanted: for Crimes Against Common Sense’, *Daily Mail*, 5 January 2007 and ‘Fury over ‘Rights’ of Suspects’, *The Sun*, 10 February 2007. See also *R (Stanley, Marshall and Kelly) v Metropolitan Police Commissioner* [2004] EWHC 2229 (Admin).

KFC meal: see ‘KFC meal ‘ensures siege man’s rights’’, *Telegraph*, 7 June 2006.

Sex Offenders Register: see ‘Human Rights law left facebook killer free to groom girls’, *Telegraph*, 10 March 2010; ‘Rapists win new legal rights’, *The Sun*, 21 April 2010; *Adamson v UK*, Admissibility Decision, Application No. 42293/98, 26 January 1999 (ECtHR); *R (on the application of JF (by his litigation friend OF) and another) v Secretary of State for the Home Department* [2010] UKSC 17; [2010] 2 All ER 707.

Human Rights Act 1998

(1998, c. 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)

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) Article 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 Secretary 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.

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 the 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.

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—
 - (a) the Supreme Court;
 - (b) the Judicial Committee of the Privy Council;
 - (c) the Court 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;
 - (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.

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 Supreme Court against any declaration of incompatibility made in the proceedings.
 - (5) In subsection (4)—
 - “criminal proceedings” includes all proceedings before the Court Martial Appeal Court; and
 - “leave” means leave granted by the court making the declaration of incompatibility or by the Supreme Court

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.

...
- (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.

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 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 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.

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 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 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).

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 (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).

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—
 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 Secretary of State.

...

- (3) If a designated derogation is amended or replaced it ceases to be a designated derogation.
- (4) But subsection (3) does not prevent the Secretary of State from exercising his power under subsection (1) to make a fresh designation order in respect of the Article concerned.
- (5) The Secretary 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.

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 Secretary 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 Secretary of State from exercising his power under subsection (1)(b) to make a fresh designation order in respect of the Article concerned.
- (5) The Secretary 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).

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 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), or
 - (b) extended by an order under this subsection,
- comes to an end, the Secretary of State may by order extend it by a further period of five years.
- (3) An order under section 14(1) 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 Secretary of State must by order make such amendments to this Act as he considers are required to reflect that withdrawal.

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 Senior Courts Act 1981 (maximum number of judges) nor as a judge of the Senior 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 Court of Session Act 1988 (maximum number of judges) or of section 9(1)(c) of the Administration 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 Judicature (Northern Ireland) Act 1978 (maximum number of judges) nor as a judge of the Court 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 Courts Act 1971 (salaries etc);
 - (e) a sheriff is not to count as such for the purposes of section 14 of the Sheriff 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 County Courts Act (Northern Ireland) 1959 (salaries etc).

- (5) If a sheriff principal is appointed a judge of the Court, section 11(1) of the Sheriff 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.
- (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).

*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 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 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 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 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.

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 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 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 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 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;

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

“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) Measure 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 Northern 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, 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).

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.

The Convention Rights

SCHEDULE I

The Articles

Section 1(3)

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.

Part III: Article 1 of the Thirteenth Protocol

Abolition of the Death Penalty

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

SCHEDULE 2 Remedial Orders

Section 10

Orders

I

- (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.

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.

SCHEDULE 3

Derogation and Reservation

Sections 14 and 15

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.

Note: Schedule 4 has been omitted (relating to Judicial Pensions).

About the Author

Anita Coles is a Policy Officer at Liberty (the National Council for Civil Liberties). She is principally involved with Liberty's parliamentary lobbying and policy development: responding to government consultations and briefing parliamentarians on the human rights implications of proposed legislation. She is a qualified Australian lawyer, with a Masters of Law from the University of Cambridge. Prior to joining Liberty she was Parliamentary Counsel in Victoria, Australia.

This book provides parliamentarians with a clear and concise guide to the Human Rights Act 1998. It explains how the Act operates, including the role of Parliament, the courts and public authorities. It provides a comprehensive and accessible explanation of all the rights contained in the HRA together with case studies demonstrating how the rights operate in practice. It also addresses the most common and prevalent myths and misunderstandings about the HRA – separating fact from fiction. Included at the end of the Guide is an updated version of the full text of the HRA. This Guide is intended to assist parliamentarians in fulfilling their many and varied functions, including scrutinising new legislation and government policies and advising constituents.