



**A Guide to the
Human Rights Act 1998**
Questions and Answers

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A GUIDE TO THE HUMAN RIGHTS ACT 1998

1. Introduction: How the legal system has changed

The Human Rights Act: a new set of rights in UK law

The **Human Rights Act 1998 (the Act)** came into full force on **2 October 2000**. The aim of the Act is to ensure that a set of basic human rights, which are listed in the Act, are fully respected and enforced in the UK. The Act fundamentally changes the way the UK system of justice works, and makes public authorities more accountable for their decisions.

The effect of the Act is to put human rights at the centre of the UK legal system, for the first time. Under the Human Rights Act, everyone is entitled to expect that the government, and all public agencies and organisations should have respect for their basic human rights. If they consider that their rights have been ignored, they can bring a case in the UK courts to challenge an action or a decision by any public authority on the grounds that it interferes with their rights – for example their right to express their views freely, or their right to privacy, or their right to a fair trial in court.

What rights does the Act include?

The rights that are brought into effect by the Human Rights Act are the rights laid down in an international treaty, **the European Convention on Human Rights** (the Convention), which was signed by the UK in 1951. That treaty permits individuals who believe that their human rights have been violated to bring a case before an international court in Strasbourg, the **European Court of Human Rights**. This court is part of an international organisation, the Council of Europe, which is a distinct organisation, separate from the European Union.

In many respects, the rights introduced by the Human Rights Act are not new. They have been binding on the UK government since 1951. However, what is new is the fact that people can now hold public authorities directly accountable in the UK itself.

How does the European Human Rights System work?

- **Before the Human Rights Act, human rights standards were applied directly only in the Strasbourg court.**

Over the many years it has been in operation, the European Court of Human Rights has found that the UK has violated individuals' human rights in many and varied cases. But, until now, anyone in the UK who claimed that their rights had been breached had no choice but to bring a case to the court in Strasbourg. To all intents and purposes, they were unable to make the argument in the UK courts that their rights had been breached. Taking a case to Strasbourg is a time-consuming and expensive process. For example, it means that someone who believed that they had not been given a fair trial would have to appeal their case all the way through the UK courts, without being able to have their human rights arguments properly addressed, and then go to the Court in Strasbourg, which might take a considerable time to reach a final decision in the case.

How has the Human Rights Act changed the system?

- **Under the Human Rights Act, human rights standards are applied from the beginning.**

Now, by contrast, the process is considerably simpler. The guiding principle of the Act is that all public authorities must act compatibly with the human rights standards contained within it. If someone believes that their human rights have been unlawfully interfered with, the very first court or tribunal before which a case is heard must take human rights standards into account, and ensure that, whatever decision is taken, it does not interfere with these rights. People can assert their Convention human rights in all UK courts and tribunals. They can challenge in court an organisation that performs a public function, if they believe that there has been a breach of their human rights. They are also entitled to expect that the courts take account of their rights in all cases, from maintenance proceedings to planning decisions, from employment disputes to criminal trials. If, having pursued all available appeals, a person still believes that his or her human rights have been interfered with and that the UK courts have not applied human rights standards properly, it is, of course, still possible to take a case to the Strasbourg court to enforce rights there.

- **Human rights standards must be applied by public authorities as well as by the courts.**

The ultimate remedy for a breach of the Human Rights Act is in the courts, but, even before an issue comes to court, people are entitled to expect that account be taken of their human rights in the way public services are administered. The Human Rights Act is deliberately designed so that human rights are taken account of and vindicated at the earliest possible stage, where decisions are first made, and not only in the courts.

2. Fundamental Rights and the Human Rights Act

Why must human rights be protected?

Holding the State and public authorities accountable against basic minimum standards of respect for rights is a benchmark of a civilised society. Human rights embody values which should be central to any democratic government and administration.

- **Human rights are inherent, inalienable and universal.**

The starting point for all human rights protection is that everyone has basic, inherent human rights. These rights are seen as essential to the individual's human dignity. The essential elements of human rights are that they are recognised as being **inherent, inalienable and universal**.

- Human rights are **inherent** because they are the birthright of all human beings. They are not granted only to citizens, but belong to people simply by reason of their humanity.
- They are **inalienable** because no one can agree to give up their human rights, or have them taken away.
- They are **universal** because they apply to everyone regardless of their nationality, status, sex or race.

What are the rights Guaranteed by the European Convention and the Human Rights Act?

The European Convention on Human Rights reflects these basic principles. The rights included in the Convention range from basic guarantees such as the right to life and the right not to be subjected to torture, to ensuring that people are given a fair hearing in the courts, and to protections for privacy and free expression, and protection against discrimination. As we will discuss in more detail later, the Convention should be interpreted as a “living instrument” which develops according to present-day values and conditions.

The European Convention rights included in the Human Rights Act are:

- **Article 2: The right to life.** Article 2 states that everyone's right to life must be protected by law. For example, excessive use of force by the police and security services leading to loss of life could breach Article 2. There could also be a breach of the right to life where, for example, the police failed to provide adequate protection to someone whose life was in particular danger, or where prison authorities failed to take adequate precautions against suicides in detention.
- **Article 3: freedom from torture and inhuman or degrading treatment or punishment.** Article 3 rights would apply where, for example, police interrogation techniques were so harsh as to be designed to be inhuman or degrading. A person's right to freedom from inhuman and degrading treatment might also be breached where he or she was held in extremely inadequate or unsanitary prison conditions. Corporal punishment of children may also breach Article 3. Extreme forms of discrimination may also amount to inhuman and degrading treatment, and breach Article 3. There will be a breach of Article 3 rights where someone is deported or extradited to a country where they will face torture or be subjected to inhuman or degrading treatment.
- **Article 4: freedom from slavery and forced or compulsory labour.** Although Article 4 prohibits forced labour, it does not forbid some generally accepted types of mandatory work, such as jury service, or compulsory military service.

- **Article 5: The right to liberty.** Article 5 recognises that no one should be deprived of their liberty, except in defined circumstances, for example where a person has been convicted by a court, or where someone who is of unsound mind needs to be detained for treatment. Article 5 also requires that anyone who is arrested must be informed of the reasons for their arrest, and must be brought promptly before a judge, and tried within a reasonable time.
- **Article 6: The right to a fair trial.** Under Article 6, there is a general obligation to ensure fairness between the parties to a case, either civil or criminal. Article 6 requires that there should be “equality of arms” between the parties to a case, so that one party is not treated more favourably than another. Additional protections, set out in Article 6.3, apply in a criminal trial. These include the right to have adequate time and facilities to prepare a defence, the right to examine witnesses and the right of an accused to choose a legal representative or defend themselves in person if they wish to do so. In addition, Article 6.2 guarantees the right of anyone charged with a criminal offence to be presumed innocent until proven guilty.
- **Article 7: No punishment without law.** Article 7 prohibits retrospective criminal penalties. It states that no one is to be punished for an action which was not an offence at the time it was committed. Article 7 also requires, more broadly, that criminal offences should be clearly defined in the law, so that people can regulate their behaviour so as to stay within the law.
- **Article 8: The right to respect for private and family life, home and correspondence.** Article 8 protects the individual's right to privacy, and prevents a public authority from intruding disproportionately into a person's private life. For example, Article 8 may be breached, in some cases, by subjecting people to surveillance, or intercepting their telephone calls, or publishing newspaper accounts of their private life. Article 8 also protects rights to family life, and means that, for example, decisions regarding custody or adoption must take into account the rights to family life of all those involved. It also protects the individual's right to physical integrity, and the right to respect for the home.
- **Article 9: The right to freedom of thought, conscience and religion.** Article 9 protects the right of everyone to practise their chosen religion, and to express their

religious beliefs through worship, dress etc. It also protects the right to hold other strongly held philosophical beliefs, for example pacifism.

- **Article 10: The right to freedom of expression.** Article 10 guarantees everyone's right to express their views and opinions without interference by the State. It guarantees the freedom of the press, which is seen as of fundamental importance in any democracy. Freedom of expression also guarantees the right of artists to express themselves through their work, and includes the right to receive and impart information.
- **Article 11: The right to freedom of association and assembly.** Article 11 guarantees the right of everyone to join (or not to join) trade unions and other similar associations. It also protects the right to freedom of assembly and to peaceful protest.
- **Article 12: The right to marry and found a family.** Article 12 guarantees the right of "men and women of marriageable age" to marry according to the laws of the country. The right is therefore a restricted one, and it does not, for example, require the State to recognise same sex marriages or polygamous marriages.

The rights in the Human Rights Act also include some rights set out in protocols added to the Convention since the main text was prepared.

Protocol 1

- **Article 1: The right to property.** The right to property is protected by Article 1 of Protocol 1 of the Convention. It states that everyone is entitled to the "peaceful enjoyment of possessions." It also prevents the State or public authorities from depriving anyone of their possessions except where this is in the public interest, and where the grounds for confiscating the property are set out in law.
- **Article 2: The right to education.** This Article states that no one is to be denied the right to education. It also requires the State to respect the right of parents to ensure that their children are educated in conformity with their own religious and philosophical convictions.

- **Article 3: The right to free elections.** This Article requires states to hold free elections at reasonable intervals by secret ballot.

Protocol 6

- **Article 1: Abolition of the death penalty.** This Article states that the death penalty is abolished.
- **Article 2: Death penalty in time of war.** This Article states that the death penalty may be carried out where there is a war or imminent threat of war.

There are also some additional protocols which the UK has not yet signed: the rights in these protocols are not included in the Human Rights Act.

Prohibition on Discrimination

- **Article 14: Freedom from discrimination** (in relation to all of the rights listed). Article 14 guarantees the right not to be discriminated against in the way in which an individual's Convention rights are guaranteed. This Article is discussed in more detail below.

How are human rights protected in the UK courts?

Under the Human Rights Act, **the courts can find their own ways of interpreting the Convention**, and can begin to develop a distinctive law of human rights for the UK. Although the courts are required, by the Human Rights Act, to take into account the decisions of the Court of Human Rights in Strasbourg, are not obliged to follow them in all cases. Particularly in the early stages of the Human Rights Act's operation, the decisions of the Strasbourg court will be of great assistance and importance for all those applying the Convention's human rights standards here. The standards applied by the Strasbourg court should certainly form a floor: a minimum standard which the UK should meet and apply in all circumstances. However, the UK courts may decide in some instances to go beyond the standards applied in Strasbourg, and demand higher standards of human rights protection here.

- **The courts may look to the example of courts in other countries, or refer to international agreements.** In developing a new law of human rights, based on the Convention, the UK courts have a range of sources to draw on. They can look to the decisions of the courts in other countries, such as Canada, the United States, India or South Africa, where human rights are also protected by the Courts. They can also look to the other international human rights treaties that the United Kingdom has signed. These might include, for instance:

- The International Covenant on Civil and Political Rights (ICCPR)
- The Convention on the Elimination of all Forms of Racial Discrimination (CERD)
- The Convention Against Torture, and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT)
- The European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment
- The Convention on the Rights of the Child (CRC)
- The International Covenant on Economic Social and Cultural Rights (ICESCR)
- The European Social Charter

3. Balances of Rights and Interests

What happens when rights and interests conflict?

- **Some rights can be qualified or restricted but others cannot.**

The Convention recognises that not all rights are absolute and unconditional. Often, one person's rights will have to be balanced against another's. Therefore, to ensure effective application of human rights standards, it may be necessary, in the interests of the community, to limit or qualify certain types of rights. However, some rights are seen as so fundamental that they cannot be interfered with under any circumstances.

As a broad principle, in learning to identify when and how it may be appropriate to balance or qualify rights, it is helpful to consider that there are three types of rights. These are:

1. **Absolute rights**, which the State must protect in all circumstances
2. Rights which can be **limited**, in defined circumstances
3. Rights which may be **qualified**, by the rights of others, or by the needs of society, but only where it is necessary to do so

- **Absolute rights must be protected in all circumstances.**

Some rights are seen as so fundamental that they cannot be modified by other rights and interests. These are absolute rights. For example, where a prisoner is subjected to serious ill-treatment whilst in detention, or during interrogation, breach of his right not to be subject to torture, or inhuman or degrading treatment, cannot be justified by considerations such as the preservation of national security or the prevention of crime.

Absolute rights include the **right to life**, the right to **freedom from torture**, the right to **protection from retrospective criminal penalties** and the right to **freedom from forced labour** or slavery. These rights are stated very clearly in the Convention. For example, Article 3 states simply:

“no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Where these rights apply, the State must respect them in all circumstances, and is not permitted to interfere with them even where there is a war or other serious emergency. However, there are cases where these rights will be considered simply not to apply. For instance, the right to freedom from forced labour will not prevent the authorities from requiring people to serve on a jury, or to undertake military service.

The test to establish an absolute right is high, but once established, there can be no subsequent qualification or defence to breaching the right. For example, in the case of *A v UK*, it was decided that the State's failure to mount a successful prosecution of a stepfather for beating his stepson breached the UK's obligation in Article 3 to prevent inhuman and degrading treatment. It was not enough that the State had brought a prosecution that had failed – because the child had been subjected to inhuman and degrading treatment, it should have been ensured that the stepfather's argument that he had only exercised “reasonable chastisement” could not be used as a defence. No defence should have been allowed to the breach of an absolute right.

- **Limited Rights can be interfered with in specified circumstances.**

Some of the rights included in the Convention are limited, so that they may be restricted in particular ways, which are specified in the Convention text. Limited Rights include the right to a fair trial under Article 6, and the right to marry and found a family under Article 12. Another example is the **right to liberty**. Everyone has a general right, guaranteed in Article 5 of the Convention, to liberty, that is, not to be imprisoned. But the Convention recognises

that all societies limit rights to liberty in some circumstances. People convicted of criminal offences may be sentenced to imprisonment, and people arrested on suspicion of an offence may also be confined to jail. Also, someone who is found to be of unsound mind may have their liberty removed. Illegal immigrants may have certain restrictions placed on their liberty. Article 5 of the Convention recognises all these situations as exceptions to the general principle that liberty should not be restricted.

- **Aspects of the right to a fair trial can be limited under the Convention**

Article 6 of the Convention guarantees that everyone has the **right to a fair trial**, both in criminal cases, and in other cases, where civil rights and obligations are involved. This right, which can also be described as a limited right, is seen as being of fundamental importance. Judicial impartiality is the cornerstone of any democratic system. It is obviously essential in any democratic society that there should be access to the courts, and that the courts should deal with cases fairly and without bias. However, certain aspects of the right to fair trial, such as the **right to a hearing in public**, can be limited in certain specified circumstances. So, Article 6 allows the public to be excluded from court in certain circumstances. This may be, for example, where juveniles are involved in the case, and it is clear that it is in their interests that the public be excluded. So, for example, in child residence or adoption proceedings, it may be appropriate for the court to hear the case in private, and this will not breach the Convention. Rights such as the right to a public hearing may also be waived by the parties to the case, though of course the court must ensure that any such waiver of rights does not interfere with the interests of justice.

Article 12 guarantees **the right to marry and found a family**. This right to marry is limited by the requirement that: (a) individuals seeking to marry are of marriageable age; and (b) they comply with marriage rules in domestic law. Domestic law can prescribe the procedural requirements for legally valid marriages, but not have the effect of impairing the very essence of the right to marry. The right to found a family is linked directly with the right to marry. The right to found a family does not have an independent existence. Article 12 does not guarantee a married couple the right to right to found a family by adoption.

- **Qualified rights can be balanced against other rights and interests.**

Some human rights cannot be guaranteed absolutely, but may need to be balanced against the rights of others, or the interests of society in general. This is so in regard to the rights known as qualified rights in the Convention. They include:

- the right to respect for **private and family life**, home and correspondence (Article 8)

- the right to **freedom of thought, conscience or religion** (Article 9)
- the right to **freedom of expression** (Article 10)
- the right to **freedom of assembly** (Article 11)
- **property rights:** the right to peaceful enjoyment of possessions (Article 1, Protocol 1)

Each of these rights is described in the Convention in two parts, the first of which sets out the general right and the second of which states the exceptions to it. For example, the right to respect for private and family life is stated in **Article 8** as follows:

“8(1). Everyone has the right to respect for his private and family life, his home and his correspondence.

“8(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 the rights and freedoms of others.”

Careful and sometimes difficult balances need to be struck between qualified rights, and other interests, such as national security, or the prevention of crime. For example, the right of the press to free expression may need to be limited by the right to privacy of those they write about, where the press publishes details of the personal lives of well-known figures. The interests of the State in preventing serious crime might justify the State in bugging the home of a suspect, and so interfering with his right to privacy. Equally, the interests of national security, or the need to prevent public disorder, might in some circumstances make it necessary for the authorities to ban protests or demonstrations, which would normally be protected as an expression of the right to freedom of assembly.

However, any of the restrictions mentioned above would have to be carefully justified. The State cannot simply impose restrictions on rights on a vague pretext that there is a need to prevent disorder.

When is a qualified right unlawfully interfered with?

Step 1: is the right in issue? The first question to be addressed in relation to qualified rights is whether a decision affects in some way the right set out in the first part of the Article, for example Article 8(1). Once it is established that there is an issue in relation to the basic

right, then it must be considered whether it is justifiable to restrict the right, in accordance with the second part of the Article (for example, Article 8.2).

Step 2: Is the interference **prescribed by law**: that is, clearly set out in legislation, or case law? The law must be clear enough that people can regulate their conduct by it.

Step 3: Is the interference justified by one of the **recognised aims** listed in the second part of the Article?

Step 4: is the interference “**necessary in a democratic society**”?

Step 5: Is it applied in a **discriminatory way**?

- **Assessing what is "necessary in a democratic society" creates a new way of thinking.**

Assessing whether the restriction is “necessary in a democratic society”, in step 4 is particularly important. The key point is that the restrictions which are acceptable are not those that are necessary in a totalitarian or a fascist society, but in a **democratic society**, that is characterised by considerations of **tolerance, pluralism and broadmindedness**. In assessing whether a restriction is necessary in a democratic society, it must be asked:

- a. Does the restriction fulfil a **pressing social need**? and
- b. Does it pursue a **legitimate aim**? and
- c. Is it **proportionate** to the legitimate aim pursued?

An example of a case where there would not be a pressing social need for an interference with rights might be where a criminal offence interfered with the right to private life. If conduct was made criminal, but in practice there were no prosecutions brought in relation to it, then it would also be difficult to establish a pressing social need for the criminal offence.

Asking whether there is a legitimate aim recognises that the restriction on rights must be related to some valid interest of the community and must pursue a purpose that is legitimate in a democratic society. The restriction on rights must then be proportionate to this aim or purpose.

- **All interferences with qualified rights must be proportionate.**

The last question, proportionality, is central to the way that human rights work under the Human Rights Act. To ask whether a restriction on human rights is proportionate is to engage in a balancing act between the rights concerned and the aim and purpose of the restriction. **Is there any way in which the aim could be achieved in a way that does not interfere, or interferes less, with human rights?** Is the restriction **based on fair and rational considerations?** Or is it, on the other hand, arbitrary? Answering these questions will help to determine whether a restriction on rights is proportionate and therefore justifiable.

Protection from Discrimination: Article 14

What are the rights protected by Article 14 of the Convention?

One of the key human rights provisions included in the Human Rights Act is the prohibition on discrimination, in Article 14 of the Convention. **Article 14 forbids states and public authorities from discriminating in the way they grant any of the rights in the Convention.**

Article 14 states:

"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."

So, for example, Article 14 would prevent a court from deciding that custody of a child should be granted to one parent, because it disapproved of the religion of the other. To do this would be to discriminate in relation to one parent's right to family life, on the grounds of religion.

What groups are protected from discrimination by Article 14?

The prohibition on discrimination can refer to discrimination on grounds not specifically mentioned in Article 14, such as disability or sexual orientation. **The types of discrimination listed in Article 14 are not intended to be exhaustive,** but are given as

examples only, and discrimination between groups of people on any grounds may be found to be in breach of human rights.

When is discrimination prohibited?

It should be emphasised that Article 14 only prohibits discrimination in the way that other human rights are applied. Article 14 does not prohibit discrimination in and of itself. Instead, **for there to be discrimination, there must be some issue raised in relation to the exercise of another right** – this could be the right to family life, the right to privacy, to fair trial, or any of the rights in the Convention. There does not have to be an outright breach of any right, however – it is only necessary to show that there is some issue raised in relation to it.

Is discrimination ever justified?

Sometimes there may be sound reasons to treat different groups differently. Article 14 prohibits only differential treatment that has no reasonable justification to back it up. In considering whether a different treatment of one group is justifiable under Article 14, it should be asked: **is the distinction reasonable, and justifiable on objective grounds?** It should also be asked: is the difference in treatment **proportionate** to the aim it seeks to achieve? An example of a case where differential treatment might be justifiable would be where the police were given more extensive powers in relation to some political groups that engaged in terrorist activity. Of course, these extended powers would always have to comply with basic standards of human rights. However, some difference in treatment of these political groups would probably be justifiable, so long as it was a proportionate response to the situation.

4. The Human Rights Act and Public Authorities

What are the responsibilities of Public Authorities under the Human Rights Act?

The obligation of public authorities to observe human rights standards is set out clearly in section 6 of the Human Rights Act. It states:

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

This obligation covers all the activities of a public authority, including the public functions they carry out, and their responsibilities as employers. So, as well as the obligation on a public authority to ensure that its practices, procedures and decisions made in the course of its day to day business comply with Convention rights, a public authority must ensure, for instance, that it does not unlawfully interfere with the rights of its employees in the workplace.

When can an action be taken against a public authority under the Human Rights Act?

The Human Rights Act allows anyone who claims to be the victim or the potential victim of a violation of his or her human rights by a public authority to bring the public authority to the appropriate court to enforce those rights.¹ The court, if it finds that there has been a violation of human rights in the case, can award damages against the public authority.²

What is a "public authority" under the Act?

"Public authority" includes a wide range of public and semi-public organisations. It includes the courts,³ and judges in the courts. It includes government departments and local authorities. However, the definition of "public authority" also covers a range of bodies that would not obviously be seen to be public. As well as organisations that have a purely public function, the definition includes organisations that have some private as well as some public functions, for example, the NSPCC, hospitals, Railtrack, or the BBC. Such organisations, however, only have to comply with their statutory duty under the Human Rights Act when they are their performing public functions.⁴ Their private functions are not covered by the Act. So, for example, Group 4 or Securicor might be a public authority required to comply with the Human Rights Act when they exercise public functions by providing security services in the courts, but they would not be a public authority when they provide security for private commercial concerns.

Who can bring a claim for breach of the Human Rights Act?

¹ Section 7 of the Human Rights Act states that a person who claims that a public authority has acted or proposes to act in a way that is unlawful under the Act may bring proceedings against the authority under the Act in the appropriate court or tribunal, or may rely on the Convention right concerned in any legal proceedings.

² Section 8 of the Human Rights Act states that a court or tribunal that finds a breach of the Act, it may grant a relief or remedy that it considers appropriate, including damages, where the court has power to award damages or order the payment of compensation in civil proceedings.

³ Section 6(3)(a)

⁴ Section 6(3)(b) states that "public authority" includes "any person certain of whose functions are functions of a public nature."

A person can bring a claim for breach of their human rights by a public authority only if they are, or are likely to be, a victim of a breach of a Convention right by a public authority.⁵ The test of who is a victim has been interpreted broadly by the Court of Human Rights. In general, the requirement is that a person must be **directly affected** in some way by the act or omission complained of. A person may bring a claim where they risk being directly affected by a measure, even if they have not already been affected. Organisations such as professional associations or trade unions may bring a claim on behalf of their members. Companies and political parties may also bring complaints, if they are the victim of a violation.

How soon must a victim bring a claim under the Human Rights Act?

In general, anyone who wishes to bring a case claiming that their Convention rights have been breached,⁶ must, under the Human Rights Act, begin legal proceedings within a year of the action which they consider to have breached their human rights. In exceptional cases, the Court may allow a claim to be brought after a longer period has elapsed, where it considers that it would be fair to do so in the circumstances.⁷ It should also be noted that the time limit for bringing a case may sometimes be shorter, depending on the type of proceedings that are brought. If a person brings a claim that does not rely solely on the Human Rights Act, but only relies on the Act as an additional argument in support of the case, then the period within which the case must be brought will depend on the time limits for the type of case brought.

What if there is a human rights violation by a private individual or private company?

The Human Rights Act does not make provision for a case alleging a breach of human rights to be brought against anyone other than a public authority. However, bringing an action against a public authority is not the only way in which people may use the Human Rights Act to defend their human rights. **Under the Act, courts must also take human rights**

⁵Article 34 of the Convention states: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation ...of the rights set forth in the Convention." The same test is applied under section 7 (7) of the Human Rights Act.

⁶Under section 7(1)(a) of the Act.

⁷Section 7(5) of the Human Rights Act states that proceedings 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."

standards into account in all cases, including those involving only private individuals. Since courts are considered public authorities under the Act, they must not act in such a way as to breach human rights. Therefore any decision they make must take human rights into account and ensure that they are given sufficient weight. So, for example, the courts will need to ensure that the rights to family life of the parties to a custody dispute are taken into account, and that, in a criminal case, the rights of the accused to fair trial are respected.

What if an Act of Parliament is in breach of the Human Rights Act?

The Human Rights Act means that all those interpreting and applying legislation must, wherever possible, interpret the legislation in a way that protects human rights. The courts, as well as public authorities applying the Convention, must read Acts of Parliament in the light of Convention human rights.⁸ Where necessary, they may have to strain the meaning of words in order to do this.

Where a higher court tries to interpret a provision of legislation in a way that is compatible with Convention rights, but finds that it cannot, it may make a **declaration of incompatibility**, which states that the legislation concerned is incompatible with Convention rights.⁹

The courts do not, however, have the power to strike down and disapply Acts of Parliament which they consider to be incompatible with human rights. Their powers are limited to making a declaration that the legislation is incompatible. The responsible Minister may then, with the approval of parliament, amend the legislation so as to make it compatible with the Human Rights Act.¹⁰ The Minister is not obliged to amend the legislation. If he or she decides not to make amendments, then the victim of the violation has no remedy, at least at the national level. However, it is open to the victim to take a case to the Strasbourg court, challenging the legislation.

⁸ Section 3 (1) of the Human Rights Act states: "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."

⁹ Section 4 (2) states that "if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

¹⁰ Section 10 (2) provides that "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."

What if regulations or statutory instruments breach the Human Rights Act?

The Human Rights Act also requires that "**secondary legislation**", such as regulations, **must be read and interpreted in a way which protects Convention human rights.**¹¹ Unlike Acts of Parliament, however, secondary legislation that is found not to comply with Convention rights can be considered to be invalid and need no longer be applied. The exception to this rule is that secondary legislation that is incompatible with Convention rights, must continue to be applied if the Act of Parliament under which it is made requires it to breach those Convention rights.¹² In such a case, a declaration of incompatibility could be made in respect of the Act of Parliament.

What if legislation requires a public authority to act in breach of human rights?

There may well be areas where a public authority is compelled to act in a particular way by an Act of Parliament other than the Human Rights Act, even though it knows that acting in that way will breach human rights. The Act recognises that such situations may arise, and so it states that where a public authority is compelled by legislation to act in a way that breaches human rights, it will not be held responsible.

The Human Rights Act and the responsibility of Public Authorities as employers

How does the Human Rights Act affect Public Authorities as employers?

The Human Rights Act also effects the obligations of public authorities towards their employees. Some examples of the effect the Act has in this area are:

- If a disciplinary action arose out of some aspect of an employee's private or family life, this might breach Article 8 of the Convention.
- If employees' communications (including phone calls or e-mails) were intercepted or there was surveillance in the workplace, this might also breach Article 8.
- If an employee were to be discriminated against, for example on grounds of sexual orientation, this might breach Article 14 of the Convention, in conjunction with Article 8.

¹¹ Section 3(1), above.

¹² Section 3 (2) (c) states that the rule requiring interpretation in accordance with Convention rights "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."

- The right to freedom of expression may also be an issue in cases where an employee dresses in a way that is contrary to the employer's dress code.

It should also be noted that the right to freedom of association and assembly (Article 11) includes the right to form and to join Trade Unions and similar associations.

5. Interpreting Convention Rights

How should the rights in the Convention be interpreted and applied?

The Court of Human Rights has developed a number of general principles in the interpretation of human rights. It is important to have an appreciation and general awareness of these principles, as part of the background to the system of decision making that will operate under the Human Rights Act. These principles include the margin of appreciation, the positive obligations of States, and the interpretation of the Convention according to present day circumstances.

How much leeway should be allowed to States in the way in which they protect rights?

The European Convention on Human Rights applies in states across Europe, from Portugal, to the United Kingdom, to Romania. The very different cultures and legal systems of these many countries means that it is sometimes difficult to apply completely uniform standards and rules to all of them. Consequently, the European Court of Human Rights has developed a practice of allowing states some leeway in the way in which they protect and limit human rights. This is known as the **margin of appreciation**. It acknowledges that, in some cases, the national courts are in a better position to judge the situation in their country than an international court in Strasbourg.

Although the margin of appreciation doctrine has been important on an international level, it **will not apply under the Human Rights Act**. There is no need for this doctrine where human rights are being protected in the national courts and by public authority decision-makers who are familiar with the culture and legal system in which the human rights are to be guaranteed.

What is the extent of the State's responsibility to protect human rights?

At a minimum, human rights protection requires that a State must not violate an individual's human rights. However, in some cases, the State may need to go further, and may have **positive obligations**: the duty to promote and secure rights.

The duties of the State include:¹³

- the duty to put in place a legal framework which provides effective protection for Convention rights.
- the duty to prevent breaches of Convention rights.
- the duty to provide information and advice relevant to the breach of Convention rights.
- the duty to respond to breaches of Convention rights.
- the duty to provide resources to individuals to enforce their Convention rights.

Positive obligations to protect human rights may have consequences for the courts. Positive obligations might mean, for instance, that the responsible authorities in a prison would need to take steps to prevent a prisoner from being subjected to ill-treatment by fellow prisoners. It might mean that there was a duty to keep litigants informed of the facilities available to them in court as part of their fair trial rights.

How does the Convention adapt to changing ideas and circumstances?

The Convention's list of rights should be seen as a **living text**, to be interpreted broadly and dynamically, and **in the light of present day circumstances**. The ideas and values our society has now, about what is meant by basic human rights and dignity, by tolerance and equality, are in many areas very different from the ideas of fifty or even twenty years ago. The Convention is being applied today in a society very different to that in which it was drafted in 1951. The European Court of Human Rights has taken the approach that the rights in the Convention must be interpreted in a way that reflects this developing society. One example is that, as society's attitudes to homosexuality have changed, the Court has, over time, developed the right to respect for private life under Article 8 of the Convention to find that, for example, measures outlawing homosexual acts, or preventing lesbians or gay men from serving in the armed forces, are in breach of Article 8. Another area in which values have changed significantly since the drafting of the Convention is in relation to the

¹³ Starmer K, "European Human Rights Law", LAG 1999

environment. Reflecting this, the Court has developed Article 8 rights to give protection from environmental damage such as pollution or excessive noise. This approach of the European Court of Human Rights is also expected to be followed by the courts in this country.

Conclusion

The aim of this paper has been to provide a brief and general introduction to questions that arise under the Human Rights Act and the European Convention on Human Rights. Further information on the Human Rights Act can be found in the JUSTICE publication *An Introduction to the European Convention on Human Rights and the Human Rights Act*, and in more detailed JUSTICE human rights training materials which examine the impact of the Act on particular areas of UK law, including:

- The Human Rights Act and Criminal Law
- The Human Rights Act and the Common Law
- The Human Rights Act and Public Law
- The Human Rights Act and Employment and Discrimination Law
- The Human Rights Act and Family Law
- The Human Rights Act and Community Law
- The Human Rights Act and Medical Law
- The Human Rights Act and Immigration and Asylum Law
- The Human Rights Act and Sentencing
- The Human Rights Act and Civil Law

Copies of these materials can be obtained from the JUSTICE offices. A reading list relating to the European Convention on Human Rights and the Human Rights Act is also attached.

HUMAN RIGHTS READING LIST

Law Reports

Butterworths Human Rights Cases
Commonwealth Human Rights Law Digest, Interights
Decisions & Reports, Council of Europe
European Human Rights Reports (EHRR), Sweet & Maxwell

Journals

European Human Rights Law Review (EHRLR), Sweet & Maxwell
Legal Action, (January and July: *Recent Developments in European Convention Law*), LAG
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