

# **Disability Law Service**

advice and legal representation for disabled people

## **Human Rights Act 1998**

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# Human Rights Act 1998

## Purpose of the Act

The UK ratified the European Convention of Human Rights in 1950. However the Convention was not incorporated into UK law. This meant that persons could not seek redress in UK courts if their rights were breached. People needed to go the European Court of Human Rights in Strasbourg. This could take many years to do so. The Labour party introduced the bill in order '*to bring rights home.*'

## What are the main sections?

Section 3 of the Act makes it clear that a court must interpret all legislation to be in accordance with the Human Rights Act 1998. If the court can not interpret primary legislation to be compatible with the Human Rights then it may make a declaration of incompatibility under section 4 of the Act. This will then put pressure on the UK government to make changes to the law. The Human Rights Act 1998 will take precedent over secondary

legislation. Unlike primary legislation this is legislation not passed by Parliament, for example, regulations introduced by a Minister.

Section 6 of the Act makes it unlawful for a public authority to act in violation of any rights protected under the Human Rights Act 1998. Section 6 (3) (b) refers to a public authority including – ‘(b) *any person certain of whose functions are functions of a public nature.*’ Thus this appears to be very broad.

In holding a housing association could be a public authority for the purposes of the Act, in **Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595**, the Court stressed that the definition of what is a public authority should be given a generous interpretation. You need to look at:

- Statutory authority
- Control over the function by another body which is a public authority
- Acts which might be of a private nature being enmeshed in the activities of a public body

- Closeness of the relationship with a public body
- Transfer of responsibilities between public and private sectors.

## Disability Specific Case

In **YL v Birmingham City Council and others [2007] UKHL 27** an 84 year old woman who had Alzheimer's disease tried to argue that her article 8 right, the right to respect for private and family life had been breached by a private care home forcing her to live that particular home.

Although a private care home, her placement at the home had been funded by her local authority and it was therefore argued that the private care home was carrying out a public function in her case. The House of Lords took a restrictive view of the definition of a public authority under the HRA 1998, holding that a private care home was not exercising functions of a public nature within the meaning of s.6(3)(b). This case was extremely disappointing as it meant that persons in private care homes, many of whom are very vulnerable, did not have protection under the Act.

However section 145 of the **Health and Social Care Act 2008** seeks to address this. It states that where a private or voluntary sector care home provider provides accommodation together with nursing or personal care to a person under arrangements made with a local authority the provider is taken to be exercising a function of a public nature under section 6(3)(b) of the Human Rights Act 1998 and thus must not act incompatibly under the Act.

## What are the Rights under the Act?

Article 2: Right to life

Article 3: Prohibition of torture

Article 4: Prohibition of slavery and forced labour

Article 5: Right to liberty and security

Article 6: Right to a fair trial

Article 7: No punishment without law

Article 8: Right to respect for private and family life

Article 9: Freedom of thought, conscience and religion

Article 10: Freedom of expression

Article 11: Freedom of assembly and association

Article 12: Right to marry

Article 14: Prohibition of discrimination

Protocol No. 1

Article 1: Protection of property

Article 2: Right to education

Article 3: Right to free elections

Protocol No. 6

Article 1: Abolition of the death penalty

Article 2: Death penalty in time of war

## Disability Specific cases

The articles of the Human Rights Act 1998 most used in relation to disability are article 2, article 3, article 5, 8 and article 14. We look here at some specific disability related cases decided under the Act.

### Article 2 – The Right to Life

In **Pretty v United Kingdom (1997) 24 EHRR 423**, Ms. Pretty tried to argue that a ban on assisted suicide affected her right to life. The European Court of Human Rights held that the right to life did not extend to the right to die.

Article 3 – No one shall be subjected to torture or to inhuman or degrading treatment or punishment

In **Vincent v. France (2006) 6253/03**- the European Court of Human Rights held that detaining a person who was a wheelchair user in an establishment where he could not leave his cell by his own means constituted '*degrading treatment*' within the meaning of article 3 of Convention.

In **Price v. United Kingdom (2001)5493/72**, the European Court of Human Rights held that sending a disabled woman to prison without accessing her needs breached article 3. When considering whether the treatment was severe enough to reach the threshold of article 3, where appropriate, consideration should be given to the age, vulnerability or ill health of an applicant.

Article 5 – Everyone has the right to liberty and security of person

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: *5(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.*

Hence the original text of the Convention does not offer much protection to people who are denied liberty because of their disability. This can be contrasted with the 21<sup>st</sup> century, **Convention on the Rights of Persons with Disabilities 2008**, which specifically prohibits deprivation of liberty on grounds of someone's disability. However as stated by the European Court of Human Rights on many occasions, the Convention is a '*living instrument*' and



should be interpreted in accordance with modern day standards and practices.

Thus the Court found in **Johnson v UK (1996) (119/1996/738/937)** that there had been a breach of article 5(1) as Mr. Johnson had been detained when it was evident that he was no longer suffering from a recognised mental illness. Notably this case does not help someone who is actually living with a recognised mental illness.

The majority of successful cases under this article concern article 5(4), which states:

*‘Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.’*

In **HL v UK (2004) 45508/99** the European Court of Human Rights found that the admission to hospital for treatment for a mental disorder, of a person lacking capacity, under the common law doctrine of necessity did not contain the procedural safeguards required by Article 5.

In **Kolanis v UK (2005) 517/02** the Court held that a failure to review detention was in breach of article 5(4).

The English courts have also decided several important cases since the incorporation of the Human Rights Act 1998.

In the landmark case of **The Queen on the application of H v Mental Health Review Tribunal North & East London Region (Secretary of State for Health Intervening) 2001 EWCA Civ 415**, the Court of Appeal held that sections 72(1) and 73(1) of the **Mental Health Act 1983** were incompatible with Articles 5(1) and 5(4) in that, for the Mental Health Review Tribunal to have to order a patient's discharge, the burden was placed on the patient to prove that the criteria justifying his detention no longer existed. The Court made a declaration of incompatibility. In order to remove the incompatibility, the **Mental Health Act 1983 (Remedial) Order 2001** changed the burden of proof.

In **R(G) v MHRT [2004] EWHC 2193** it held that a discharge could be so restrictive as to amount to a deprivation of liberty and therefore the authorities needed to ensure that there were procedural safeguards in place.

## Article 8 – Right to respect for private and family life

Unlike article 2 or article 3, article 8 is a qualified right. That is a right that can be interfered with but only in specific circumstances. Article 8 states:

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

*2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'*

The drafting of article 8(1) is very broad and would extend to a wide range of different situations. The extent of the protection is perhaps best illustrated by **X and Y v the Netherlands (1985) 8 EHRR 235** in which the European Court of Human Rights stated that it extended to protection of *'psychological integrity.'*

Before the introduction of the Human Rights Act 1998, a public authority's decision could only be challenged in an

English court if it was procedurally unfair, ultra vires (that is the person that made the decision did not have the power to do so, or if it was irrational).

The case of **Smith and Grady v UK (1999) 25154/94** perhaps best illustrates the difficulties applicants faced in the English courts. The case concerned the ban of homosexuals in the army. Although able to win their case under article 8 at the European Court of Human Rights, the applicants had failed in their judicial review case in the English courts. The Government had tried to justify the ban on grounds of morale in the armed forces. The English courts were unable to say that the justification was irrational.

Under article 8, instead of looking at irrational, the English courts will now look at whether there has been a disproportionate interference with the qualified right in question. Thus the proportionality test offers more protection. The Courts need to look at:

- Was there a legitimate aim? (as outlined in article 8(2))
- Was the interference necessary to achieve one of more legitimate aims?

- Were there alternative/ less harsh ways of achieving that legitimate aim?

The majority of disability cases have been decided under this right. It has been used, for example, to ensure that a dying man was able to live out his last days at home, to ensure that a mother was given sufficient visiting rights to see her son in a care home and to protect a woman from being moved from a residential care home that she had grown to love.

It was used recently in the landmark case of **R (Purdy) v Director of Public Prosecutions [2009] EWCA Civ 92** where the Court of Appeal held that the crown prosecution must set out guidance on when participants in assisted suicide will be prosecuted.

#### Article 14 – The Equality Guarantee

*‘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.’*

Although the article does not specifically refer to disability, 'other status' has been interpreted to include disability. Thus this article can be used alongside other articles, for example the right to marry, the right to education etc... to ensure that disabled people enjoy equal protection of those rights.

## Useful Websites

### **European Court of Human Rights**

Web: **[www.echr.coe](http://www.echr.coe)**

All European Court of Human Rights judgments referred to above can be accessed on a free internet database called Hudoc – **[www.echr.coe.int/echr/en/hudoc](http://www.echr.coe.int/echr/en/hudoc)**

All English court judgments referred to above can be accessed on the free legal internet database provided by the British and Irish Legal Information Institute – **[www.bailii.org](http://www.bailii.org)**

The Ministry of Justice has produced an excellent booklet on the Human Rights Act 1998 for people with learning difficulties. You can find a copy at:

**[www.justice.gov.uk/about/docs/human-rights-act-learning-disabilities](http://www.justice.gov.uk/about/docs/human-rights-act-learning-disabilities)**

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For further advice on these matters please contact:

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