

ENSURING EQUALITY: DO WE NEED PROTOCOL 12?



The principle of equality is a fundamental and essential human right. It is recognised as such in all the main international human rights treaties. Over the past decade there has been increasing recognition that access to equality and to protection from discrimination is piecemeal and, at times, ineffective. To ensure improved access to equality within Europe, changes have now been made to the European Convention on Human Rights (ECHR).

What is the European Convention on Human Rights?

The European Convention on Human Rights (ECHR) is a Council of Europe human rights treaty. Over forty countries are now members of the Council of Europe. People in countries whose government has ratified the Convention can take a case to the European Court of Human Rights and seek to establish that their rights have been breached.

The Convention is principally designed to guarantee civil and political rights, such as the right to life, the right to liberty, the right to a fair trial and protection from slavery and torture. The Convention also includes a right to privacy, a right to freedom of expression and a right to freedom of religion or belief. Most of the rights in the Convention are designed to be qualified or limited in some way. For example, it can be lawful to interfere with certain rights in the interests of the general community. However, any limitation to those rights has to be proportionate.

The Human Rights Act 1998

The Human Rights Act 1998 (HRA) made the bulk of Convention rights part of UK law. Before then, to all intents and purposes, it was impossible to argue a breach of the Convention before the courts in the UK. Now that the Convention is UK law, it is possible to argue that it has been breached before any appropriate court or tribunal. Additionally all public authorities

must now act compatibly with Convention rights. To this extent, the HRA should be considered to be a Bill of Rights for the UK.

What does the ECHR say about discrimination?

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.**”*

What are the limitations of this?

Article 14 does assert a right to protection from discrimination, but it is insufficient because it only offers protection in relation to the enjoyment of other rights in the Convention. It does not provide a universal guarantee of equality. Therefore a discrimination claim will only be considered under Article 14, if any difference of treatment falls within the ambit of another Convention right. If it does not, regardless of how bad the discrimination is, the claim will be dismissed. This means that for those areas outside the scope of the Convention, it will be impossible to rely upon the ECHR for protection from discrimination.

What is the definition of discrimination for the purposes of the ECHR?

Discrimination is a difference in treatment that cannot be objectively and reasonably justified. For there to be an objective justification, the difference of treatment must have a very good reason and be proportionate.

What is Protocol no 12?

Protocols are used to add to, or extend, the rights protected by the Convention. The Council of Europe, conscious of the limits of Article 14, has agreed an additional Protocol (no. 12). This Protocol strengthens the ECHR's ability to protect against discrimination.

Protocol 12 says:

“(1) The enjoyment of any right set forth by law 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.

“(2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.”

Protocol 12 is a free standing provision to protect individuals from discrimination:-

- In enjoying any right within national law
- By public authorities carrying out their legal obligations, including when using discretionary powers such as grant making
- Any other act, or failure to act, by a public authority.

It would strengthen the ECHR by protecting individuals from discrimination with regards to **all** of their legal rights, not just rights protected by the Convention. It will provide a general guarantee of the fundamental human right to equal treatment without discrimination. It will

increase the importance of non-discrimination rights within human rights law. The European Court of Human Rights has supported the adoption of the new protocol saying that “certain forms of discrimination cannot be brought within the ambit of Article 14”

What is happening to Protocol 12 in the Council of Europe?

Protocol 12 is now part of the ECHR. Ten Member States of the Council of Europe had to ratify it before it could take effect. This has now occurred so on April 1st 2005 it came into force and it is binding on those countries that have ratified it. Thus people from those countries may then take cases to the European Court of Human Rights arguing a breach of the Protocol. So far 34 Member States have signed it and 11 have also ratified it.

What is the UK's position?

The UK Government has said that they “have no plans at present” to ratify it. They have also said that in principle they are in favour of it but that the time is not yet right for it.

What can organisations in the UK do?

A free standing right to equality is an important, necessary and effective tool in the fight against unjustified discrimination. The UK government should ratify it and then incorporate it within the Human Rights Act. It offers an opportunity for the government to honour it's commitment to prevent unjustified discrimination.