

## FOCUS

### HUMAN RIGHTS LAW

By Francis Bennion MA (Oxon.), former Parliamentary Counsel

#### THE HRA IN THE HIGH STREET

The Human Rights Act 1998 (“the HRA”) will be brought fully into force on 2 October. How will this effect High Street solicitors? People coming off the street and existing clients may think the Act will change their lives. How is that likely to happen? Will it happen at all? This article aims to give some answers. On a subject so complex it cannot give a complete picture.

#### What human rights are protected?

The rights in question are set out in Schedule 1 to the HRA. They are conferred by the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) which was agreed by the Council of Europe at Rome on 4 November 1950. The relevant provisions of the Convention are Articles 2 to 12, together with subsequent Protocols. Summarising, we can say that they comprise the right to life, the prohibition of torture, slavery and forced labour, the right to liberty and security, the right to a fair trial, the right that there shall be no punishment without law, the right to respect for private and family life, the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of assembly and association, the right to marry, the right to the peaceful enjoyment of possessions, the right to education, and the right to free elections. The following is the substantial content of these rights (the Convention is in the masculine only, but applies equally to females).

*Right to life* With certain exceptions, no one shall be deprived of his life intentionally. The exceptions include use of necessary force to effect an arrest or quell violence. [Article 2.]

*Prohibition of torture* No one shall be subjected to torture or to inhuman or degrading treatment or punishment. [Article 3.]

*Prohibition of slavery and forced labour* No one shall be held in slavery or servitude, or be required to perform forced or compulsory labour. There are exceptions for prisoners, service personnel, emergencies and “any work or service which forms part of normal civic obligations”. [Article 4.]

*Right to liberty and security* Everyone has the right to liberty and security of person. There are exceptions for lawful arrest, convicted prisoners, illegal immigrants, education of minors, infectious diseases etc. [Article 5.]

*Right to a fair trial* 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 legal tribunal. [Article 6.]

*No punishment without law* No one shall be held guilty for anything which was not a criminal offence when it was done, or be subjected to a heavier penalty than that which prevailed when it was done. This does not prevent punishment under a retrospective law for something which is criminal according to the general principles of law recognised by civilised nations. [Article 7.]

*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. [Article 8.]

*Freedom of thought, conscience and religion* Everyone has the right to freedom of thought, conscience and religion. [Article 9.]

*Freedom of expression* Everyone has the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. [Article 10.]

*Freedom of assembly and association* 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. [Article 11.]

*Right to marry* Men and women of marriageable age have the right to marry and found a family, according to their national law. [Article 12.]

*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 legal conditions. [First Protocol, Article 1.]

*Right to education* No person shall be denied the right to education. [First Protocol, Article 2.]

*Free elections* Free elections must be held at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature. [First Protocol, Article 3.]

### **Who can benefit from the HRA?**

The HRA extends to the whole United Kingdom, though additional arrangements are made in the Scotland Act 1998 for applying the Convention to Scotland. However nothing in the HRA prevents complainants from going direct to the European Court of Human Rights at Strasbourg as in the past. Furthermore persons dissatisfied with their treatment under the HRA can have a second bite of the cherry by going to Strasbourg as well, though the HRA does not actually provide for an appeal there: the two procedures are quite separate. They are also different, since the HRA is far from being a mirror image of the Strasbourg arrangements. For example, in British cases the defendant at Strasbourg is always “the United Kingdom”. As we shall see, that does not apply under the HRA.

On the question of who can claim the benefit of the Convention, we need to start with article 34 (formerly article 25), which states: “[t]he court [at Strasbourg] may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention . . .” The effect of this has been described as follows: “While ‘non-governmental organisations’ and ‘groups of individuals’ are broad categories they do not cover, for example, bodies such as municipalities, other local government organisations or semi-state bodies” (D J Harris, M O’Boyle and C Warbrick, *Law of the European Convention on Human Rights* (1995), page 630) Even the word “person” in article 34 does not include one of these bodies, which cannot therefore object at Strasbourg that “the United Kingdom” has infringed

its rights under the Convention. The position on this may be different under the HRA, but we shall have to wait for a court decision to find out.

It seems that our judges are meant to have a free hand in construing the Convention articles. This is confirmed by the HRA s. 2, which requires a British court applying a Convention article to take into account rulings on its meaning given by the Strasbourg court without being bound by them. This permits allowance to be made for the “margin of appreciation” which is permitted under the Convention jurisprudence. It also goes wider. The Lord Chancellor said in a debate on the HRA Bill that “[o]ur courts must be free to develop human rights jurisprudence by taking into account European judgments and decisions, but they must also be free to distinguish them and to move out in new directions in relation to the whole area of human rights law” (HL Deb. 24 November 1997, col. 835).

The HRA s. 7(1) states, with one caveat that I shall come to, that *any* person with a claim will be entitled to pursue it. Here “person” is used with its wide English-law meaning, including all natural and artificial persons. The caveat I mentioned is that it must be the case that the applicant “is (or would be) a victim of the unlawful act”. We are told in section 7(7) that a person is a victim only if he or she would be a victim for the purposes of article 34. So we are brought back to article 34 after all, but the position is not as clear as it might be. The official notes say of section 7(7): “[t]his attracts the Convention jurisprudence on ‘victim’. In particular, the person must be directly affected by the act”.

### **What acts can the “victim” complain about?**

A “victim” cannot complain under the HRA unless the breach was committed by what the HRA calls a “public authority”. This partly, though not wholly, reflects Strasbourg practice. An official notice of the European Commission of Human Rights dated 5 January 1998, issued for the guidance of applicants to Strasbourg under the Convention, says: “You can only complain . . . about matters which are the responsibility of a public authority (legislature, administration, courts of law, etc) of [the state]. The Commission cannot deal with complaints against private individuals or private organisations”. In the second sentence of this, “private” is contrasted with a meaning of “public” which equates it with *belonging to the state*. So an organisation which is in ordinary usage “public” (such as a public limited company or p.l.c.) cannot be the subject of an application under the Convention because it is not a manifestation or emanation of the British state.

Does the same apply under the HRA? Section 6 of the HRA says that, subject to exceptions, it is unlawful for a “public authority” to act in a way which is incompatible with a Convention right. The main exception is that this 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 without breaking the law. The HRA does not say that here “public authority” has the same meaning as in the Convention. Indeed it does not say what meaning it has, though it says what meaning it does *not* have.

Its meaning does not, for example, include either House of Parliament, nor presumably (though the HRA does not say so) the Queen in Parliament, the source of our primary legislation. This cuts out the very first type of body (legislature) which as we have seen is named by the European Commission as an example of a public authority to which the Convention applies. During the parliamentary passage of the HRA ministers were frequently asked to say what “public authority” meant. They invariably replied that that would be for the courts to decide, so we must wait and see. Probably it will be held to have a very wide meaning, so that for example an NHS practice would be covered.

A “victim” who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6 may bring legal proceedings against the authority (including

judicial review). However this does not apply where the act in question is one by a court or tribunal. Here the HRA remedy must be sought through the exercise of the normal rights of appeal.

This remedy against public authorities is referred to as the “vertical” or direct effect of the HRA. This contrasts with a “horizontal” or indirect effect under which remedies could also be sought against private persons. In the debates on the HRA Bill Lord Wilberforce said it was perfectly clear that the HRA is aimed entirely at public authorities and not at private individuals (HL Deb. 24 November 1997, col. 781). However it can be argued that since HRA s. 6(3)(a) expressly makes courts and tribunals “public authorities” they are bound to apply the HRA in all types of legal proceeding before them. HRA s. 3(1) states that “so far as it is possible to do so” both primary and subordinate legislation must be read in a way which is compatible with the Convention rights (for a detailed analysis of the effect of this provision see Bennion, “What interpretation is ‘possible’ under section 3(1) of the Human Rights Act 1998?”, *Public Law*, Spring 2000).

### **Conclusion**

In this article I have had space only for a general survey of the HRA itself. It will be the responsibility of all firms to ensure that enough of their fee-earners are well acquainted with the detail not only of the HRA and the Convention articles it mentions but also the Strasbourg case law. As time goes on there will be a growing body of HRA case law as well. The HRA will have a big impact in the High Street and elsewhere. Many textbooks and other aids have already been produced, and there will be no excuse for failure in this important new area of our law.

2000.028 8 CLW 13/00