

# LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

# Human Rights Act 1998 – How it works

- Requires public authorities to act compatibly with Convention rights;
- Requires legislation to be interpreted in accordance with Convention rights;
- Requires Courts to have regard to Strasbourg Case law;
- Allows Courts to make a declaration that an Act of Parliament is incompatible with the Convention;
- Allows individuals to bring proceedings against public authorities in UK courts for breach of their Convention rights;
- Requires courts to provide a remedy (including damages) where it finds that a public authority has breached an individual's Convention rights.

# Acts of public authorities

- Section 6(1):
- *“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”*

# What is a public authority?

- *(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.*

Any person certain of whose functions are functions of a public nature

- *Wholly public bodies (e.g. government departments, local authorities, police, prison service)*
- *Hybrid bodies (but only in respect of their public functions)*

# YL v Birmingham City Council [2008] 1 AC 95

- A privately-owned care home which accommodates and cares for residents placed and paid for by a local authority does not perform a “function of a public nature”.

# Relevant factors:

- Whether the body has special powers conferred or duties imposed in the general public interest;
- whether the body has powers of compulsion over individuals;
- the extent that a body is publicly funded or is “taking the place” of central government or local authorities or is providing a public service;
- whether the activity is publicly funded (note that this is a necessary, but not a sufficient, condition)
- whether the activity benefits the public (although Lord Neuberger said that little weight should be placed on this)

# Court or Tribunal

- Can create 'horizontal effect'
- Need cause of action that enables proceedings to be brought,
- once before the court or tribunal, Tribunal will have to act compatibly with Convention rights of parties.

# Campbell v Mirror Group Newspapers [2004] UKHL 22

- Naomi Campbell brought proceedings for breach of confidence to stop publication of photos,
- Under traditional common law publication not breach of confidence
- But the Court found that publication breached her Article 8 right to respect for her privacy,
- Modified law of confidence to enable them to protect her privacy.

# Section 6(2) defence

*“Subsection (1) does not apply to an act if:*

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

*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.”*

# R (Hooper & others) v Secretary of State for Work and Pensions [2005] UKHL 29

- Widows received benefits (the widow's payment and the widowed mother's allowance) which were denied to widowers.
- Section could not be interpreted as requiring payments to be made to men as well
- Court held that there was no duty on Sec. of State to provide for extra-statutory payments to men.

R (Hooper & others) v Secretary of State for  
Work and Pensions [2005] UKHL 29

*“Paragraphs (a) and (b) [of section 6(2)] both qualify the basic principle in section 6(1) that it is unlawful for a public authority to act in a way that is incompatible with the Convention rights. The purpose of these paragraphs is to prevent section 6(1) being used to undermine another of the Act's basic principles. This is that in the final analysis, if primary legislation cannot be interpreted in a way that is compatible with them, Parliamentary sovereignty takes precedence over the Convention rights.”* (Lord Hope – para. 70)

## Section 3(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.”*

# Section 3(1):

- *“...the interpretative obligation under section 3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature...In accordance with the will of Parliament as reflected in section 3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained...”* - Lord Steyn (R v A [2001] UKHL 25)

# R v A [2001] UKHL 25

Section 41 Youth Justice and Criminal Evidence Act 1999 which severely limited a defendant's right in a rape trial to adduce evidence or to cross-examine the victim on the issue of consent had to be read subject to the right of the defendant to have a fair trial (Article 6 of the Convention).

## Ghaidan v Godin-Mendoza [2004] UKHL 30

- Tenant lived in a stable and monogamous homosexual relationship with Mr Godin-Mendoza. After the death of the tenant, the landlord, brought proceedings for possession of the flat.
- Rent Act 1977 gave rights of succession to the surviving spouse, or to “ a person living with the tenant as his or her wife or husband”.
- On a literal reading of the Act Mr Godin-Mendoza would therefore not qualify to succeed.
- House of Lords held that Rent Act had to be read to include someone living with the original tenant “as *if they were* his or her wife or husband”.

# *R (Wilkinson) v Commissioners of Inland Revenue* [2005] UKHL 30

- Mr Wilkinson was a widower. If he had been a widow, he would have been entitled to a widow's bereavement allowance under the Income and Corporation Taxes Act 1988. Failing to apply the allowance, he argued, was incompatible with his Convention rights,
- He argued that section should be read so that word 'widow' includes 'widower',
- Court did not allow that - found that the contrary indications in the 1988 Act were too strong to allow any reasonable reader to give this meaning to the statute.

# What happens if legislation cannot be read compatibly with the Convention?

## ***Primary legislation***

- House of Lords, Court of Appeal and the High Court can make a *declaration of incompatibility* (section 4(2)).
- Declaration of incompatibility does not affect the continuing operation of the offending provision (section 4(6)). There is no breach of the provisions of the Act, and no claim for damages can arise.
- Fast track for amending legislation where there are *compelling reasons* (also applies where ECHR decision makes legislation incompatible with the Convention) (section 10).

## Section 2 – Significance of ECtHR Caselaw

- Domestic courts must take into account caselaw of the European Court of Human rights
- But ECtHR caselaw is not strictly binding on UK courts, and there have been one or two occasions when the domestic courts have disagreed with Strasbourg and refused to follow its judgments.
- Where the ECtHR has declared a question to be within the national “margin of appreciation”, the question must be decided by the national authorities, including the courts, which may result in the domestic courts going further than the ECtHR in their interpretation of Convention rights (see Re G (adoption: unmarried couple) [2008] 3 WLR 76).
- Lower courts are bound to follow judgments of the House of Lords, even if there is a subsequent conflicting Strasbourg case (Kay v London Borough of Lambeth [2006] 2 AC 465).

# Section 7: Proceedings

- Anyone who claims that a public authority has acted (or proposes to act) in a way that is incompatible with the Convention can:
- Bring proceedings (section 7(1)(a))
- Rely on the Convention right(s) in any proceedings (section s7(1)(b))

# Section 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.

# Victim

- Only 'victim' can bring claim
- 'Victim' has same meaning as under Convention (section 7(7))
- Only victim if directly affected by the act or omission which is the subject of the complaint
- Need not have actually suffered consequences of alleged breach, provided that there is a real (and not merely theoretical) risk of that (*Dudgeon v UK*).

# Time Limits

- Limitation period for bringing proceedings under section 7(1)(a) one year or longer if equitable “*having regard to all the circumstances*” (section 7(5))
- Although the normal time limit for other proceedings (e.g. judicial review, employment tribunal, appeal to Social Security Commissioners) will apply (section 7(5)).

# Section 8 - Remedies

- Court may grant such relief or remedy within its powers as it considers appropriate (section 8(1))
- Damages should only be awarded if they are necessary in all the circumstances to afford “just satisfaction” (section 8(3)) - the circumstances include any other relief or remedy granted
- In deciding whether to award damages and how much, the court should have regard to ECHR principles (section 8(4))

# Damages

The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as *restitutio in integrum*. The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded.

*R (Anufrijeva) v LB Southwark* [2003] EWCA Civ 1406

# 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 14 of the Convention complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to ‘the enjoyment of the rights and freedoms’ safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions - and to this extent it is autonomous - there can be no room for its application unless the facts at issue fall within the ambit of one or more of them.”

Gaygusuz v Austria (1997) 23 EHRR 364

“...under Article 14 not every difference in treatment will amount to discrimination contrary to this provision. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment, and that there is no reasonable or objective justification for this distinction.”

Courten v the United Kingdom Application no. 4479/06, admissibility decision of 4th November 2008

# Michalak v London Borough of Wandsworth

## [2002] EWCA Civ 271

- i. Do the facts fall within the ambit of one or more of the Convention rights?
- ii. Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
- iii. Were those others in an analogous situation?
- iv. Was the difference in treatment objectively justifiable? i.e, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

The House of Lords has tended to disapprove this formulaic approach.

“... the time has come to say that in cases on article 14, the Michalak catechism, even in a corrected form, is not always the best approach.”

Lord Walker in R (Carson and Reynolds) v Secretary of State for Work and Pensions [2005] UKHL 37, § 64

# Ghaidan v Godin-Mendoza [2004] UKHL 30

“ . . . the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.” Baroness Hale, § 134

# R (Carson and Reynolds) v Secretary of State for Work and Pensions [2005] UKHL

## 37

- “Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny.” Lord Nicholls, § 3
- “There is a single question: is there enough of a relevant difference between X and Y to justify different treatment?” Lord Hoffmann, § 31

# Personal Characteristics

- Does difference in treatment have to be based on a personal characteristic?
- The list of prohibited grounds of discrimination in Article 14 is not exhaustive. E.g. sexual orientation is now clearly a ground of discrimination.
- Salgueiro da Silva Mouta v Portugal (2001) 31 EHRR 1055
- Ghaidan.

“... the proscribed grounds in Art14 cannot be unlimited, otherwise the wording of Art14 referring to ‘other status’ beyond the well-established proscribed grounds, including things such as sex, race or colour, would be unnecessary. It would then preclude discrimination on any ground. That is plainly not the meaning of Art14. It is therefore necessary to examine whether the ground for different treatment in this case amounts to a status in the sense of a personal characteristic within the meaning of Art14.”

Lord Steyn in R (S & Marper) v Chief Constable of South Yorkshire [2004] UKHL 39

# S & Marper

- Police power to retain DNA samples and profiles of people arrested for an offence but not convicted
- Claimants argued that they were treated differently from other innocent people who had never been arrested
- Lord Steyn accepted the characterisation as being one of “historical fact”
- Obiter, as the House of Lords held that Article 8 was not engaged by the retention
- Grand Chamber of the ECtHR held unanimously that Article 8 was breached (and so did not consider Article 14)

R (Clift, Hindawi and Headley) v Secretary of State for the Home Department [2006]  
UKHL 54

- C was serving an 18 year prison sentence. As he was serving more than 15 years final decision as to whether to release him on parole lay with the Home Secretary and not the Parole Board.
- H & H were foreign nationals liable to deportation. As such the Parole Board could not recommend their release.

“... it is plain [...] that a different parole regime for foreigners who are liable to deportation from that applicable to citizens or others with the right to remain here, falls within the grounds proscribed by article 14 and thus (subject to the ambit issue) requires objective justification. The same would surely apply to a difference in treatment based on race, sex or the colour of one's hair. But a difference in treatment based on the seriousness of the offence would fall outside those grounds. The real reason for the distinction is not a personal characteristic of the offender but what the offender has done.”

Baroness Hale, § 62

# R (RJM) v Secretary of State for Work and Pensions [2008] UKHL 63

- Homeless man challenged the fact that the income support disability premium could not be claimed by those who were “without accommodation”
- The Court of Appeal held that his homelessness was a voluntary choice and could not therefore be a personal characteristic
- The House of Lords took a different view

“... while reformulations are dangerous, I consider that the concept of “*personal* characteristic” (not surprisingly, like the concept of status) generally requires one to concentrate on what somebody is, rather than what he is doing or what is being done to him.”

Lord Neuberger § 45

“Personal characteristics’ are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person’s family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual’s personality [...]. Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14...” Lord Walker, § 5

# Francis v Secretary of State for Work and Pensions [2005] EWCA 1303

- Claimant had a residence order for a child that was born to her sister
- Denied Sure Start Maternity Grant, when an adoptive parent in the same situation would receive it.
- The Court of Appeal held that a residence order, like an adoption order, gives rise to a continuing relationship between the person who thereby had parental responsibility for a child.
- This could be described as a personal characteristic.

# Ambit – Article 8

## *Right to respect for private and family life*

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

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.

# Secretary of State for Work and Pensions v M [2006] UKHL 11

- The claimant was the absent parent for the purposes of a child support assessment
- She challenged the fact that, as someone in a same-sex relationship, the housing costs that she shared with her partner were treated differently for the purposes of the assessment than they would have been had she been in a heterosexual relationship.
- Successfully argued in the lower courts and tribunals that this breached Article 14 taken with Article 8.

“...the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa.”

Lord Nicholls § 14

“It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol, to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for.”

Lord Bingham § 4

- The impact on the claimant's private life was too insignificant to bring her within the scope of Article 8.
- Unclear whether this approach is limited to Article 8. Lord Walker suggested that Article 8 was to be contrasted with other Articles with “a reasonably well-defined ambit (or scope)”:

“...article 8 is very different because of its much wider and less defined ambit.” § 61

# R (Morris) v Westminster City Council [2005]

## UKCA Civ 1184

- The claimant, a homeless person and a British citizen by descent, was denied priority need status because her young daughter did not have citizenship, was subject to immigration control and therefore ineligible for housing assistance (section 185(4) Housing Act 1996.)
- She argued (successfully) that this breached Article 14 taken with Article 8 on the basis of a difference in treatment based on nationality.
- Part VII Housing Act 1996 was within the scope of Article 8 because:
- “...albeit within a larger social welfare measure, it sets out to give effect to a legislative policy of preserving family life for the homeless.”
- Sedley LJ § 25

# Ambit – Article 5

- *Right to liberty and security*
- Clift, Hindawi and Headley

*“...the right to seek early release, where domestic law provides for such a right, is clearly within the ambit of article 5, and differential treatment of one prisoner as compared with another, otherwise than on the merits of their respective cases, gives rise to a potential complaint under article 14.”*

Lord Bingham § 18

# Ambit – Article 1 of the First Protocol

## *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 considers 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.

Stec and others v the United Kingdom  
Application nos. 65731/01 and 65900/01,  
admissibility decision of 6th July 2005

Both contributory and non-contributory benefits come within the ambit of Article 1 of the First Protocol when it is taken with Article 14

“... [Article 1 of the First Protocol] does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.” § 54

# **Analogous situation**

“relevantly similar situation”

# Unmarried couples

- Shackell v UK Application no.45851/99, admissibility decision of 27th April 2000
- Applicant not permitted to claim widow's benefits after the death of her "common law" husband.
- Claimed difference in treatment compared with widow
- "The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it. The situation of the applicant is therefore not comparable to that of a widow."

# Burden & Burden v UK Application no. 13378/05, judgment of 29th April 2008

- Elderly sisters concerned about the inheritance tax liability that the survivor would face
- Compared themselves to a married or civilly partnered couple
- “... the legal consequences of civil partnership under the 2004 Act, which couples expressly and deliberately decide to incur, set these types of relationship apart from other forms of co-habitation. Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature.” § 65

# Courten

- Surviving same sex partner
- Partner died before the Civil Partnership Act 2004 came into force
- Wished to claim the inheritance tax exemption that a surviving spouse (or now civil partner) could claim
- No analogous situation

# Ratcliffe v Secretary of State for Defence

## [2009] EWCA Civ 39

- Surviving unmarried partner of serviceman not entitled to a pension because the injury that caused his death pre-dated 2005.
- Had his injury occurred after 2005 she would have been entitled to a pension.
- “... the decision whether a married and unmarried couple are in an analogous situation must be made in the light of the scheme under examination.” Hooper LJ, § 72
- By the time of her partner’s death it was clear that the Armed Forces intended to treat married and unmarried survivors substantially the same.

# Objective and reasonable justification

- Carson & Reynolds

Lord Hoffmann:

“Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment.”

- There was a need “distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and those which merely require some rational justification” § 15
- “...while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.” § 16

- Claimants receiving UK pension but resident in some countries abroad were not entitled to annual updating
- Compared themselves to pensioners in the UK and pensioners in some other countries where pensions were updated as a result of reciprocal arrangements with those countries
- Lost their claims in the House of Lords and the ECtHR
- Application is still to be considered by the Grand Chamber

# Stec

- Differences in treatment between the sexes in relation to payment of reduced earnings allowance (a historic earnings related benefit payable to employees who have suffered an accident or injury at work) and the point at which it was replaced by retirement allowance
- Justified by connection to different state retirement ages

# Hooper

- Continuing to pay a widow's pension to women widowed before 9th April 2001 while not paying it to men widowed before that date was objectively and reasonably justified
- The pension was introduced in 1925 in recognition of the fact that older women faced hardship when their husbands died because they did not tend to have worked themselves.
- Parliament was entitled to consider that it would be a "breach of faith" to withdraw it from those who had planned to receive it.

# RJM

- Secretary of State justified the difference in treatment on the grounds:
  - Not paying the supplement encouraged rough sleepers to seek accommodation
  - Rough sleepers did not have the additional expenses that those in accommodation had
- “...the government was entitled to adopt and apply the policy at issue.” Lord Neuberger, § 56

# Morris

“...putting foreign nationals under pressure to leave if they cannot regularise their stay is a perfectly intelligible policy objective. But while it is simple to justify in relation to foreign nationals, it has no discernible justification in relation to British citizens.” Sedley LJ, § 44

# Indirect Discrimination

DH v Czech Republic Application no. 57325/00,  
judgment of 13th November 2007

- The applicants were all Roma children who were placed in special schools by the Czech education authorities
- 56% of pupils placed in special schools in the town of Ostrava were Roma, but Roma represented only 2.26% of the total primary school population.
- Only 1.8% of non-Roma pupils were placed in special schools, compared with 50.3% of Roma.

- “...the Court considers that when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant is required to produce.” § 188
- The burden then passed to the respondent state to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin
- Breach of Article 14 taken with Article 2 of the First Protocol.

# Case Study Exercise

- Peter was in receipt of the mobility component of the Disability Living Allowance (DLA), which was originally stated as being for life.
- Peter moved to Spain in 2007, where the weather is beneficial to his condition.
- Shortly after moving to Spain, the DWP stopped paying the mobility component of the DLA, as Peter was no longer resident in the UK.
- Persons who are in receipt of Maternity Allowance and move abroad are able to continue to receive it.

# Questions to consider

- Has there been a breach of Peter's human rights?
  - Does the facts fall within the ambit of one of the Convention rights?
  - Is there a difference of treatment in respect of that Convention right?
  - Is the difference of treatment on the grounds of 'status' or 'personal characteristic'?
  - Was Peter in an analogous situation with the relevant comparators?
  - Was the difference in treatment justified on objective grounds?

# Questions to Consider

- If there is an argument that his human rights have been breached, what should he do?
- What would you need to check to see whether a challenge might succeed in UK court?

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